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THE ENGLISH REPORTS

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THE

ENGLISH REPORTS

VOLUME CLX

EXCHEQUER DIVISION
XVI

CONTAINING
YOUNGE AND COLLYER, VOLS. 1 TO 4

W. GREEN & SON, LIMITED, EDINBURGH
STEVENS & SONS, LIMITED, LONDON
AGENTS FOR THE UNITED STATES OF AMERICA
THE BOSTON BOOK COMPANY
AGENTS FOR CANADA
THE CANADA LAW BOOK COMPANY
1917

Printed by GREEN & SON, *Edinburgh*

January 1917

REPORTS of CASES ARGUED and DETERMINED in the COURT of EXCHEQUER in EQUITY; from Trinity Term, 4 WILL. IV. to Michaelmas Term, 6 WILL. IV., both inclusive. By EDWARD YOUNGE, Esq., of the Middle Temple, Barrister-at-Law, and JOHN COLLYER, Esq., of Lincoln's Inn, Barrister-at-Law. Vol. I. London, 1836.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER IN EQUITY.

THE REVEREND WILLIAM DENT, Clerk, *Plaintiff;* EDWARD, LORD ARCHBISHOP OF YORK, JOHN ROB, THOMAS BUCKLE, THOMAS EELES, JOHN LEIFE, WILLIAM WALBANKE, WILLIAM FAINT, WILLIAM WAITES, EDWARD HODGE, JOHN WATSON, WILLIAM SQUIRES, RICHARD OASTLER, JOHN SANDERS WATSON, HENRY WICKHAM HIRD, ROBERT LASCELLES, JOHN LASCELLES, AND FRANCES his Wife, AND MARY LASCELLES, *Defendants.* May 27th, June 6, 27, 1834.—There is nothing illegal in the supposition that, in ancient times, a chapel and chapelry existed, to the curate or chaplain of which the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of patronage of the curacy; and therefore, where it appeared from ancient documents that a chapel had immemorially existed as a parochial chapel, with rites of baptism, marriage, and sepulture; and that, in early times, there were chaplains having an assignment of the tithes, as of old time, and there were appointments to the curacy from a very early period: and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction: Held, that the curate was entitled to all small tithes, except wool and lamb, which appeared from the documents to be clearly payable to the rector.—Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry.—It does not of necessity follow that there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. And the circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 Rich. 2 and 4 Hen. 4.—Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption.

The bill in this cause stated that the defendant, the archbishop of York, in right of his see, was seised of the [2] impropriate rectory of the parish of Thirsk, in the county of York, and that there were within the said parish of Thirsk, which was very

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extensive, a parish church and three several chapelries, called respectively Sowerby, Sandhutton, and Carlton, and such parish church and chapelries respectively were distinguished by well-known boundaries; that the curate of the chapelry of Sowerby, for the time being, was, by endowment, grant, prescription, usage, or some other lawful ways and means, well entitled to have, receive, and take all and singular the tithes, as well great as small, yearly arising, growing, renewing, and increasing in and throughout the chapelry of Sowerby, and the titheable places thereof, except the tithes of corn and grain, which belonged to the archbishop of York, as impropriate rector of the parish of Thirsk: and accordingly the curates of the chapelry of Sowerby had always received or been paid all and singular the tithes, as well great as small, arising, growing, renewing, and increasing within the said chapelry, or the titheable places thereof (except as aforesaid), in kind, or compositions in money for the same, and particularly for the farms and lands occupied by the defendants, until the tithes were subtracted by them; that the plaintiff was, in the month of April, 1827, duly nominated and licensed to the curacy of the chapelry of Sowerby, and had ever since been and then was the curate thereof, and had, by himself and his deputies, officiated in the cure thereof, and as such curate the plaintiff had, ever since his said nomination, been entitled to have, receive, and take all and singular the tithes, as well great as small, except the tithes of corn and grain, yearly arising, growing, renewing, and increasing in and throughout the chapelry of Sowerby, and the titheable places thereof. The bill then stated the occupation by the defendants, except the archbishop of York, of lands within the chapelry, and their perception of titheable matters, and prayed the usual accounts.

[3] The archbishop of York, by his answer, admitted himself to be seised in right of his see of the impropriate rectory of the parish of Thirsk, and that the parish contained the three chapelries of Sowerby, Sandhutton, and Carlton, and that, as impropriate rector, he claimed to be entitled to the tithes of corn and grain arising in and throughout the chapelry of Sowerby; that in April, 1827, the plaintiff was nominated and licensed to the curacy of the chapelry of Sowerby, and had ever since been curate thereof; that the defendants, John Sanders Walton and Henry Wickham Hird, were the archbishop's lessees of the impropriate rectory; and that, upon the renewal of the lease to them, the tithes of corn and grain were the only tithes upon which the defendant made his calculation in setting the fines to be paid for the renewed leases; and that a Mr. Bower was employed by him to make the valuation of the tithes upon that occasion; and that the defendant never claimed or pretended to be entitled to any other tithes within the chapelry of Sowerby than the tithes of corn and grain.

The defendants John Rob and Thomas Buckle, by their answer, admitted the archbishop of York to be seised, in right of his see, of the impropriate rectory of Thirsk, and that the parish of Thirsk was very extensive; that there were within the parish a vicarage and parish church; that there were three several chapelries, called respectively Sowerby, Sandhutton, and Carlton Miniott; and that the chapelry of Sowerby was within the parish of Thirsk, but whether the two other chapelries, or either of them, were or was within the parish, the defendants were unable to set forth. They admitted that the chapelry of Sowerby was distinguished by well-known boundaries; but whether the said vicarage and parish church, and the chapelries of Sandhutton and Carlton, were distinguished by well-known boundaries, they could not set forth. They believed that the nomination to the chapelry of Sowerby belonged to the archbishop of York in right of his see; but they did not know or be-[4]-lieve that the curate of the chapelry of Sowerby for the time being was, by endowment, grant, prescription, usage, or otherwise, entitled to have, receive, or take all or any of the tithes, great or small, yearly arising, growing, renewing, and increasing in or throughout the chapelry, and the titheable places thereof, or any compensation for the same; for the defendants had been informed and believed that all and every the tithes, as well great as small, yearly arising, growing, renewing, and increasing in and throughout the chapelry and the titheable places thereof, or the moduses or customary payments in lieu thereof, thereinafter mentioned, belonged and were of right due to the rector of the rectory of Thirsk, or his lessees for the time being; and that the curate of the chapelry of Sowerby, when duly and legally presented, was merely a perpetual stipendiary curate, and not entitled to any tithes whatsoever. The defendants then set up, as payable to the rector of the rectory of Thirsk, at Michaelmas in each and every year, by the owners and occupiers of land within the said township and chapelry

of Sowerby, the following moduses or customary payments, viz. one penny an acre for every acre of meadow and pasture land, held and occupied by each and every such owner or occupier, for and in lieu and full satisfaction of the tithes of hay and grass had and taken by such occupier upon and from off his said farm and lands. The sum of three halfpence for every milch cow, kept by every owner and occupier of lands within the said parish, for and in lieu of the tithe of the milk and calves of such cow; and the sum of one penny for every barren cow, kept, fed, and depastured on the lands of every such owner or occupier, for and in lieu of the tithe of agistment of every such cow. The defendants believed that by an indenture bearing date the 17th April, 1779, and made between William, then lord archbishop of York, of the one part, and Matthew Butterwick of Thirsk aforesaid, esquire, of the other part, in considera-**[5]**-tion of the surrender of a former lease therein mentioned, and for other the considerations therein expressed, the said William, lord archbishop of York, demised to the said Matthew Butterwick the said rectory or parsonage of Thirsk, with the mansion-house, buildings, gardens, orchards, dove-house, barns, stables, edifices, glebe lands, pasture, feedings, tithes, oblations, obventions, fruits, rights, profits, commodities, emoluments, and advantages, with the appurtenances whatsoever to the said rectory or parsonage belonging, or in anywise appertaining; to hold the same unto the said Matthew Butterwick, his heirs and assigns, for and during the natural lives of three persons therein named, and the life of the longest liver of them, at the yearly rent of 20l., payable half yearly as therein mentioned; and also the yearly sum of 40l., to be employed by way of salary to the curate of the mother church of Thirsk aforesaid, to be named and appointed by the archbishop and his successors for the time being; and upon condition, also, that the said Matthew Butterwick, his heirs and assigns, should at all times during the term of the lives aforesaid, at their own proper costs and charges, provide, find, and keep so many other sufficient, able, and orderly allowed ministers, to say divine service, and administer the sacraments to the parishioners within the several chapelries of Sowerby, Carlton, and Sandhutton, belonging to the parish church of Thirsk, as had been accustomed to be found, kept, or allowed by the farmer or occupier of the said rectory and the parsonage, and thereof should acquit and discharge the archbishop and his successors during the term of the lives aforesaid. That, by articles of agreement, bearing date the 16th day of December, 1795, and made between the said Matthew Butterwick of the one part, and Ralph Rob and Edward Buckle of the other part, Matthew Butterwick covenanted and agreed, on or before the 12th of May then next, at the costs and charges of Ralph Rob and Edward Buckle, their heirs and as-**[6]**-signs, to assign and convey unto the use of Ralph Rob and Edward Buckle, their heirs and assigns (amongst other premises), all those the tithes of wool, lamb, corn, and grain, yearly renewing, arising, and increasing in and throughout the township of Sowerby aforesaid, then the property of the said Matthew Butterwick, and then in the occupation of the said Edward Buckle and Edward Hodge: to hold the same unto and to the use of the said Ralph Rob and Edward Buckle, their heirs and assigns, for and during the natural lives or the life of the longest liver of the several persons for whose lives the said tithes were granted to the said Matthew Butterwick, with all benefit and advantage of renewal from time to time upon the death of any of them; and Ralph Rob and Edward Buckle thereby covenanted and agreed to pay the same sums of money therein mentioned. That by indentures of lease and release, bearing date respectively the 11th and 12th days of May, 1796, and made between the said Matthew Butterwick of the one part, and the said Ralph Rob and Edward Buckle of the other part, Matthew Butterwick granted and confirmed unto Ralph Rob and Edward Buckle, their heirs and assigns, all those the tithes and tenths of corn, grain, wool, and lamb yearly renewing, arising, increasing, growing, and becoming due in and throughout the township of Sowerby aforesaid, being part and parcel of the rectory and parsonage of Thirsk (save and except the tithes of corn, grain, wool, and lamb yearly renewing, arising, and increasing from and out of the farm and lands of Mr. Richard Milburn, called Thorpe Field Farm, situate in the township of Sowerby aforesaid, which tithes of the said farm had theretofore been sold to the said Richard Milburn, with the appurtenances); to hold the same (except as aforesaid) unto and to the use of the said Ralph Rob and Edward Buckle, their heirs and assigns for ever, for and during the several lives of the several parties for whose lives the same had been granted to the same Matthew Butterwick, and with such benefit **[7]** of renewal as therein mentioned. The defendants then

referred to various leases and conveyances under which they derived title to the tithes granted by the last-mentioned conveyances, and they insisted that the tithes of corn and grain arising in the chapelry of Sowerby did not belong to the archbishop of York, as impropriate rector of the parish of Thirsk, but to the defendants, under such lease and conveyances thereof as therein mentioned. They denied the title of the curates of the chapelry of Sowerby to any tithes, though they believed that, some time prior to and down to 1822, tithes of turnips, potatoes, and garden stuff, or some money compositions in lieu thereof, and the several moduses or customary payments in lieu of tithes, hay, milk, and calves, and the agistment of barren cows were, in ignorance of the right of the curate of the chapelry, and that he was only a stipendiary curate, rendered or paid by some of the occupiers of lands in the chapelry, but not, as the defendants believed, by the occupiers of the farms and lands occupied by the defendants, to the predecessors of the plaintiff, curates of the chapelry. They believed that, since the year 1822, no tithes whatsoever, nor any composition in money in lieu of tithes, had been rendered or paid to or received by the curates. That the tithes of wool and lamb, arising and renewing in the chapelry (except as aforesaid) were received by Edward Buckle and Edward Hodge, as the farmers or tenants of Matthew Butterwick, for some years prior to 1795; and that since the year 1795, down to the time aforesaid, Ralph Rob and Edward Buckle and the defendants had from time to time received and retained the tithes of wool and lamb under the title and conveyances therein mentioned and set forth. The defendants were unable to state whether the plaintiff had been duly nominated and licensed to the living, but they admitted that he had officiated in the cure thereof; however, they denied that, as such curate or otherwise, he had ever been or was now entitled to any of **[8]** the tithes, great or small, arising in the chapelry of Sowerby. The defendants admitted their occupation of lands within the chapelry of Sowerby, and their perception of titheable matters, and they set forth in schedules the usual accounts.

The defendants, Thomas Eeles, John Leife, William Walbanke, William Faint, William Waites, Edward Hodge, John Watson, William Squires, and Richard Oastler, by their answer did not admit the title of the plaintiff as curate, though they admitted that he had officiated in the cure. They admitted their occupation of lands and the perception of titheable matters in the chapelry of Sowerby, the particulars of which they stated in schedules, but they denied the title of the plaintiff to the tithes of any of such titheable matters. The defendants then stated that, towards the latter end of the last century, the then lessees of the impropriate rectory of Thirsk alleged that they were entitled, in right of the said impropriate rectory, to the tithes of wool and lamb in the said township of Sowerby, and by intimidation or misrepresentation gradually induced many, if not all, of the occupiers of lands in the said township to pay the tithes of wool and lamb, or some composition for the same, to the said lessees or farmers of the said rectory; and such occupiers, for many years during the latter end of the last century and the beginning of the present, paid such tithes to the said lessees or farmers of the said impropriate rectory in ignorance that such lessees had no right or title thereto; but such tithes, so far at least as respected the said township of Sowerby, had not been paid to such lessees for some number of years past, in consequence of the occupiers of lands in the said township of Sowerby having discovered that the lessees of the said impropriate rectory, and those under whom they claimed, had no right or title thereto, but that all the lands in the said township of Sowerby were lawfully exempted, exonerated, and discharged from payment of the said tithes of wool and **[9]** lamb, and all other tithes whatsoever. The defendants stated that the parsonage of Thirsk was originally founded and appropriated by Roger de Mowbray to the monastery of Newburgh, in the county of York, before the statutes 15 Rich. 2 and 4 Hen. 4, which expressly required that, on appropriations of benefices after those statutes, vicars should be created and endowed. That no vicar was ever lawfully created or endowed within the said impropriate rectory or parsonage of Thirsk, and consequently that there could not be the three parochial chapelries and perpetual curacies, for want of union with such a proper ecclesiastical benefice; and because there never had been to such proper ecclesiastical benefice and consolidated mother church, any presentations or collations with the said chapelries annexed. That the said church at Sowerby, at its original foundation, was a distinct parish church and free chapel, endowed by the original patron, with an assignment of the tithes of wool, lamb, and other small tithes, and nothing more, within the parish and free

chapelry, and that the same so continued at the dissolution of the monasteries. That the impropriate rectory and parsonage of Thirsk was formerly part of the possessions of one of the monasteries, and at their dissolution became vested in the crown; and that there then was within the parish and free chapelry of Sowerby, belonging to the impropriate rectory of Thirsk, the tithes of corn and grain, and also a certain immemorial customary payment of 1l. 8s., payable in each year by the then occupier of all the lands of Sowerby aforesaid, to the rector of the said impropriate rectory of Thirsk, who was then sole proprietor of all the same lands, when demanded, as a modus in lieu of all the tithes of hay grown within the parish and free chapelry; and that there then also was a certain fixed and invariable money payment of 9l. 10s., payable in each year, at Easter, for offerings, by the said occupier of all the lands of Sowerby aforesaid, to **[10]** the rector of the impropriate rectory of Thirsk aforesaid. That King Henry 8, as owner and proprietor of all the lands within the said parish and free chapelry, entered into a composition real with the then officiating minister of the said parish and free chapelry, and that it was agreed between King Henry 8 and the then officiating minister of the said parish and free chapelry of Sowerby aforesaid, with all proper, lawful, and necessary consents, that his said Majesty should and would, and that he did accordingly, grant and convey to the said then officiating minister or chaplain of the parish and free chapelry of Sowerby aforesaid, certain lands in Sowerby aforesaid, then in the possession of the plaintiff, containing together, by estimation, six acres, more or less, and also the said modus for hay of 1l. 8s., and the said certain, fixed, and invariable money payment of 9l. 10s., as a composition real and recompense for the discharge, exoneration, and acquittal of all the said lands within the said parish and free chapelry of Sowerby aforesaid, from the small tithes and every of them. That the chapel of Sowerby aforesaid was, at and long before the time of the reign of King Henry 8, a distinct parish church and free chapel, and that the same so continued until the passing of the statute of the first of Edward the 6th for their dissolution, and for vesting their possessions in the crown; and the said then free chapel of Sowerby aforesaid, together with all its possessions, including the said composition real, became, by virtue of the same statute, absolutely vested in the crown. That the crown some time afterwards created the said free chapel of Sowerby aforesaid a lawful vicarage and parish church, and endowed the same with the lands then in the possession of the plaintiff, and also with the said modus for hay of 1l. 8s., and the said certain, fixed, and invariable money payment of 9l. 10s. That, at the time of the creation and endowment of the said vicarage and parish church of Sowerby aforesaid, the advowson, presentation, and right **[11]** of patronage of the said parish church was lawfully vested in the crown; and that in a grant from the crown, in the 42nd year of the reign of her late Majesty Queen Elizabeth, the advowson, presentation, and right of patronage of and to the said vicarage and parish church of Sowerby aforesaid was expressly reserved to the crown. That, as no adverse presentation to the said vicarage against the right of the crown had ever taken place, the right of the crown was still continuing; and that consequently the right of patronage and presentation to the said vicarage and parish church of Sowerby aforesaid was in the King; and that as the said complainant was not presented to the said vicarage and parish church of Sowerby by the crown, he was not duly or lawfully presented. That the tithes of corn and grain solely and alone, within the said parish and free chapel of Sowerby, belonged to the archbishop of York, or those claiming under him, as impropriate rectors of Thirsk aforesaid.

The defendants John Sanders Walton and Henry Wickham, who were trustees under the will of Matthew Butterwick, a former lessee of the tithes of the rectory, and to whom, as such trustees, a renewed lease had been granted, by their answer disputed the title of the plaintiff, as curate, to the tithes of wool and lamb, which they alleged had, prior to the year 1821, been received by the impropriate rector or his lessees, though they admitted that, on the last renewal of the lease, the fine was fixed on a valuation of the tithes of corn and grain only. The defendants, Robert Lascelles, John Lascelles, Lamplugh Hood, and Hannah Frances, his wife, and Mary Lascelles, who were respectively devisees under the will of Matthew Butterwick, put in an answer to a similar effect with the answer of the trustees under Matthew Butterwick's will.

The evidence on the part of the plaintiff consisted of the ministers' accounts, 30 and 31 Hen. 8 1540, of the possessions of the monastery of Newburgh; by which

Thirsk appeared to be a rectory, and the bailiff accounted "for 6l. **[12]** for the farm of one messuage in Thirsk, with the tithes, barn, and garden to the same belonging, and with the tithes of grain in Thirsk; for the farm of the tithes of grain of the township of Sowerby, 6l. 13s. 4d.; the tithes of grain of the township of Sandhutton, 4l.; and all and all manner of tithes of a field called Woodhall Field, 13s. 4d.; and, among other particulars, for 12l. 15s., for the farm of personal tithes, with one messuage and two closes, with four oxgangs of land, then in the tenure of Babrygge, and with all and all manner of oblations, tithes of wool, lamb, geese, hemp, and line, together with all other spiritual profits: those tithes which to other persons are before demised being excepted, and all tithes of wool, lamb, and other small tithes of Sowerby, Sandhutton, and Carlton of old time assigned for the support of two chaplains there celebrating, in like manner excepted." A grant in the 36 Hen. 8, by which the crown granted to the archbishop of York, inter alia, "the rectory of Thirsk, tithes of corn in Thirsk, and tithes of corn in Sowerby." A parliamentary survey, dated in 1650, in which, among other profits of the rectory of Thirsk, were enumerated the tithes of corn, hay, wool, lamb, Easter book, and all small tithes of Thirsk, with the tithe, corn, wool, and lamb of Sowerby. The survey contained also the following passages:—"There are three chapels within the parish of Thirsk, viz. Sowerby, Carleton, and Sandhutton; the curates have small tithes for their pains, which are worth 10s. a piece per annum." "The small garthes and backsides of Sowerby, Carlton, and Sandhutton, being sown with hemp, line, or corn, pay tithe to the curate of Sowerby, and also one close called Priest close." The plaintiff also proved books of acts of the archbishop of York, from the archbishop's registry, commencing in 1676, and continued to the present time, containing the admissions and licenses of the curates, including the plaintiff, to serve the cure of souls in the chapelry of Sowerby: various register books of the chapelry of Sowerby, containing entries of baptisms, mar-**[13]**-riages, and burials, for a great number of years, signed by the curates for the time being; various terriers, stating the curate to be entitled to tithes, and moduses for tithes, and some old tithing books. The plaintiffs also proved, by parol testimony, that he had officiated in the cure, as also the render of small tithes by some of the inhabitants of Sowerby.

The defendants gave in evidence Pope Nicholas' Taxation, by which the rectory of Thirsk was valued at fifty-five marks, or 36l. 13s. 4d. The following extract is from the Nonæ Rolls, 14 Edw. 3, 1340:—"The account of the prior of Newburgh, William de Popelton, and William de Scorneton, assessors, venditors, and collectors of ninths and fifteenths granted to the King Edw. 3, in the fourth year, in the parts of the North Riding, in the county of York, for the first year of the payments of the same ninths and fifteenths. The ninth of the sheaves, fleeces, and lambs, by inquisition made of the true value of the same ninth, according to the tenor of the third commission directed to the assessors in the deanery of Bulmere, Thirsk, taxed, by Pope Nicholas' survey, at 36l. 13s. 4d. The same assessors answer for 20l. of the ninth of the same parish, committed to John Calneton, John Schate, Adam de Tanfield, Stephen de Sutton, John Fitzwilliam, and Peter de Calneton, whereof 3s. 6d. is for portion of the abbot of Byland, arising from his temporalities in the same parish, by the assessment of the men aforesaid, and so there is less than the tax by 16l. 13s. 4d., because the glebe of the church and the tithe of hay are worth 10l. The obventions, oblations, mortuaries, and other small tithes, are worth 10l.; and where the rector was accustomed to receive by the year to the value of 10l., in this year he hath not received beyond two marks, as it is found by the oath of the men aforesaid—sum 20l." The defendants also proved a return of the names of the incumbents in the diocese of York, and their benefices, returned by the archbishop of York in 1536, and presented in the First Fruits Office, which mentioned a chaplain of the free chapel **[14]** of Thirsk, and two chantry priests at Thirsk, but did not mention Sowerby, or that there was any chaplain or curate there. The defendants also gave in evidence a return to the commissioners of Queen Anne's bounty in 1763, in which Sowerby was described as a curacy or donative, and held under the archbishop of York, exempt from all ecclesiastical jurisdiction, and in which it was said to be in the parish of Thirsk; and it was stated that the township of Sowerby paid a small share to several repairs and lasting improvements of Thirsk church, but otherwise Sowerby was a distinct parish of itself, and did not belong to, and was not annexed to or united with any other parish; and that the improved yearly value of the curacy of Sowerby then amounted

to 14l. a year, arising from three or four acres of glebe land, some small moduses for tithe hay, for small tithes and dues, and Easter offerings, which had been paid time out of mind. And a similar report in the year 1792, which was to the like effect, except that the annual income was there stated to amount to 26l. a year. The defendants also proved a lease, dated the 6th June, 1718, from the then archbishop of York to Matthew Butterwick, of the rectory of Thirsk, in which the lessee covenanted, during the time thereby granted, at his own costs and charges, to provide, find, and keep so many efficient, able, and orderly allowed ministers to say divine service, and administer the sacraments to the parishioners within the chapelries of Sowerby, Carlton, and Sandhutton, belonging to the parish church of Thirsk, as had been accustomed to be found, kept, or allowed, by the farmer or lessee of the said rectory, and thereof should acquit and discharge the archbishop. The defendants also proved that a parcel of land, mentioned in some of the ancient documents, was in the possession of the plaintiff as curate.

Mr. Boteler and Mr. Monro, for the plaintiff. The Parliamentary Survey of 1650 contains a statement of what the parsonage then consisted, and what was payable **[15]** to the curate. This also agrees with the grant and the Ministers' accounts. The Parliamentary Survey mentions the three chapelries of Sowerby, Sandhutton, and Carlton; and it states that the curates have some tithes in the parish which are worth per annum at least 10l. The Parliamentary Survey contains a distinct recognition of the rights of the curates. By small tithes it is evident must be intended the other small tithes except wool and lamb. The nomination, admission, and licensing of curates from 1676 to the present time is distinctly proved, the admission being throughout, in general terms, admitted and licensed. They omit the statement that the right of nomination belonged to the archbishop of York. An officer of the archbishop's court proves that no earlier entries are to be found. The terriers signed by some of the defendants themselves shew that if the tithes of grain and wool and lamb be put out of the question, the curate is entitled to all the other tithes. The tithing books also shew this. It may be said that the terriers prove that moduses were payable in respect of the tithes; it will, however, be found that there are many variations in the payments. A bad modus may be good evidence of a right to tithe in kind. *Travis* v. *Oxton*,(*a*) *Blackburn* v. *Jepson*.(*b*)[1]

On the part of the defendant Eeles, it was objected that the curate could not be entitled to tithes, inasmuch as there was no mother church, and there was not any collation, institution, or induction, the curate being only admitted and licensed. That a perpetual curacy depended on the principle of a lawful union having formerly taken place with the mother church. That in *Macgill* v. *Le Strange* (2 Eagle & Younge, 115) a spiritual rectory was usurped by a layman, **[16]** by whom and his family the tithes were received for upwards of a century, without any rector being appointed; the small tithes, during the whole of that period, being paid to the vicar of an adjoining parish; but this was not considered sufficient evidence of a union of the rectory with the adjoining parish. That there was no ground for treating the chapelry as a perpetual curacy, and even if it were a perpetual curacy, then Thirsk must be a vicarage; and it appeared to have been formerly part of Thirsk, and was treated as such in the report to the governors of Queen Anne's bounty. That the early leases granted by the archbishop of York shewed that the lay impropriator, or his lessee, was bound to provide for the chaplain, and that the archbishop had no right of patronage. That, supposing the fact that it was a perpetual curacy to be established, then there had been a composition real, in which lands, now in the possession of the curate, had been allotted to him. In support of this argument were cited *The Attorney-General* v. *Brereton* (2 Ves. sen. 425), *Britton* v. *Ward*,(*b*)[2] and *Boulton* v. *Richards*.(*c*)

Mr. Spence, for the defendants Rob and Buckle. The plaintiff has produced a terrier of 1716, with a view of proving his title to the tithes, but it proves that

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(*a*) 3 Wood. 523; Eyres, MSS., 7 Bro. P. C. 49; Lord Red. MSS., 3 Eagle & Younge, 1248.

(*b*)[1] 17 Ves. 473; 3 Swinb. 132; 3 Eagle & Younge, 588.

(*b*)[2] Palm. 113; Turn. MS. Rep. 37; Cro. Jac. 515; 2 Ro. 97, 127; Winch. 70; *Anon.*, in Poph. 144; 1 Eagle & Younge, 298.

(*c*) 6 Price, 483; 3 Eagle & Younge, 948; 9 Price, 671; 3 Eagle & Younge, 1068.

moduses were paid. Where a plaintiff, claiming tithes in kind, proves a modus, he cannot have a decree for an account. *Scott* v. *Fenwick* (3 Eagle & Younge, 1318; Gwill. 1250). Two observations arise on the terriers: first, whether they are evidence of constant usage; and, secondly, whether an endowment can be presumed from such evidence of usage. The terrier of 1743 **[17]** gives the curate all small tithes except wool and lambs. It appears from the Ministers' Accounts that wool and lamb were given to the vicar. The next terrier, in 1764, shews that wool and lamb no longer belong to the vicar or curate. Now if the curacy had been endowed with these tithes, it is not at all probable that, in the interval, the curate should have lost them. The reason clearly was that the tithes having considerably increased in value, whilst the rector only continued bound to pay the curate 10l. a year, the rector took the tithes of wool and lamb, and left the curate the remainder. This is quite consistent with the case made by the defendants that the rector is bound to assign sufficient provision for the curate, though they were incorrect, when they supposed that he had been endowed with these tithes. The evidence clearly establishes the moduses. In order to support farm moduses, the antiquity of the farms must be proved. This the defendants are at present not in a situation to do; and the defendants therefore only rely on the modus of one penny an acre for the meadow lands belonging to the township of Sowerby, other than those lands which are subject to any particular modus. In the terrier of 1777 the modus of one penny an acre for meadow lands is clearly recognised. In the terrier of 1764 it is not mentioned. The one penny an acre for meadows has been continued down to the present time, with only some slight variations in the description of the meadows. One of the witnesses for the plaintiff proves that he himself paid this modus of one penny an acre for the lands which he held, being grazing or meadow lands. The plaintiff cannot obtain any decree for hay, not having proved any perception, either by the documentary evidence or the parol testimony. There is no evidence of an endowment; and the evidence of the defendants shews that the usage and the ancient documents are inconsistent with any perception in favour of the plaintiff. It is clear from **[18]** the ancient documents that, up to the 14th Edw. 3, the rector was in possession of all the tithes, great and small.

Mr. Griffith Richards, for the defendants, the devisees of Matthew Butterwick.

Mr. Forster, for the other defendants, except the defendant Eeles.

Mr. Boteler, in reply. The only inference which can be drawn from Pope Nicholas' Taxation and the Nonæ Rolls is that there was not then a vicarage regularly endowed. It frequently happened that a monk supplied the cure from the monastery, and so it might have continued down to the dissolution of the monasteries. It is clear that at that time there was a chaplain of Thirsk, and two chantry priests—and there is no reason why the chaplain of Thirsk and the two chantry priests should not be the persons mentioned in the Ecclesiastical Survey. It is sufficient to say that, for two centuries, the benefice has assumed the rights of a perpetual curacy, and all the benefits annexed to such. The Parliamentary Survey recognises the existence of three chaplains. The parochial registry of Sowerby, carried back to the time of Queen Elizabeth, shews baptisms, marriages, and burials, signed by the curates from that time to the present. The curates are found, from the bishops' books, to have been regularly nominated and licensed. It has been argued that there is a discrepancy in the documents as to the right to the tithes. It appears that tithes of lamb and wool originally belonged to the chaplains, and that they now do not. The Ecclesiastical Survey gives the value of the corn tithes, the tithes of wool and lamb, Lent tithes, oblations, and the small tithes received at Easter time, at 35l. The small tithes referred to arise in the township of Thirsk, which have never been demanded by the curate, and are precisely the same as those mentioned in the grant from Queen Elizabeth. The Parliamentary Survey assigns to the **[19]** rector tithes of wool and lamb in Sowerby, and to the three chaplains the other small tithes. The terriers appear to be signed by the curate, chapel wardens, and several inhabitants, and they all purport to give an account, not of what the curate received, but to give an account of the houses, glebe land, and buildings belonging to the chapelry. The evidence is all one way. The curate has given sufficient evidence of enjoyment of all small tithes except wool and lamb. It is clear that his general title is made out; and the only question is whether, as to particular parts, that general title has failed. The constant receipt by him of the tithes of articles of modern introduction shews his general title. With respect to tithe of hay, the early terriers mention a modus of 1s. 4d. for a farm,

of which there are twenty in the township. This is bad on the face of it. *Travis* v. *Oxton*,(*a*)[1] *Blackburn* v. *Japson* (17 Ves. 473; 3 Swinb. 132; 3 Eagle & Younge, 588). The modus of one penny an acre for meadows lying in the open fields applies only to a particular description of lands, and the defendants have not proved that they held any lands of the particular description.

Cur. adv. vult.

June 27th.—ALDERSON, B. This was a bill filed by the plaintiff, as curate of the township of Sowerby, in the parish of Thirsk, claiming the tithe of hay, and also all small tithes, within that township; and an account of such tithes against such of the present defendants as are occupiers of lands within that district. The plaintiff has also made the archbishop of York, the owner of the impropriate rectory, and the defendants, Rob, Buckle, R. Lascelles, J. Lascelles, H. Lascelles, Hird, and his wife, who are the lessees and assignees of the lease of the tithes under the archbishop, parties to the bill. The archbishop, by his answer, admits the plain-**[20]**-tiff's right, claiming only for himself the tithes of corn and grain within the district: the defendants Rob and Buckle claim, as lessees of the archbishop, the tithes of corn and grain, wool and lamb; and by their answer, being also occupiers of land within Sowerby, deny the plaintiff's right, as curate, to the tithes claimed by him. The other lessees disclaim altogether. The remaining defendants deny the right of the plaintiff, as curate, to the tithes claimed; and also set up, as a defence, an exemption by composition real.

The case on the part of the plaintiff purports to be founded on prescription. He contends that, from time immemorial, the township or district of Sowerby has been separated by known boundaries from the rest of the parish of Thirsk, and that there has from all time been a parochial chapel therein; and that the curate of such chapel has, by prescription, existed as an endowed curate, having a right, by his endowment, to certain tithes, immemorially assigned to him. It has always appeared to me most important, for the general good of society and the preservation of the equal rights of all, to give to long and uninterrupted usage and enjoyment the greatest weight and force. I adopt the language and sentiment of Lord Coke, who says, "God forbid that ancient grants and acts should be drawn in question, although that all things cannot be shewed which at first were necessary to the perfecting of them."(*a*)[2] In considering this case, I shall reverse the order of time, and, beginning from the modern usage, trace it back to more remote periods. If this usage be consistent, I ought to infer that it has so existed from time immemorial; and then, if there be any supposed state of facts upon which the plaintiff's claim can rest, as a legal one, I am bound by the principle which I propose to take for my guide to decree in his favour. Now I am not aware that there is any thing illegal in the supposition that, in times of remote antiquity, this chapel and cha-**[21]**-pelry may have existed, and that the rector of this parish, with the consent of the patron and ordinary, and, if necessary, with the assent of the King also, as supreme ordinary, may have assigned to the curate or chaplain of the chapel of this district of his parish a portion of tithes as an endowment: in that case, the rector would probably have the patronage of the curacy upon each successive vacancy. Other modes, in which such a claim may have originated, may perhaps be pointed out; if it can in any way have had a legal origin, it is sufficient for this purpose.

I proceed then to examine the evidence. In the first place, as to the district itself. On this point the evidence seems to me uniform and uncontradicted; that Sowerby, as far back as human testimony or documents can go, has been a district separate from the parish at large. The chapel seems to have immemorially existed as a parochial chapel; there having been exercised in it, as appears from old registers produced in evidence, the rites of baptism, marriage, and sepulture, certainly as far back as 10 Eliz. —in fact, as far back as any register can be found to exist. Sowerby is also apparently spoken of as a separate district in the Parliamentary Survey in 1650, and in the Ministers' Accounts, 31 H. 8, and as an ancient one; for, in the latter of these documents, the Ministers' Accounts, two chaplains are mentioned as celebrating divine service there, and as having had an assignment of tithes "of old time." If it rested here, what other reasonable inference could be drawn from the evidence than that this

(*a*)[1] 3 Wood, 523; Eyre's MSS.; 7 Bro. P. C. 49; Lord Red. MSS.; 3 Eagle & Younge, 1248.

(*a*)[2] *Bird and Wingfield's case*, 12 Co. 5.

was a separate district from time immemorial? This part of the case is also materially confirmed by the next head of the plaintiff's evidence. We have appointments to this curacy, beginning with that of the plaintiff in 1827, and going back probably to the time of the dissolution of the monasteries; for this right of appointment has been uniformly exercised by the archbishops of York, who were the original grantees of the rectory of Thirsk under the crown at the period of the dissolution. And in the **[22]** account of the possessions of the monastery, from whom the archbishops derived this property, we further find mention made of two chaplains, to whom the small tithes of Sowerby, Sandhutton, and Carlton had then been of old assigned. And again, in the Parliamentary Survey of 1650, express mention is made of the three curates of Sowerby, Sandhutton, and Carlton, and of their endowment with the small tithes of their districts; and, in addition, that the curate of Sowerby had other portions even of the great tithes in particular fields there situate. Even the document put in by the defendants, the report to the governors of Queen Anne's bounty, though not entitled to much weight, confirms this part of the case, by treating the endowment of this curacy as an endowment of right belonging to the benefice, and therefore as being admitted to be an ancient one. Now what is there to be set against all this body of evidence? There is first produced the Taxation of Pope Nicholas, A.D. 1291, and secondly the Nonæ Roll, A.D. 1340. These documents are wholly silent on the subject. They do not contain any affirmative statement inconsistent with the previous evidence, but are merely negative evidence, the weight of which depends on our estimate of the accuracy of commissioners of inquiry in very remote times; as to whose means of information, and capacity and disposition to acquire it, we can only form a conjecture. The same observation applies to the next document, the Ecclesiastical Survey, 26 Hen. 8, which omits any mention of these chaplains and districts within Thirsk. As to the return of beneficed clergy made in the following year, 1536, by the archbishop of York, I am not at all satisfied that there is any omission in that document; for I find in it mention made of the chaplain of the free chapel of Thirsk, and of two chantry priests at Thirsk also, who are all included in the list of the beneficed clergy by the archbishop. But even if it were so, and if these documents were at variance with the affirmative testimony of the almost contemporary Ministers' Accounts in the 31 **[23]** Hen. 8, still I think we must resort to the subsequent usage, which in this case, as far as the evidence goes, is uniform. The same observation will also apply to the discrepancy which has been very properly pointed out as existing as to the number and description of the curates in the Ministers' Accounts and in the Parliamentary Survey. These discrepancies are constantly found in such documents. Usage is the best guide in such cases; for the rights of men should not rest on conjecture alone, but on the rational presumption that what has in fact existed long has existed by right, unless the contrary be clearly shewn.

But then it is argued that there are other facts which are admitted now to exist, and which are quite inconsistent with the above conclusion. One of these admitted facts is that parishioners dwelling within Sowerby contribute to the repairs of the church of Thirsk; and it is urged that, according to the case of *The Attorney-General* v. *Brereton* (2 Ves. sen. 427), this circumstance shews that the chapel of Sowerby must be considered as a chapel of ease to the inhabitants of Thirsk. But I apprehend this is not so. The contribution to such repairs is a circumstance conducing to such a conclusion, and, if standing alone or confirmed by others, would have great weight. But the other facts here seem to me to shew the contrary. The right of baptism and sepulture, the endowment with tithes, and the other circumstances of this case, lead me to an opposite conclusion. Then again it is urged that there cannot be these parochial chapels, because the case I have just mentioned shews that such can only exist where there has been a union of parishes; and that there is no such union here; because there is no vicarage or mother church with which these can be supposed to have been anciently united. But this is by no means a proper inference to draw from that authority. In that case the Lord Chancellor pointed out various circumstances, which **[24]** shewed that the chapel of Flint was not a mere chapel of ease. He observed that it was an immemorial chapel, that it belonged to a country town, that it was endowed, that public worship was there celebrated, and that the rites of baptism, marriage, and sepulture (particularly the latter) were there exercised—the criteria he mainly relied upon; and they all exist in the present case. But there it also appeared that the presentations to the vicarage of Northop had always been "cum capella annexa,"

which seemed to require some explanation, and to rebut the presumption of Flint being itself part of Northop. In order to explain how this might be, the Lord Chancellor adverted to the probability of an ancient union of the parishes of Northop and Flint, and pointed out the exemption from contribution to the repairs of the parish church of Northop, as leading strongly to that conclusion; but I do not find it laid down there or any where else, that there can be no such parochial chapel, unless there has been a union of that description. The circumstance that there is no vicarage is obviously accounted for by the fact that the conveyance to the monastery of Newburgh was by Roger de Mowbray prior to the statutes 15 Rich. 2 and 4 Hen. 4, as is indeed stated in the defendants' answer. As to the conveyances, I shall not advert to them, for they appear to me to have no material bearing on the case. If they even included these tithes, which I doubt, they would be utterly inconsistent with an enjoyment of nearly two centuries. Neither do I think that much weight ought to be given to the covenants in the archbishop's leases, of his tithes of the rectory of Thirsk; for the covenant aptly applies to the supply of a curate to the parish church of Thirsk itself; and to construe it in any other way would be at variance with the other circumstances of this case.

Upon the whole, then, I think the plaintiff's title is sufficiently made out; and that I ought, on the evidence before me, to come to the conclusion that he is legally **[25]** nominated and licensed as curate of the chapelry of Sowerby, that such chapel and chapelry have existed from time immemorial, and that he and his predecessors, curates of that chapel, have lawfully been endowed with some tithes by prescription.

The next question is the extent of such endowment. This question must also depend upon the usage which has prevailed within the district. There is no doubt that the endowment may have been of the whole, or of any portion of tithes, or of the moduses, if any there be, lawfully existing in lieu of the tithes, or of any portion of them. The general evidence here is tolerably clear, I think, as to the extent of the endowment. There is no proof of the receipt of the tithes of wool and lamb; and therefore, although the language of the Ministers' Accounts, and of the Parliamentary Survey, and of some other ancient documents is general in its terms; yet, construing them, as all such documents ought to be, with the light thrown upon documentary evidence by contemporary and modern usage, I think the plaintiff's counsel have judged wisely in not attempting to claim tithe of wool and lamb, although not claimed by the archbishop. It is clear that the right to the enjoyment of these tithes is at the expiration of the present lease to Rob and Buckle, in the see of York. If the archbishop chooses, he may then endow the curacy of Sowerby with these tithes, which he seems erroneously to suppose has been done already. With this exception, the right to all small tithes in Sowerby seems fully made out. There is one strong circumstance, which I think very satisfactorily demonstrates the extent of the endowment: I allude to the admitted fact, that the curate has taken tithes of articles which have not been cultivated immemorially within this kingdom. His right to these new articles could only have arisen from a general endowment of all small tithes, with the particular exception of wool and lamb. But though his endowment had been thus in general terms, still it would not be at all inconsistent with a **[26]** well established modus or moduses for any particular articles. On this head the terriers are to be adverted to; but after examining them, it does not appear to me that there is any uniform payment to be found, except 1½d. for a renewed cow, and 1d. for other cows. Now the plaintiff is willing to allow these payments as a modus for tithe milk; and therefore there seems to be no objection to my allowing it also, it being understood that by a renewed cow is meant a milch cow having had a calf within the year, for which 1½d. is to be paid, and that the 1d. is to be paid for a cow which has not had a calf within that period.

There remains only the question as to the tithe of hay. This also, although not a small tithe, is claimed by the curate. It is very material to be observed that no one else claims it, although it must be payable to some one, either in kind or under the form of a modus. The evidence by which the curate contends for it is that of usage. He produces a long series of terriers, in all of which hay is mentioned. But, at the same time, it is to be observed that it is mentioned in conjunction with a claim of modus in respect of it. If I could have found in these documents any consistent or even prevalent usage as to a modus for hay, I should have been disposed to give great weight to the claim; but I cannot find any such usage: the whole is a mass of con-

fusion on this subject. But one conclusion seems fairly to arise from these terriers, which go back as far as 1716, viz., that the right to the tithe of hay, either in kind or under a modus, belongs to the curate. There is only one circumstance in opposition to this, viz., the omission of any mention of hay in the ancient documents which speak of the endowment of the curates. If the contest had been between the archbishop or his lessees and the present curate, I should have paused as to the conclusion. But when I find them making no claim, and that, unless due and payable to the curate, hay tithe would be without any claimant, I think the usage ought clearly to prevail, and that I ought to consi-**[27]**-der the curate as endowed with the tithe of hay in kind; or, if the modus exist, with a modus in lieu thereof. Now the varying, uncertain, and confused payments under the name of a modus must, I think, according to reason and authority, be treated as compositions for tithe hay, and not as moduses; and the result of the evidence will then be that the curate must be taken to have received, from time to time, compositions for hay—in other words, tithe in kind of hay; and this evidence is sufficient to establish the extent of his original endowment, as including hay also. The receipt of clover tithe in kind, which is proved by the former curate's books, is strongly confirmatory of the right now claimed. On the whole, then, I come to the conclusion that the curate's endowment must be taken upon this evidence to include the tithe of hay in kind, and all small tithes except wool and lamb, subject, however, to a modus in respect of tithe milk. This brings me to the last point made by the defendant Mr. Eeles, viz. that there has been a composition real. I shall not dwell long on this point because, after much consideration, I really cannot find any evidence on which such a defence can rest, amounting even to a probable conjecture. It may be admitted, and the law certainly is so, that it is not necessary to produce the deed of composition in order to support this defence; but reasonable evidence must be given to make it probable that there was such a deed. The coincidence as to the possession of a piece of land by the curate, with some land mentioned or alluded to in some of the older documents would, if made out, which I think it is not, be but a slender foundation for such a superstructure. I can see no ground for this defence.

Upon the whole, I come to the conclusion that as against Rob, Buckle, and the other occupiers, the plaintiff is entitled to a decree for an account of all small tithes except wool and lamb, and of the tithe of hay establishing, however, their claim to the modus in respect of tithe **[28]** milk, unless the plaintiff elects to have an issue on that point; and this decree must be with costs. As to the archbishop and the other lessees, except Rob and Buckle, I think the plaintiff must pay the costs of bringing them before the Court. As to Rob and Buckle, they are to have the costs arising out of the claim of wool and lamb, and the claim of milk in kind.(*a*)

MARY SLATTER, Widow, *Plaintiff;* GEORGE SLATTER the Elder, CHARLES DRUCE the Younger, JOHN DRUCE, GEORGE NUGENT, AND THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND, *Defendants.* June 7th, 1834.—Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and by a separation deed, containing the usual provisions, the husband agreed to pay to his wife for her maintenance, an annuity of 180l. a-year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts and contracts of his wife,

(*a*) Considerable discussion took place as to the costs of the suit, the defendants Rob and Buckle claiming to be allowed the costs occasioned by the plaintiff's having claimed in his original bill tithes of wool and lamb, which on amendment he had struck out; and also the additional costs occasioned by several of the witnesses having proved, not only documents, but also the effect of those documents. For the plaintiff it was contended that the defendants had been allowed the usual costs of the amendment, which was the whole that they were entitled to, according to the practice of the Court. And as to the costs of the evidence, it was urged that the costs of dissecting the evidence would exceed the amount of the costs objected to. The Court expressed an opinion that the Master, in taxing the costs, should make proper allowances to the defendants in these respects.

and all dower and thirds at common law or by custom, which she at any time thereafter, might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal; and an agreement that the wife should make and execute all such acts, deeds, and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate, it was held that the deed did not deprive the wife of her share of her husband's personal estate, under the Statute of Distributions.

[Not applied, *Gurly* v. *Gurly*, 1840, 2 Dr. & Wal. 463: affirmed 1842, 8 Cl. & F. 743. See 4 Y. & C. Ex. 561.]

In August, 1820, John Slatter, deceased, and the plaintiff were married. In and prior to the year 1826 John **[29]** Slatter had become addicted to habits of intoxication and intemperance, which rendered a separation between him and his wife necessary. By a deed of separation dated the 14th January, 1831, and made between John Slatter, of the first part, the plaintiff, his wife, of the second part, and Charles Druce the younger, John Druce, and George Nugent, of the third part, after stating that differences had arisen between Slatter and his wife, and that they had agreed to live apart from each other, and that for the purpose of making a provision for her support and maintenance during her life, but subject to the proviso thereinafter contained, John Slatter had agreed to allow her an annuity of 180l. a year, to be secured by the transfer of 6000l. Consols into the joint names of John Slatter and of trustees (the parties of the third part). Slatter covenanted and agreed with the trustees and with his wife that it should be lawful for her, and that he would permit and suffer her, at all times during their joint lives, to live separate and apart from him; and that he would not at any time thereafter have, claim, or demand any of her property, real or personal estate, whatsoever; and that the plaintiff might enjoy the same, and make such disposition thereof as if she were a feme sole and unmarried, and that the same should not be subject or liable to the debts, engagements, incumbrances, power, intermeddling, or control of him the said John Slatter; that he, the said John Slatter, would from time to time (subject, nevertheless, to the proviso thereinafter contained), pay to the plaintiff and her assigns, for the term of her life, an annuity or yearly sum of 180l., for her support and maintenance, by equal half-yearly portions; provided always, and it was thereby agreed by and between all the parties to those presents, that the said John Slatter, his executors and administrators, should be indemnified and reimbursed by and out of the said annuity or yearly sum of 180l., from the payment of all debts, of what nature or kind soever, **[30]** which the plaintiff should thereafter during her life contract or make with any person or persons whomsoever; and also of and from all alimony or maintenance whatsoever (except the aforesaid annuity or yearly sum of 180l.), and all dower or thirds, either at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, upon, or against the said John Slatter, or his present or future estate, real or personal. The settlement then contained provisions against the plaintiff's molesting John Slatter, or compelling him to live with her, and an agreement on her part to make and execute all such acts, assurances, matters, and things whatsoever as should be requisite or expedient for the purposes of releasing, barring, extinguishing, and destroying all dower or thirds, or right or title to dower or thirds, at the common law or by custom, which she could or might claim or demand in, to, or out of any real or personal estate or effects of or belonging to, or to belong to the said John Slatter. And it was agreed that the 6000l. three per cent. Consolidated Annuities, transferred into the names of the said trustees, were so transferred, and that they should stand possessed thereof, in trust for the further and better securing the said annuity or yearly sum of 180l.; but subject, nevertheless, to the proviso thereinbefore contained.

John Slatter died in October, 1832, intestate and without issue, leaving the plaintiff, his widow, and the defendant, George Slatter the elder, his father and next of kin; and after John Slatter's death, administration to his estate was granted to George Slatter the elder.

John Slatter, at the time of his death, was a freeman of the city of London, and was possessed of considerable real and personal estate.

The bill was filed by the widow of John Slatter against the administrator, George Slatter, the trustees of the deed of separation, and the Governor and Company of the Bank of England. The plaintiff, by her bill, claimed to be entitled to elect, when the residue of John Slatter's perso-[31]-nal estate should have been ascertained, whether she would take the provision made by the deed of separation, or the value or amount of her widow's chamber, and her three equal fourth parts of the clear residue of the personal estate, being the share to which she was entitled by virtue of the custom of the city of London. The bill, after stating the agreement to live separate, and the deed of separation, charged that she was not bound by the provisions of the deed, and that she was not deprived or excluded from her legal rights to a share of the personal estate of the said John Slatter. That though by the deed an attempt was made to bar or deprive her of her rights and interests in the personal estate of John Slatter, either by the common law or by custom, yet that no reference or allusion was made to her distributive share as the widow of John Slatter, under the statute made for the distribution of intestates' estates; and that, therefore, if she were in fact bound or affected by the deed, and was thereby deprived of her share of his personal estate by the common law or by custom, yet she was not in any manner deprived of her share thereof under the statute. The bill further charged that if the deed were, in fact, ever binding on the plaintiff, yet that such deed was, subsequently to the execution thereof, rendered wholly null and void, excepting so far as the annuity was secured thereby, by the subsequent cohabitation of John Slatter and the plaintiff. That in June, 1831, John Slatter proposed to the plaintiff that they should again live together, to which proposal the plaintiff acceded; and with a view to such arrangement, John Slatter gave instructions to two of the trustees named in the deed of separation to prepare a deed or instrument for determining and putting an end to the said separation, and the deed of separation; but, nevertheless, for continuing the payment of the said annuity or yearly sum of 180l. to the plaintiff. And that, in pursuance of such directions, a deed was prepared, and was perused and approved by John Slatter, and was after-[32]-wards, by his direction, engrossed and indorsed on the deed of separation, but was not executed by him, by reason of his irregular habits, though the plaintiff received the annuity down to July, 1832, just before the death of the intestate. The bill prayed the usual accounts of the personal estate of John Slatter; a declaration that the plaintiff was not bound by the deed of separation, or thereby in any manner bound or deprived of any of her legal rights as the widow of John Slatter, and that she was at liberty to elect to take under that deed, or to reject the same, after the amount of John Slatter's personal estate should have been ascertained; and that, in case she should elect to insist on her legal rights as the widow of John Slatter, then that the defendant George Slatter the elder might be decreed to pay to her the value of her widow's chamber, and that three equal fourth parts of the clear residue of John Slatter's estate might also be paid to her.

The defendant George Slatter the elder, by his answer, insisted on the deed of separation, and on the provision thereby made for the plaintiff, in bar of any claim which she might have in or to the estate and effects of the intestate; and he denied that any reconciliation or subsequent cohabitation had taken place between the plaintiff and her late husband.

The defendants, the trustees, and the Governor and Company of the Bank of England put in formal answers.

Evidence was entered into on both sides. On the part of the plaintiff, it was proved by the testimony of two witnesses, that John Slatter, subsequently to the deed of separation, had gone to his wife at Gravesend, where she resided, and on two or three occasions had slept with her at her lodgings. The general habits of intoxication and intemperance of John Slatter were also proved, as also his desire, when sober, to be reconciled to his wife, and that she should live with him, and that he continually made pre-[33]-sents to her. Some evidence was also given that, upon the treaty for a reconciliation, it was arranged that the annuity of 180l. should be continued to the plaintiff, and that a deed should be prepared for that purpose.

On the part of the defendant George Slatter the elder, the defendant Charles Druce the younger, one of the trustees in the separation deed and the solicitor by whom it was prepared, was examined: the material effect of whose testimony was that the indorsement on the deed of separation was prepared in consequence of the proposed reconciliation between the parties, the plaintiff delaring that she should not

object to return to him, if she could do so without prejudice to her annuity in case of a second separation. That John Slatter refused to sign the indorsement, on the ground that he did not approve of the articles. The witness also deposed to the plaintiff's having given him to understand that no cohabitation had taken place between the plaintiff and her husband subsequently to the deed of separation.

Mr. Spence and Mr. Bickner, for the plaintiffs. The plaintiff is not in any manner bound by the deed of separation. A married woman cannot contract, nor can she bind herself by deed alone, except as to her separate property. *Lord St. John* v. *Lady St. John* (11 Ves. 526, 531). Deeds of separation are contrary to the policy of the law. There is no covenant in the deed of separation in this case, on the part of the trustees, to indemnify the husband; the only indemnity is the trust-fund, out of which the annuity is to be paid to her. In *Stamper* v. *Barker* (5 Madd. 157) the wife, being entitled to a present interest in personal property, and to certain contingent interests, a deed of separation was entered into between herself, her father, and her husband, by which she was to retain her present interest in the property, and the husband was to have a share in **[34]** the contingent property when it fell into possession; the husband having died before the wife, the deed was treated as a nullity as against the wife, and she was held to take by survivorship. The deed, in the present case, bears internal evidence that it was not considered binding on the wife, the annuity being subjected to make good any debts which she might incur. The wife is incapable by law to bind herself by any deed. Assuming, however, the deed to be valid, it was not intended to deprive her of any of her legal rights, but only to deprive her of the annuity. If the deed had any effect, and was in any manner binding on the wife, then it was avoided by the subsequent reconciliation and cohabitation of the parties, which is clearly established by the evidence.(*a*)

Mr. Wigram and Mr. James Russell, for the defendant George Slatter. By this separation deed it is covenanted and agreed by all parties that the plaintiff shall do and execute all such acts and deeds as shall be requisite for releasing, barring, and destroying all dower and thirds at the common law, or by custom, which the plaintiff could or might claim out of the real or personal estates of John Slatter; and the trustees covenant to indemnify John Slatter. If, therefore, the plaintiff succeed, the defendants the trustees will be liable to indemnify the defendant Slatter under that proviso and the covenant for further assurance in the separation deed. If the deed be **[35]** declared void, it must be void altogether; and if so, then no case of election can arise. In all the cases which have arisen the deed has provided for future separation; and the Court has considered such a proviso as against the policy of the law. In *Wilson* v. *Mushett* (3 Barn. & Adol. 743) it was held that a mere accidental cohabitation did not amount to a condonation. In the present case the evidence, if it actually proves any cohabitation subsequently to the separation deed, shews that such cohabitation was merely accidental, and not from any determination in the parties to live with each other again. In *Lord Westmeath's case* (1 Dow & Clark, 519) it was proved that the husband and wife had visited many places together, and were frequently alone in rooms together; but as there was not any evidence of any intended reconciliation, it was held that there was not any condonation. A Court of equity holds a wife bound by her contracts with respect to her separate property, and no substantial reason can be shewn why she should not be considered equally bound in the present case. *Head* v. *Head* (3 Atk. 295, 547), *Guth* v. *Guth* (3 Bro. C. C. 614), and *Holt* v. *Brien* (4 Barn. & Ald. 252), were also cited for the defendant.

Mr. Teed, for the defendants the trustees.

Mr. Phillimore, for the Bank of England.

Mr. Spence, in reply. If the defendant Druce be liable at all, he can only be liable to reimburse the plaintiff out of the annuity of 180l. provided by the separation deed. The plaintiff elects to take all the interest to which she is entitled as the

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(*a*) See *Bateman* v. *Countess of Ross*, 1 Dow, P. C. 235; *Hindley* v. *The Marquis of Westmeath*, 6 Barn. & Cress. 200; *The Marquis of Westmeath* v. *The Marchioness of Westmeath*, 1 Dow & Clark, 519; *Earl of Westmeath* v. *Countess of Westmeath*, 1 Jac. 126, 140; *Westmeath* v. *Westmeath*, 2 Hagg. Suppl. 1, 115; *Legard* v. *Johnson*, 3 Ves. 352, 9; *Elworthy* v. *Bird*, 2 Sim. & Stuart, 372, 381; *Lord Rodney* v. *Chambers*, 2 East, 283; *Worrall* v. *Jacob*, 3 Meriv. 256, 268; *Chambers* v. *Caulfield*, 6 East, 244; *Durant* v. *Titley*, 7 Price, 577; *Onslow* v. *Onslow*, 1 Sim. 18.

widow of John Slatter, and, thus electing, she necessarily repudiates the annuity; so that, in fact, the defendant Slatter is indemnified out of the annuity by the plaintiff's not claiming it.

[36] THE LORD CHIEF BARON, without entering into any detail of the circumstances of the case, expressed his opinion to be that there was nothing in the deed to deprive the wife of any interest to which she was entitled in the personal estate of her late husband.

The decree directed the usual accounts of the personal estate of John Slatter, an inquiry whether he was a freeman of the city of London, whether any settlement was made on his marriage with the plaintiff, whether any property came to the plaintiff since the date of the separation deed during the coverture, and an inquiry who were the next of kin of John Slatter at his decease. The bill was dismissed as against the Bank of England, with costs.(*a*)

[37] SMALL AND OTHERS *v.* ATTWOOD. May 24th, 1834.—Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court, for the inspection and examination of the plaintiff, under the usual order for that purpose, the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree. Bill, by certain persons, on behalf of themselves and the other members of a joint stock company, to which an answer was put in and a decree subsequently made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries. A supplemental bill was afterwards filed in the name of the same plaintiffs against the same defendant, seeking, among other things, a specific lien on a part of the purchase-money paid to the defendant. The defendant pleaded that one of the parties named as a plaintiff in the supplemental bill had, previously to the filing of it, parted with all his interest in the partnership or company, and had ceased to be any longer a member or proprietor of the company, and that he had not any other interest. The plea was overruled. Where any of the plaintiffs in a suit live in the country, copies of the answer will be allowed, and the costs of them will be costs in the cause. Costs may be allowed for affidavits used in reference to the common injunction. Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit. The costs of all copies of documents, which are required by the Judge for his assistance in hearing the cause, are costs in the cause. The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation.

(*a*) At the sittings in London, after Michaelmas Term, 1833, an action for dower which had been brought by the plaintiff against George Slatter the younger, the nephew and heir-at-law of John Slatter, was tried before Lord Chief Justice Tindal. To that action the defendant pleaded the deed of separation, and an election by the plaintiff to take the annuity in lieu of dower; and the defendant proved a receipt by the plaintiff, after issue joined and before trial, of the dividends of the stock mentioned in the separation deed. A verdict was found for the plaintiff, subject to a case for the opinion of the Court; and, upon the argument of that case before the Court of Common Pleas, in Michaelmas Term, 1834, it was held that the evidence of the receipt by the plaintiff of the dividends was not sufficient evidence to warrant the Court in holding that the plaintiff had elected to take the annuity in satisfaction of her dower. It was held, also, that an order made in the suit in equity (to which the defendant at law was not a party), by which it was provided that the receipt of the dividends by the plaintiff should be without prejudice to her right to dower, was admissible in evidence to shew quo animo she received them. The Court expressed a doubt whether a Court of law could properly take cognizance of an election to take something in lieu of dower. See 5 Moore & Scott, 82.

[See this case in House of Lords, 6 Cl. & F. 232; 7 E. R. 684 (with note).]

Mr. Wakefield moved that the books, papers, and writings, mentioned in a schedule annexed to the answer of the defendant, which had been brought into Court, and deposited by the defendant with his clerk in court, pursuant to the usual order obtained for that purpose, might be delivered out to him, the purpose for which they had been so deposited having been answered. In support of the motion, he contended that the Court only required that the books, papers, and writings, should be left with the clerk in court a sufficient time to enable the plaintiffs to inspect them, and, if they thought fit, to take copies; that the books and papers in question had been deposited upwards of seven years, and the plaintiffs had, therefore, had every opportunity of inspection and examination.

Mr. Wigram, for the plaintiffs, denied the rule to be such as stated by Mr. Wakefield, and contended that, under the decree directing inquiries as to the mode in which the trade had been carried on, there might be occasion to refer to the books; that copies of them would cost 10,000l.; and that no sufficient ground was shewn for returning the books. It was not pretended they were wanted for the purposes of the trade of Mr. Attwood. The defendant also sought to impeach the decree, on the ground that the trade was improperly carried on by the plaintiffs. The books would be necessary for the purpose of defending the plaintiffs from this imputation. Another reason why the books should not be produced was that they would be required on the hearing of the appeal now pending before the House of Lords.

Mr. Wakefield, in reply. The application is quite of **[38]** course, unless some special circumstances can be shewn in opposition to it. The books are brought in for the purpose of inspection by the plaintiffs, who are permitted to take such extracts as may be necessary to be used at the hearing of the cause; and when the parties have had sufficient opportunity for these purposes, no instance can be shewn in which such an application has been refused. It is absolutely necessary that the books should be returned to the defendant for the purposes of the decree. All that the Court can do is to annex a condition to the delivery of the papers, that the party shall produce them at the hearing of the cause. Another reason why they should be delivered back to the defendant is that they are now in the hands of the clerk in court, and they are required for the purpose of being produced before the Master in the prosecution of the inquiries; but the clerk in court cannot produce them without an order.

THE LORD CHIEF BARON. It appears to me that when books and papers are brought into Court for the inspection and examination of the plaintiffs, that object having been answered, the books should go back to the custody of the party producing them; and that, if they are subsequently required for the purpose of any of the inquiries directed by the decree, the Master will use his discretion in requiring them to be produced, and the parties will have an opportunity of inspecting them before the Master. The decree arms the Master with power to call for the books, if he shall think their production necessary. If the Master does not exercise a sound discretion in calling for them, exceptions may be taken to the report. I shall require a certificate from the clerks in court as to the practice before I dispose of this motion.

On a subsequent day, his Lordship stated that he had **[39]** inquired the practice of the clerks in court, and that they concurred in opinion that the defendant was entitled to have the books and papers delivered back to him.

May 24th.—In this cause the plaintiffs having filed the supplemental bill stated in 1 Younge, 507, the defendant John Attwood filed the following plea in bar of the supplemental suit:—

This defendant, by protestation, &c. to all the discovery and relief, in and by the said bill sought and prayed, doth plead; and for plea says, he has been informed and believes that the complainant, Francis Baily, did some time in or about the year 1828 absolutely sell and dispose of, and transfer to some person or persons unknown to this defendant, all his, the complainant's, Francis Baily's share, right, and interest in the partnership or company in the said bill mentioned, and therein called the British Iron Company, and did at and from that time cease to be a proprietor or member of such partnership or company; and was thenceforth acquitted and discharged from all obligations and every obligation in respect of his having been the proprietor of shares or any share in, or of having been a member of, such partnership or company, and did at and from such time cease to have any right, title, or interest, either at law or

in equity, of, in, or to the property, effects, rights, and credits of such partnership or company, or any or either of such particulars, or any part or parts thereof, and did at and from such time cease to have any right, title, or interest of, in, or to any of the matters the subject of, or mentioned in, the original bill of complaint in the supplemental bill mentioned; and that the complainant, Francis Baily, from some time previous to had been, and at the **[40]** time of filing this supplemental bill, was not a proprietor or member of the said partnership or company, or in any way interested therein, or liable in regard thereto, or in any of the matters in such supplemental bill mentioned. All which matters and things, &c.

Sir Edward Sugden, Mr. Wakefield, and Mr. Lovat, in support of the plea. The bill in this case is filed by the plaintiffs, on behalf of themselves and all other the members of the British Iron Company. The prayer of the bill is in respect of their rights as members of that company. The statement takes up the original bills, which sets out a common partnership deed. There is nothing stated in the bill which shews that Baily had any interest, except as a partner. Mr. Baily is not even alleged to have any title or interest, except as a partner. The plea is this, Mr. Baily was not a partner at the time of the filing of the bill, and had not any interest. In *The King of Spain* v. *Machado* (4 Russ. 225) it was held that the two persons, who were joined as co-plaintiffs with the King of Spain, but who were in fact only his agents, and had no actual interest in the subject of the suit, were improperly joined as plaintiffs, and a demurrer to the whole bill was allowed. In giving judgment in that case, the Court referred to two cases, *Cuff* v. *Platell* (4 Russ. 242) and *Makepeace* v. *Haythorne* (4 Russ. 244), as establishing the doctrine that a general demurrer for want of equity is good, where it appears on the face of the bill that of two co-plaintiffs one only has any interest in the matters in question. Suppose Mr. Baily had been the sole plaintiff at the filing of the original bill, and to have subsequently parted with his interest, how could a supplemental bill be filed in his name? It cannot be pretended that the junction of an improper party is no injury to the plaintiff; the cases have decided **[41]** that it is, and the present case cannot be distinguished from those which have been cited.

Mr. Knight, Mr. Wigram, and Mr. Sharpe, in support of the bill. The plea does not touch the merits of the case. The plea is singular in form, for it is only on information and belief. The decree was not made till after 1828. If Baily is now an improper party, he was no less so at the time when the decree was pronounced; no objection was, however, made at that time, and there is no allegation of any recent discovery of his having parted with his interest.(*a*) If Baily had not been made a party, either as plaintiff or defendant, the bill would have been demurred to. In support of the bill, Lord Redesdale's Treatise on Pleading (4th edit. p. 61), *Jones* v. *Jones* (3 Atk. 217), and *Dormer* v. *Fortescue* (id. 123, 133), were cited.

Sir Edward Sugden, in reply, contended that, on the argument of the plea, the plaintiffs could not insist that Baily was liable, for the truth of the plea was not in issue. The bill professed to be the bill of the plaintiffs therein named, on behalf of themselves and all other the mem-**[42]**-bers of the British Iron Company; but, if the plea were considered to be true, which on the argument it must be, then there was no foundation for the allegation in the bill.

Dec. 23rd.—THE LORD CHIEF BARON. This is a plea to a supplemental bill; and the effect of the plea is this: that Francis Baily, who is one of the plaintiffs in the supplemental bill, had disposed of his share and interest in the partnership; that,

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(*a*) The counsel for the plaintiffs then proceeded to read the decree in the original cause; when it was objected, on the part of the defendant, that the plaintiffs, having stated in their supplemental bill so much of the decree as they had thought fit, were bound by that statement, and were not at liberty to read the decree.

Mr. Knight, Mr. Wigram, and Mr. Sharpe, in support of their right to refer to the decree, insisted that the fact, whether Baily had or had not any interest, could not be disposed of without a reference to the decree, and that the only passages from the decree which they desired to refer to were those directing the account of the manner in which the mines had been worked, and which directed an account to be taken of the net profits, which would shew that Baily was interested in the result of those inquiries.

The Court declined to decide this point.

at the time the bill was filed, he had no interest whatever in any of the proceedings. That is the substance of the plea; and the question is whether that is a good defence, under the circumstances of this case to the supplemental bill. In order to determine this question, it is necessary to consider what was the scope and effect of the original bill, and what is the nature of the supplemental bill. The object of the original bill was to set aside an agreement which had been entered into between the plaintiffs and the defendant, on the ground that it had been obtained by imposition. The Court decreed accordingly, and directed the money to be refunded, and at the same time directed that the plaintiffs should account for the profits of the property while it was in their possession and under their management. That was the substance of the bill in the original cause. Facts had existed during the progress of the original cause, which were not discovered till after the decree was pronounced. Those facts were of this description: that the money which had been paid by the plaintiffs, as a consideration for the purchase, was paid in bank notes, and those identical bank notes were handed first to the bankers of Mr. Attwood, and afterwards by those bankers to a stock broker; and that money was laid out in the purchase of the stock which is the subject of the present suit: and the object of the present suit is to obtain a declaration that there was no transfer of the property; that the stock was in fact the **[43]** property of the plaintiffs in the suit; and there is an offer to make all proper allowances with reference to what was provided for in the decree in the original suit. Now it appears to me that this is only a modification or alteration of the relief in the original suit; and it comes within the language of Lord Hardwicke, in the case of *Dormer* v. *Fortescue*, in which he says, "I think the bill and the supplemental bill ought to be considered as one bill and connected together" (3 Atk. 133). Considering the supplemental bill nothing more than a continuation of the original suit, I think on that ground—if it rested on that ground alone—it would not be sufficient to say that, after the filing of the original bill and before the filing of the supplemental bill, Francis Baily had parted with his interest. But, independently of that consideration, it is alleged in the plea that Francis Baily had disposed of his interest in the partnership, and that he has no interest whatever in the subject-matter of the suit. In an ordinary case these averments must, for the purpose of the plea, be considered as true, and true to the extent to which they are stated; but it is apparent enough that he is interested in the original suit. His interest is this: that he is liable to the account directed in the original suit; that he may be liable to costs; and, if he is interested in the original suit, such is the object of the supplemental suit, that he must of course be interested in the supplemental suit. It appears to me, therefore, that the fact is not made out and established, and that we may correct or restrain the allegation in the plea by referring to proceedings in the cause, which render it impossible to interpret the language of the plea literally to the extent to which, if it stood by itself, it might be carried. I am of opinion that the plea must be overruled.

[44] The defendant Attwood desiring to have the plea reheard, Mr. Wakefield and Mr. Lovat now moved that all proceedings against him to compel him to answer might in the interim be stayed; and they cited *Thorpe* v. *Macauley* (in Chancery, Nov. 20, 1820; and see 5 Madd. 218), *The King of Spain* v. *Hullett* (2 Bligh, N. S. 31), and *Wood* v. *Milner* (1 J. & W. 636), in which demurrers were overruled, and orders to stay further proceedings against the defendants were made, pending appeals to the House of Lords.

Mr. Wigram and Mr. Sharpe, contrà. It is not a motion of course to deprive a party of his right to a decree made in his favour. Before a party can apply for this, he must satisfy the Court that there is ground for his application, and that irreparable mischief would ensue if it were refused. *Hugenin* v. *Bazely* (15 Ves. 180), *Waldo* v. *Caley* (16 Ves. 206), *Willan* v. *Willan* (id. 216), *Nerot* v. *Burnand* (2 Russ. 56), *Walburn* v. *Ingleby* (1 Mylne & K. 61). The cases cited on the other side were merely bills of discovery, and there was no discussion. The plea here is not to the merits, but to a mere matter of form. This application is merely for delay.

Mr. Wakefield, in reply. The plea is one of vital importance. There has been no delay in presenting the petition of rehearing. The decision on the plea was given on the 23rd December, and the petition preferred on the 12th of the following month, the Court being closed during the interval. The object of the appeal is totally lost, unless the proceedings are stayed. In the cases cited there were large accounts to be taken and documents to be delivered up. Where there are heavy accounts the pro-

[45]-ceedings are not stopped. If the defendant is compelled to answer, he cannot be reinstated in the same position.

THE LORD CHIEF BARON.(*a*) The money is in Court; therefore, there is no danger of its being made away with. I think, on principle and common sense, I ought to accede to the motion. In the cases cited for the plaintiffs no prejudice could arise to the defendants by expediting the proceedings, but here it is otherwise. *Thorpe* v. *Macauley* is a very strong case.

Motion granted. The defendant Attwood to pay the costs of the application.

Feb. 10th.—The plea now came on for re-argument.

Mr. Wakefield and Mr. Lovat, for the plea. In general, a party having parted with his whole interest has no right to sue in respect of that interest in a Court of equity; so, where a party files a bill and then parts with all his interest in the suit, he has no right to file a supplemental bill. *Tonkin* v. *Lethbridge* (G. Coop. 43). In this case the supplemental bill having been filed after the decree, the original and supplemental suits are in effect distinct. In suits so circumstanced, it is not necessary that there should be the same parties to each. For instance, where one individual files a bill on behalf of himself and others, and ceases to have an interest in the suit, the others may come before the Court by supplemental bill. *Dixon* v. *Wyatt* (4 Madd. 392). The case of *Dormer* v. *Fortescue* (3 Atk. 133) will be relied upon on the other side; but the observation of Lord Hardwicke in that case was made with reference [46] to the special circumstances before him; besides, the party had not parted with his interest. In *Hartwell* v. *Townsend* (2 Bro. P. C. 107) a defendant in the suit, having parted with all his interest after the decree was made, filed a bill of review; and the House of Lords held that he could not do that. There can be no difference in principle, whether the person who is the active party in these cases is plaintiff or defendant. *Vere* v. *Glynn* (2 Dick. 441). In *The King of Spain* v. *Machado* (4 Russ. 225) the suit was circumstanced in some measure like the present. One Mendizabel having come into this country, and having arrested Machado for the sum of 80,000l., which was paid into Court, the King of Spain filed his bill against Machado, alleging that the money was part of an indemnity to which the King of Spain was entitled. Afterwards, it was understood that the money had got into the hands of Hullett and Widder, the agents of Mendizabel. The King of Spain then filed a bill against Machado, Hullett and Widder. Both these bills were in their frame original; but it is quite clear that, as far as Machado was concerned, the second bill was supplemental to the first. Now here, although the bill is called a supplemental bill, it is in fact an original bill in the nature af a supplemental bill: it seeks to give effect to the decree in the original cause. But it will be said that Francis Baily is under liabilities to Mr. Attwood. Supposing a balance due from the company to Mr. Attwood, Baily is under no liability to Attwood, so as to give him an interest in impounding this money. He must shew such a liability as will give him an interest in the 192,000l. stock. The result of this suit will not affect the general account one way or the other. Suppose a special property in this money, vested in the company, to be traced to the defendants; they cannot get more than is due to them in respect of that money. There is no interest be-[47]-yond liquidating that particular balance, and in that Mr. Baily has no interest.

Mr. Knight, Mr. Wigram, and Mr. Sharpe in support of the bill. The supplemental bill seeks to vary the account decreed in the original suit. It seeks to withdraw from that account certain property which has been traced into the funds, and laid hold of by injunction. It has nothing to do with setting aside the contract, but only with the account. As to that, the two suits are the same; and, if it were to the interest of the plaintiffs to have the accounts taken as against Baily in a different mode, they had a right to make him a party. The account, though varied, cannot be taken in Baily's absence. It cannot be separated into parts. The stock is one item in it. This bill relates to matter intimately connected with the original suit, which ought to have been embodied in the original bill if it had been known. In fact, Baily parted with his interest pendente lite; and alienation, under these circumstances, makes no difference in the rights of the parties or their representatives. The alienee is bound by the decree, though not a party; and Baily represents the alienee: *Garth* v. *Ward*

(*a*) Lord Abinger.

(2 Atk. 175), *Bishop of Winchester* v. *Paine* (11 Ves. 197), *Landon* v. *Morris* (5 Sim. 247), Mitford, Treat. Eq. Pl. 61, 62. Whoever, therefore, purchased from Baily, purchased subject to the accounts to be taken in this suit. Whatever was the contract of indemnity between Baily and his partners, that will not destroy his liability to Attwood. He cannot be relieved from this suit while any of the purposes of the original suit remain unperformed. *Hartwell* v. *Townsend* (2 Bro. P. C. 107) is not an authority for the position advanced. The case is loosely reported, being little more than an abstract of the printed case laid before the House **[48]** of Lords. It is clear that the decision must have gone on some other ground. The doctrine in *Dormer* v. *Fortescue* (3 Atk. 133) supports the present bill. Where a party assigns over a legal interest, though the assignee may sue in a Court of equity, he cannot do so, except in the presence of the assignor. The legal interest must be bound. *Cathcart* v. *Lewis* (1 Ves. jun. 463). Now Baily is one of the persons in whom the legal interest is vested as a trustee. Attwood is liable to an action by the trustee, and he will remain so, unless the legal right is bound by the suit. Another thing is that Baily, being one of the parties to whom the money is to be paid, is a necessary party to any release to be given for the payment of the money. It may be added that there cannot be a plea to a supplemental bill of matter which took place before the decree in the original suit.

Mr. Wakefield, in reply. The bill does not seek to vary the decree; it does not seek to interpolate into that account one single item. It is a supplemental bill in aid of an original decree for the purpose of obtaining a security for that which has been decreed. This was not merely an equitable sale by Baily, but a transfer of his whole interest. There was no necessity to make him a party to the present suit; *Brace* v. *Harrington* (2 Atk. 235); but, if made a party at all, he should have been a defendant, not a plaintiff. In this Court an assignee has no right to go on with the suit in the name of the assignor. At law, the assignee cannot sue; but here, where he can, he must. In *Dormer* v. *Fortescue*, the heir-at-law would never have obtained the relief he did, if he had sold his interest. Then, as to the plaintiffs being trustees: they have not described themselves as instituting the suit in that character. They file the bill on behalf of themselves and others, as partners in **[49]** the British Iron Company, and, if not entitled to relief in that right, they are not entitled in any other. Besides, though named trustees, they were only to be so in case any assignment should be made to them.

Feb. 21st.—THE LORD CHIEF BARON.(*a*) This plea, in effect, is intended for the purpose of setting up a short answer to this supplemental bill, by stating facts which, if true and incapable of denial, would put an end to the cause without the delay and expense of putting in a full answer, and hearing the cause after a further investigation. That appears to me to be the only rational object of a plea to a bill in equity; because, if the whole matter of the plea may be taken advantage of by answer, it is obvious that there is no occasion to admit of a plea at all, unless for the sake of convenience and saving of expense, by bringing the matter to a short issue, and thus making further investigation unnecessary. It is, therefore, important that the plea, being brought forward for that purpose, should contain specific allegations capable of denial. I know very well that it has been said in some cases that where the matter is not precisely within the knowledge of the party, it will be a sufficient allegation to state that it is so to the best of his knowledge, information, and belief. That may be true as a general proposition; but it appears to me that a plea of this sort must be tried by this criterion. Supposing the plaintiffs were to take issue on this plea, what would be the result? The onus probandi would be cast on the defendant, because he undertakes to shew that Baily having no longer any interest in the suit, the bill ought to be dismissed. If the onus probandi is on him, he must be as capable of stating the facts in his plea as of proving them. Now what is the plea in this case? The whole rests on his information and belief. If, upon the **[50]** issue so taken, he were to prove his information and belief, that would not be an answer to the bill. The plea ought to be clear and specific, requiring no further investigation than to ascertain the truth or falsehood of the facts alleged. Now here it is not said that there was a conveyance of Baily's interest, but only that the defendant is informed and believes that there was such a conveyance. Had this been a case where, from the nature of the transaction and the issues which might have been joined on the plea, the onus

(*a*) Lord Abinger.

probandi had been cast on the plaintiff, the plea might have been sufficient. Here, the onus being cast on the defendant, he is bound to state to the Court what he is capable of proving. He ought, therefore, to set forth what, on the face of the plea, would be an answer to the bill. He only states his information and belief, from which he draws certain inferences, some of which may be true and others must be false.

I lay down no general rule of pleading in cases where the defendant has no distinct knowledge of the facts which he pleads; but I wish to be distinctly understood that in this case the onus probandi being on the defendant, I think he ought to shew by his plea that which he was bound to prove. If he was deficient in evidence on that subject, he might have filed a bill against Baily for a discovery. If he has not done so, it is not the fault of the plaintiffs. The present bill was filed in 1832. He files his plea after the decree in the original suit was made. He makes no apology for not putting in his defence earlier. The fact which he mentions having occurred in the year 1828, he does not state the nature of his information, or from whom he got it, or what were the particulars. If the defendant must prove that fact, so I say he must aver that fact.

Another ground upon which I proceed is this: There may be various ways in which Mr. Baily parted with his interest, or submitted to a modification of his interest, so as to produce very different results. He may have assigned his interest in such a manner as to bind himself to all the con-[51]-sequences of the suit. He may have assigned it so as to make himself still liable for the costs. The plea states the defendant's information and belief as to certain consequences arising from the assignment. It is quite clear that that portion of the plea is matter of pure law or of mixed law and fact. Now if the assignment was produced to ascertain whether the legal consequences stated in the plea resulted from it, to what endless litigation that would lead. If a defendant files a plea going to the whole merits, if that plea depends on some written document requiring construction, then as that written document is all that supports his plea, he ought to put it on his plea, and not leave the Court to act upon his imagination. If I decide on this plea, I must decide on that of which I know nothing. These are additional reasons for considering the plea as too uncertain for a Court of Equity to deal with, for the purpose of preventing all further inquiry.

I go a step farther—the defendant has drawn an inference in law which he is not justified in drawing. I must assume the facts to be truly pleaded. But it is a constant rule that you do not admit what is not properly pleaded, and is not a proper inference from certain facts. Now, in order to dispose of this bill on the present plea, it strikes me that Baily must not only have discharged himself as between himself and his co-plaintiffs, and himself and the rest of the world, from the partnership liability, but from all consequences which his own co-plaintiffs might attach to him, by making him a party to this suit. But a party by assigning his interest does not depart with his liabilities. By selling all his interest he cannot deprive his partner of any title arising from previous obligations; yet this plea states the defendant's information and belief that the party is divested of all his liabilities. I cannot state that to be true in fact which is not true in law.

But there is another important point to be considered. It was said by Mr. Wakefield in argument—an [52] argument so clear that it was a pleasure to follow him in it—that it was impossible that Baily could have any interest in this inquiry; that he must by the assignment have lost all his interest. He said that it was not true that this bill can be connected with the other; that it is for a specific object of its own; and that it stands per se. I have read the prayer of the bill. To a certain extent this is so; but in the main it is not so. The prayer is in the alternative, either that the sum in question may be given to them, they undertaking to release the defendant in respect of it; or that they may be entitled to a lien upon it. Now suppose the Court should decree that this sum in the funds, from being specifically traced out, is the plaintiffs' property, the consequence would be that the Court would direct the Master to take that sum into the account as part of the property of the plaintiffs. But if it should turn out that the sum due from the plaintiffs to Attwood is greater than what is due from him to themselves, the plaintiffs must answer to Attwood for the balance.

Again I lay much stress on the observation that none but Baily could possibly release Attwood from any claim which Baily might have to an account from him. Who, indeed, can release but Mr. Baily? Suppose, on the other hand, the bill had

set forth a conveyance of Baily's interest to some other party, Attwood would justly say that will not do: how can the plaintiffs release Baily from what is due from him to me? But then it is said by the defendant's counsel, that Baily ought to have been made a defendant. It is admitted by them he ought to have been made a defendant. But then what right would the Court have to force him against his will? He might say, I will not give up my right to be a plaintiff. I do not see how the Court could decree against him in invitum. I do not know any case except that of ship-owners where the majority of the contracting parties can bind the minority—where some of the parties may say, they shall dispose of a decree in equity as they please without the consent of the others. But **[53]** then it is said that this is not a supplemental bill but that, being after the decree in the original suit, it is only in the nature of a supplemental bill. But the rules of pleading do not vary as applied to one bill or the other. Whether a bill is supplemental or not refers more to the subject matter of the bill than the parties. The real question is whether the plaintiffs were not justified in what they have done, even supposing Baily parted with his interest in 1828; whether he had not a contingent interest in the suit, and such as he could prosecute to an end? If he had, they could file a supplemental bill for the purpose of establishing the rights of the parties in that suit. Call it what you will, if new matter was introduced it was to vary the rights of the parties in the original suit. It appears to me, therefore, that he was a proper party. Upon these grounds, therefore, I feel it my duty to overrule the plea.

Plea overruled with costs.

Nov. 18, 20.—In this cause two petitions were presented, one on the part of the defendant Attwood, the other on the part of the plaintiffs, for leave to except to the Master's certificate of costs, or that it might be referred back to the Master to review his taxation, so far as related to the matters complained of. Amongst the various grounds of the proposed exceptions, in the first petition were the following:—First, that in taxing the bill of costs, the Master had allowed several sums amounting together to the sum of 83l., for close copies of the answers of the several defendants to the bill; secondly, that in Hilary Term, 1829, the plaintiffs gave notice of their intention to move, and after-**[54]**-wards moved the Court in this cause, and in another cause then pending in this Court, for an injunction and certain issues; but that so far as the application related to the injunction, no affidavit could be read; and that inasmuch as that part of the application relating to the issues was refused, the Master ought not to have allowed any part of the costs relating to the application for the said issues; nevertheless the Master had, in his taxation, allowed the sums following, some wholly, others partly, relating to or caused by the application for the said issues; that is to say, &c. [Then followed a variety of items for preparing and engrossing affidavits, &c.] Thirdly, that the execution of the commission in this cause occupied 103 sitting days, and no more; but that, in computing the fees to the commissioners, the Master paid no regard to the number of days on which the parties were actually engaged in executing the commission, but the depositions being 5970 office folios, he allowed 199 sittings, at the rate of 30 folios a day, the effect of which was to allow the commissioners rather more than 4l. 1s. a day, instead of the regular fee of 2l. 2s. a day. Fourthly, that for copies of papers and documents for the use of the Lord Chief Baron, the following items had been allowed; that is to say, &c.

Mr. Wakefield, in support of the petition, abandoned the first ground of exception. He at first contended that this was virtually a town cause, inasmuch as the plaintiffs represented a London company, and employed a London solicitor; and therefore the mere circumstance that some few of the individual partners resided in the country would not make it a country cause, and entitle those parties to close copies; but he afterwards waived this point, upon learning from the officers of the Court that any one plaintiff residing in the country makes the cause for this purpose a town cause. He then contended that there could be no costs for the issues, the motion for the issues having been dismissed. That being so, if the costs which **[55]** have been objected to, secondly, are applied only to the injunction, they are most exorbitant. Besides, they cannot properly be charged in reference to affidavits; for where an injunction has been obtained to restrain proceedings at law, upon the coming in of the answer, no affidavits can be read. As to the third ground of exception, the Master ought only to have allowed fees to the commissioners for the days on which they

actually sat, and then at the rate of 2l. 2s. a day; but it has been the habit to suppose that the commissioners can never take depositions of more than thirty folios per day; and the consequence of acting on that supposition in the present case is this that they have received fees for 199 imaginary days. In particular, with respect to the examination of one John Burr, the number of days have been increased by this process from one to thirty-five, his deposition occupying 1041 office folios. The Court allows the commissioners 2l. 2s. a day but not 2l. 2s. for every thirty folios. [The Lord Chief Baron.(*a*) From ten o'clock till four would be a reasonable time for their sitting.] Then the commissioners' agent has been allowed at the rate of 3l. 3s. per day. It is said, on the other side, that this has been taxed down to 2l. 2s., but in strictness he has no right to more than 13s. 4d. per day. *Pultney* v. *Cornwall* (2 Fowler, 312). Lastly, with respect to the copies of documents furnished to the Court, the general rule is to furnish the Judge with the title of the cause and the prayer of the bill; and an allowance is made for this in the taxation of costs as between party and party; but this is the only charge in this respect which the party winning in costs has a right to make against his adversary. Here the charge is made for a variety of other documents and amounts to 334l.

Mr. Wigram and Mr. Sharpe, contrà. As to the costs of the injunction no evidence has been brought **[56]** forward on the other side to shew that the affidavits were improper; and until evidence has been produced against the Master's finding, the Court will presume the Master's finding right. The motion for the issues was refused with costs; and the Master was directed to ascertain what were the additional costs occasioned by the plaintiffs' praying for the issues, and to pay those costs to the defendant. But nothing was said in the order as to the costs for the injunction. Those costs therefore remain, and may very properly have arisen from affidavits. It is true that affidavits cannot be read against an answer upon an application to stay proceedings at law; but it is different where affidavits are used to supply facts as to which the answer gives no information. *Taggart* v. *Hewlett* (1 Mer. 499), *Hodgson* v. *Dean* (2 Sim. & Stu. 221). It may be presumed, therefore, in the absence of any evidence to the contrary, that the Court granted the injunction upon proper affidavits. Then the objection as to the fees allowed to the commissioners cannot be received now. A motion should have been made to suppress the depositions, or the objection should have been made before the Master, which was not done. The defendant knew the rule of payment; he knew that the commissioners were paid according to the quantity of business done, which is regulated by the number of folios. It is impossible to go into evidence upon this point now. [The Lord Chief Baron. But, if it is an abuse of the rule, the Court is bound to take notice of it: it is a monstrous abuse, if true.] They had an opportunity before the Master of making an affidavit as to the number of days on which the commissioners sat. As it is, we have no evidence to answer. With respect to the documents furnished to the Court, the Court is no doubt usually furnished with the title of the bill and the prayer; but there is no rule which limits the Court in this respect. [The **[57]** Lord Chief Baron. If it is absolutely necessary that the Court should be furnished with these documents, the costs of them are costs in the cause.]

Wakefield, in reply. Upon an application of this nature, which is only for leave to except, it is not necessary to go into strict evidence. There is, however, evidence of the objection as to the commissioners' fees having been taken before the Master; there being an indorsement on the bill of costs as to the number of days on which the commissioners sat, which indorsement was made by the defendant's solicitor at the time of taxation. With respect to the costs of copies for the use of the Court, a similar point arose in *Bozon* v. *Williams* (3 Y. & J. 378), where Alexander, C. B., called for further copies of documents; but the costs of them were not allowed as between party and party.

The Lord Chief Baron, at the close of the argument, expressed his opinion that the affidavits which had been referred to might have been read, and therefore that the objection as to the costs of the injunction must fail. He was also satisfied that the other objections could not be sustained, except that, with reference to the commissioners' fees, he would make some inquiries of the Master.

Upon a subsequent day the Master, in answer to some inquiries made by the Court, said that the general rule on taxation, with regard to commissioners' fees, was to pay them for so many folios; and that no evidence was given as to the actual number

(*a*) Lord Lyndhurst.

of days on which they sat. There had, however, been a case on which Master Spranger had required the commissioners to shew that they had sat extra hours. In the present case he, the Master, had had no [58] guide, except the number of folios. An objection was made to the number of folios containing Burr's evidence, but that was with reference to a long account which had been inserted in his deposition.

To a question likewise put by the Court, the solicitor of the plaintiffs said that no statement was made during taxation as to the number of days, but that the calculation was by thirty folios.

THE LORD CHIEF BARON. The defendant ought to have objected to the certificate at the time of taxation, if it did not contain the proper statement as to the time of the commissioners' sitting. It is the duty of the commissioners not to take a document such as this, and copy it into the deposition, but to examine the witness vivâ voce as to each of the items. As the commissioners, however, have taken it as a deposition, I must assume, under present circumstances, that they have done correctly. With respect to the objection which has been raised relative to the costs of copies furnished to the Court, I think this case differs from that of *Bozon* v. *Williams*. There it does not appear that the papers were called for during the progress of the cause, but after judgment had been delivered. In this case it was perfectly impossible to give judgment without copies or originals; but I am sorry if I have been the occasion of expense by adding to the length of the bill of costs. The petition must be dismissed, but, as I cannot say it was not proper to bring it before the Court, it must be without costs.

Petition dismissed, without costs.

The ground of the petition presented by the plaintiffs was, that the Master had disallowed a sum paid by the plaintiffs to some accountants for examining certain books and accounts produced by the defendants. The petition [59] alleged that the depositions of the witnesses were read at the hearing of the cause, and were entered in the decree as read, and that they established the inaccuracy of the defendant's statements to the satisfaction of the Court.

Mr. Wigram, for the petitioners. The costs of an annuitant generally are not costs in the cause; but there are some exceptions to the rule. In *Todé* v. *Thompson* (not reported) a bill was filed by an accountant under a will against the executrix. The answer sworn to by the executrix was false; she having taken her statement from that of her daughter, who was residuary legatee. An accountant was employed, and the Vice-Chancellor, upon a special application, allowed the costs of the accountant as costs between the parties.

Mr. Wakefield, contrà. That was a special application, which shews that such a practice is not usual. In cases of fraud there may be a special application that the costs of an accountant may be made part of the decree; but that is entirely different from the present case.

THE LORD CHIEF BARON. The charge for the accountants ought to have been made part of the decree. It does not come under the general denomination of costs. It would not have been costs without the special case of fraud. If fraud was to be made out, it ought to have been brought forward before, and the special ground ought to have formed part of the decree.

Petition dismissed, with costs.

[60] BORRADAILE AND ANOTHER *v.* BRICKWOOD. Nov. 19, 27, 1834.—Under the stat. 2 & 3 Will. 4, c. 125, for granting relief to the West Indies, the commissioners have no power to advance monies except upon such securities as shall have priority over all other securities.—A mortgagor out of possession is not "an owner or person interested" in the property, within the terms of the act, so as to authorize the commissioners, without consent of the mortgagees, to advance monies to him in respect of damage done by hurricanes to the mortgaged premises. —Semble, that where the property has been already restored, the commissioners have no power to advance money for the purpose of reimbursing the party who has restored it.

[S. C. 4 L. J. Ex. Eq. 11.]

Michael White being seised in fee of two plantations in the island of St. Vincent, called Sharpe's and Petit Bordels, by several successive indentures of mortgage con-

veyed and assigned them to Messrs. Rucker, to secure the several sums of 3780l., 5300l., and 1228l. 19s. 9d. By the last of these indentures, dated the 2nd and 3rd of April, 1818, Michael White covenanted, until the said several sums should be paid, to consign the crops and produce of the said plantations to Messrs. Rucker, or as they should direct. On the 8th July, 1830, Messrs. Rucker, being indebted to William Hodges in the sum of 7000l., deposited the said indentures of mortgage with him as a security for that sum. In November, 1831, a commission of bankrupt was awarded and issued against Messrs. Rucker, and they were declared bankrupts, and J. W. Borradaile and Joseph Edlmann were chosen assignees of their estate and effects. At the time of the bankruptcy the said several sums of 3780l., 5300l. and 1228l. 19s. 9d., with a large arrear of interest, were due and owing from Michael White to the Ruckers. In June, 1833, the assignees, together with William Hodges, filed a bill of foreclosure in the Court of Chancery of St. Vincent against Michael White, and by an order in that cause a receiver was appointed of the two plantations, who took and continued possession of them up to the time of the present application. In the course of the year 1831 a hurricane occurred in St. Vincent, by which the said two plantations, and likewise another which belonged to White, called Mount Alexander, were greatly injured. From the time of this hurricane, White ceased to make any consignments to Messrs. Rucker in satisfaction of their mortgage debt; but applied the produce of the mortgaged premises to his own use, or in reparation of the damage **[61]** done to the plantations. These reparations were completed about the month of January, 1833; and about that time, White, without giving notice to the assignees or William Hodges, applied to the commissioners, under the stat. 2 Will. 4, c. 125, for the relief of the West Indies, for a loan on account of the damage which had occurred to all the three plantations. The commissioners accordingly awarded him the sum of 3600l., to be advanced by means of Exchequer bills; and White executed to the commissioners a mortgage of all the three plantations to secure the said sum. The Exchequer bills had not yet been delivered to him.

An application was now made under the 54th section of the statute, upon affidavits verifying the foregoing facts, that the said assignees and William Hodges might be at liberty to file a bill in this Court against the commissioners, jointly with White; and that such bill might pray that the intended loan of 3600l., as far as it extended to the two plantations called Sharpe's and Petit Bordels, might be declared illegal and improper; that any mortgage of the said plantations to be taken by the said commissioners might be declared posterior and subject to the existing mortgage to the Ruckers; that the commissioners might be restrained from making, and the said White from receiving, the said loan of 3600l., other than as aforesaid; and that the indenture of mortgage executed by White to the commissioners might be delivered up to be cancelled.

Mr. Wigram, for the plaintiffs. In this case Messrs. Ruckers are mortgagees of two of the plantations in question, and have not only an interest in that property, but a right to the possession of it under the foreclosure. They are, therefore, entitled to the relief given by the 11th section of the statute.(*a*)[1] A mortgage, however, has **[62]** been made of the three estates by White to the commissioners, a deed has been executed, and the commissioners have delivered to White a certificate, which will entitle him to receive the money. This transaction could not legally take place; the commissioners had no right to make such an advance; this is clearly within that range of cases where a person has a right to come into this Court and have a deed which may affect his legal title removed, or, if the deed be not perfected, to stay the execution of it.(*a*)[2] It is provided by the act that the commissioners may advance money to owners or persons interested. Is White an owner or person interested? There must

(*a*)[1] By which it is enacted that a portion of the Exchequer bills therein mentioned "shall be advanced and lent for the purpose of enabling the owners of and persons interested in the estates, which have sustained injury in the said islands from hurricanes, to resume the cultivation of such estates, and the manufacture of the produce thereof, by restoring works and machinery destroyed or injured, and providing the requisite contingencies and supplies for such estates, and the negroes belonging thereto, and restoring, as far as the same can be accomplished, such estates to the condition in which the same were before the said injuries were sustained."

(*a*)[2] *Hayward* v. *Dimsdale*, 17 Ves. 111.

be a rational construction of the act. He is the owner of the equity of redemption, but the plaintiffs are the substantial owners of the property. Where a mortgagee is content to take his deed, and to leave the possession in the hands of the mortgagor, the commissioners may fairly deal with the mortgagor. But that is not the present case. In this case it is true, that in the first instance the mortgagor was left to manage, but he was to consign the produce of his management to the mortgagee; he was not, therefore, even then, solely interested. The plaintiffs, however, are no longer in that situation; they have taken all the steps they could to establish their right to the possession, and they have now got a receiver and manager appointed. White, therefore, is not the person to come forward against **[63]** the mortgagees to take a large sum of money, and to declare that his is the first charge upon the premises. The plaintiffs are the substantial owners—owners in law and in possession. Another circumstance is, that the premises have been restored. Now the object of the act of Parliament is clearly this, to enable proprietors of land, where the property has been laid waste, to borrow money for its restoration; for, until restoration, the property is unproductive of public good: but, where property has been already restored by the proprietor, he cannot say he has need of the money, and the commissioners have no right to advance it.

Mr. Simpkinson, for Michael White, observed that the act authorized the commissioners to lend the money not to the owners *or* persons interested, but the owners *and* persons interested, therefore to all persons who had an interest in the property. And he said that the 21st section of the act, which gives the property to persons borrowing of the commissioners, clearly refers to such persons as are previously described, namely, owners and persons interested; and this description comprehended the defendant Michael White. He added that, under the 12th section of the statute, the commissioners had power to re-pay money already advanced. [The Lord Chief Baron. That section only applies to a temporary advance by the commissioners themselves.]

Wigram, in reply.

THE LORD CHIEF BARON. I cannot help thinking that the object of the act of Parliament is wholly to protect the commissioners. They have a public duty to perform, and are liable to vexatious suits in the course of performing that duty. The legislature has therefore said that it shall **[64]** not be optional with the complaining party to sue them at his own pleasure; and with a view of preventing them from being continually harassed, it has provided that, before any suit be instituted, leave be first had and obtained from this Court. I am of opinion, however, that in the present instance a sufficient case has been made out on the part of the plaintiffs, and that leave must be given to file the bill.

Nov. 27th.—Mr. Wigram and Mr. O. Anderdon now moved for the injunction, contending that irreparable mischief would ensue if the loan were allowed to proceed.

Mr. Simpkinson and Mr. Lewis, having been served with notice of the motion, were proceeding to address the Court for Michael White; but, as he had not appeared to the bill, the Court would not hear them.

Mr. Coleridge, for the commissioners. The security taken by the commissioners in no way affects the rights of the plaintiffs. Unless the advance in question comes within the terms of the act, their security can have no other priority than the security given by any other persons. This transaction is not within the act. It cannot, therefore, have the effect imputed to it, of taking priority over all other claims. The two estates in which the plaintiffs are interested are in the hands of a receiver; and by the 23rd section, when an estate is so situated, no loan can be effected under the act, until a reference has been made to the Master in Chancery in St. Vincent's. The present, therefore, is not a loan within the act. The commissioners had no intention of getting an extraordinary priority in regard to those two estates; they only wanted a security quantum valeat. If they have lent money without taking the proper precautions, that is no injury to the plaintiffs. The injunction must, therefore, fall to the ground.

[65] THE LORD CHIEF BARON. The commissioners have no power to advance money, except under the act of Parliament. By the terms of the act, all mortgages and securities given to the commissioners shall, whether registered or not, have priority over all other mortgages or securities charged or chargeable upon, or affecting, the properties, for the restoration of which advances shall be made under the act. Now,

if this advance was made partly on the security of the two plantations, that comes within this clause of the act. By this advance you give the commissioners the right of establishing their priority, because the legislature requires, in order that the public may not be damnified, that when sums of a particular kind are advanced, the securities for those sums shall have priority over all other securities. The commissioners are not authorized, in discharge of their public duties, to advance monies, except upon these terms. To adopt their construction of the act would be hazarding the public money, and defeating the intention of the legislature. Then here the advance was intended to be made for all the three estates, in which different parties are interested; but where different parties are interested in different estates, you cannot lump them together in this way. You might take the other estates as sureties under the act.

Injunction granted.

[66] COATES *v.* STEVENS. Nov. 20th, 1834.—Testator bequeathed 2200l. stock, his property, standing in the joint names of himself and wife, to trustees, upon trust to pay the interest and dividends to his wife for her life, and, after her decease, to distribute the capital amongst his grandchildren by name; and he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects: Held, that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will.

[See 4 Y. & C. Ex. 562.]

Silas Stevens, by his will, dated the 25th April, 1823, after directing his just debts, &c. to be paid, gave and bequeathed all his household goods and furniture, plate, linen, and china, and also his ready money, bills, &c., unto his dear wife, Sarah Stevens, for her absolute use and benefit; and he gave and devised certain leasehold messuages, specified by name, unto his said dear wife, Sarah Stevens, and her assigns, for her natural life; and, after her decease, he gave, devised, and bequeathed the said several leasehold premises to John Montague and Robert Briggs, their executors, administrators, and assigns, for the residue of the terms which he the testator had therein, upon trust, after the decease of his said wife, to sell and dispose of the same, and invest the net money to arise from the sale or sales thereof, in their or his names or name, in the purchase of stock, or upon real securities, and to stand possessed of and interested in the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, upon the same trusts as were thereinafter declared concerning the capital sum of 2200l. 3l. per Cent. Reduced Bank Annuities; and he thereby gave and bequeathed unto the said trustees, their executors, administrators, and assigns, the capital sum of 2200l. 3l. per Cent. Reduced Bank Annuities, his property, then standing in the joint names of himself and his wife in the books of the Governor and Company of the Bank of England; and he empowered his said trustees, or the survivor of them, his executors or administrators, with the consent in writing of his said wife during her life, and, after her decease, at their own discretion, to vary the securities on which the said sum might be invested; and in case the said testator should not have 2200l. 3l. per Cent. Reduced Bank Annu-**[67]**-ities standing in his name at the time of his decease, then he directed the said sum of 2200l. of the said annuities to be made up out of the said other parts of his said estate and effects; and the said testator's will was, and he thereby directed, that the said trustees should stand possessed of and interested in the said stock, and the dividends, interest, and annual proceeds thereof, upon the trusts following, that is to say, upon trust to pay the dividends, interest, and annual proceeds of the said capital sum of 2200l. 3l. per Cent. Reduced Bank Annuities, or other the stocks, funds, or other securities aforesaid, as the same should from time to time become due and be received by them or him, unto his said wife, Sarah Stevens, or her assigns, for her and their own proper use and benefit, for and during the term of her natural life; and from and after the decease of his said wife, then to transfer or pay the said capital sum, or other the stock, funds, and securities aforesaid, unto and between and amongst his grandchildren (naming them), or such of them as should be then living, and the lawful issue of such of them as should be then dead leaving lawful issue, in equal shares and proportions, share and share alike, as tenants in common; the share of the said grandchildren and issue being males, to be vested in them respectively at

their respective ages of twenty-one years; and the shares of such of them being females, to be vested in them at the like age or marriage. The will then contained clauses for the survivorship and accruer of the grandchildren's shares, and for their maintenance and advancement after the death of his said wife, and during their minority; and as to all the rest, residue, and remainder of the testator's personal estate and effects whatsoever, after payment of all his just debts and funeral and testamentary expenses, he gave and bequeathed the same unto his said dear wife, Sarah Stevens, her executors, administrators, and assigns absolutely. The will [68] then contained a power of appointing new trustees, with the consent and approbation of Sarah Stevens; and the testator appointed his said wife, Sarah Stevens, and the said John Montague and H. R. Briggs, joint executrix and executors of his said will.

The testator died in August, 1832, leaving his wife and several of his grandchildren surviving him. The trustees declined to act in the trusts of the will, or as executors. The wife proved the will, and took upon herself the administration of the testator's estate.

The bill was filed by the grandchildren, acting by George Coates, their father and next friend, against Sarah Stevens, the trustees, and the Bank of England. After stating the will and death of the testator, it alleged that Sarah Stevens had possessed herself of the personal estate, and paid the greater part of the testator's debts and funeral expenses. That at the death of the said testator there was standing in the name of himself and the said Sarah Stevens, in the bank books, a sum of 1900l. Reduced 3l. per Cent. Bank Annuities; that she had already transferred and sold out a portion thereof, and applied the produce thereof to her own purposes; but that a sum of 1800l., of the same stock, continued to stand in the names of the said Silas Stevens and Sarah Stevens. That the said Sarah Stevens was bound by the directions of the will to make up, out of the other parts of the estate and effects of the said testator, the sum of 2200l. Reduced 3l. per Cent. Bank Annuities, applicable to the trusts and purposes of the will; that she had not only neglected to do so, but had applied to the Governor and Company of the Bank of England to transfer and sell the said sum of 1800l. Reduced 3l. per Cent. Bank Annuities, and that she threatened and intended to receive the money to arise from such sale, and transfer and apply the same to her own purposes, unless restrained, &c. [69] The bill likewise contained allegations as to the advanced age of Sarah Stevens, her incapacity to manage her affairs, &c., and prayed that the trusts of the will might be declared; that the defendant Sarah Stevens might be restrained by injunction from transferring and selling the said sum of 1800l. stock; that a receiver might be appointed; that the defendant Sarah Stevens might be compelled to consent to the appointment of new trustees, to be approved by the master; that the said 1800l. stock might be transferred into their names; that all proper deeds might be executed, and that the said sum of 2200l. Reduced 3l. per Cent. Bank Annuities might be directed to be made up out of the other parts of the estate of the testator.

The defendant, Sarah Stevens, by her answer, admitted the will of the testator, and that he died possessed of the leasehold and other personal property therein mentioned. She likewise stated that he was, at the time of his will and death, seised of a small freehold and copyhold property in the county of Oxford, out of which she submitted she was entitled to dower or freebench. That, upon or shortly after the marriage with her late husband, many years ago, her husband became possessed of considerable personal estate, and that he employed the same, or the proceeds thereof, in his trade or business of an oil and colour-man; and that out of the profits of his said business he from time to time, during his life, invested divers sums of money in the purchase of Bank Annuities, in the joint names of himself and of the defendant, his wife. That, her said late husband having discovered that a sum of 200l. Bank Annuities had been invested, and was standing in the name of defendant, he had shortly afterwards procured the same sum of Bank Annuities to be transferred into the joint names of himself and of defendant, his wife. That [70] divers sums, parts of the Bank Annuities, so invested in and transferred into the joint names aforesaid, were sold out on several occasions during the life of the said Silas Stevens. That her said late husband, on none of the said occasions, could be prevailed on to sell, and never in fact sold, the said Bank Annuities, or any part thereof, without obtaining the concurrence of the defendant in such sale; and that he sometimes insisted on the defendant's being a party to the transfer thereof. That by means of such investments

sales, and transfers as aforesaid, she admitted there was standing in the joint names of the said testator, Silas Stevens, and of defendant his wife, in the books of the Governor and Company of the Bank of England, at the time of the death of the said testator, a sum of 1900l. Reduced 3l. per Cent. Bank Annuities; but she submitted and insisted that, under the circumstances stated, the said sum of 1900l. Bank Annuities became, upon the death of her said late husband, her absolute property. She admitted that she had sold out 100l., part thereof, and applied the produce to the payment of the testator's testamentary and funeral expenses, and the residue to her own use, but this she submitted she had a right to do. She also submitted that she was not bound, by the directions contained in the said will or otherwise, to make up, out of the other parts of the estate and effects of the said testator, or any part thereof, the sum of 2200l. Reduced 3l. per Cent. Bank Annuities, or any other sum; but that the sum ought, if at all, to be made up out of the said freehold or copyhold hereditaments, and all other the real estates, if any, of her said late husband's, after setting out or allowing for defendant's dower or freebench therein; and also out of his personal estate and effects, if any, not specifically bequeathed by his said will, and not required for the payment of his debts. She further stated that she believed that George Silas Coates, one of the grandchildren, had pos-**[71]**-sessed himself of and still retained the testator's furniture, plate, linen, &c., and had never accounted for the same, and likewise the title deeds of the said several real estates; and she alleged that, in January last, he had removed her from the house in Windmill Street, where she had theretofore resided, and had taken possession of the premises.

An injunction having been obtained ex parte, founded on the several statements made in the bill, a motion was now made to dissolve that injunction.

Mr. Simpkinson and Mr. H. W. Busk, for the motion. At the time of the marriage of Sarah Stevens with the testator she was entitled to a considerable personal estate; that estate came to the husband, and he employed it with his other monies in his trade of oil and colour-man. From the profits so made he invested certain sums in the purchase of Bank Annuities; these he purchased in the joint names of himself and his wife. Occasionally, certain portions of the stock so purchased were sold out; upon these occasions he required her concurrence, and sometimes even required her to join in the sale. Is there any thing then to take this out of the general rule, and to do away with that primâ facie case, on which the wife has a right to insist? It has been decided over and over again that the purchase of stock by the husband in the joint names of himself and his wife, is a gift to the wife in case she survive the husband. One of the earliest cases on this subject is that of *Kingdom* v. *Bridges* (2 Vern. 67). That was the case of a purchase by the husband, in the joint names of himself and wife, of a walk in a chase; and the Court held that, the wife surviving, it was a gift to the wife. Again, in *Christ's Hospital* v. *Bridgin* (2 Vern. 683), the Court of Chancery held the same doctrine as to money lent by the husband **[72]** on mortgages and bonds. Again, *Back* v. *Andrews* (Prec. Cha. 1) was the case of a purchase of copyholds in the joint names of husband and wife. *Lanoy* v. *Lanoy* (Sel. Ca. Ch. 48; S. C. 4 Vin. Abr. 114, pl. 38) was the case of a purchase of stock. Another case of the purchase of stock is that of *Wilde* v. *Wilde* (Roper's Husb. and Wife, Jacob's ed. vol. 1, p. 54), in which Lord Eldon said, the purchase of stock by the husband in the joint names of himself and his wife, was primâ facie a gift to her, in the event of her surviving, unless evidence was produced of contemporaneous acts shewing a contrary intention. From a manuscript note of this case, it appears that this opinion of Lord Eldon was delivered on a motion either to obtain or dissolve an injunction. Then comes the case of *Dummer* v. *Pitcher* (5 Sim. 35; 2 Myl. & K. 262), very recently decided. All these cases establish that it is a gift to the wife, unless it can be shewn that the husband entertained a contrary intention at the time when the act was done. That must be shewn by contemporaneous evidence alone; and the mere fact of his bequeathing is no evidence of the husband's intention at the time of the purchase. The utmost extent to which the plaintiffs can go is, that it will put the wife to her election. Joint purchases are, perhaps, more common in the cases of father and son than of husband and wife. In many of these cases the father devises away property which he has taken in the joint names of himself and son, and the devise goes for nothing. *Dyer* v. *Dyer* (1 P. W. 112, n.), *Finch* v. *Finch* (15 Ves. 43). It is expressly laid down in *Finch* v. *Finch* that the will of the father in these cases cannot be looked to as evidence of what he meant by the act of purchase. The same

principles are to be met with in *Murless* v. *Franklin* (1 Swanst. 13), and *Crabb* v. *Crabb* (1 Myl. & K. 511). **[73]** In the present case, there is no allegation of contemporaneous acts, either in the bill or the affidavits, by which it may be inferred that, at the time of the joint purchase, the husband intended the wife to be a trustee for him. [The Lord Chief Baron. How can this case be distinguished from that in the Vice-Chancellor's Court? There the husband took upon himself to dispose of funded property by his will. That is the same as the present case. The words here, indeed, are more definite. There the bequest was not sufficiently specific to raise a case of election; here it is. There are circumstances, too, in this case, which there were not in the other, tending to rebut the notion that the wife should be a trustee. The husband always asked for her assent and concurrence. It appears to me that the only question is, whether I should retain possession of the property till the hearing, or decide the case now.]

Mr. Jervis and Mr. James Stewart, contrà. Your Lordship will not dissolve the injunction now, except upon a very clear case. The testator, by a will made nine years before his death, bequeaths the sum of 2200l. stock, standing in the joint names of himself and wife, to trustees upon certain trusts. He describes the stock as his property; and adds that, in case he shall not have that precise sum standing in his name at the time of his decease, the trustees are to make it up out of his other effects. In both clauses he speaks of the same sum. This case, therefore, is distinguishable from that of *Dummer* v. *Pitcher;* there, as the Vice-Chancellor observed, the testator was not the owner of the stock in question; here the testator describes himself as distinctly possessed of the stock which he bequeaths; he describes how it stands, and provides for the precise sum to be made up. At all events the injunction should be continued till the hearing, in order that the material facts of the case may be proved. It does **[74]** not appear clearly what part of the money invested in the trade was the wife's property; nor is it sufficiently proved that the husband required the wife's concurrence on every transfer of the stock. We may be able to prove contemporaneous acts of the testator at the time of investment, shewing that it was a trust in the wife. This which he calls his property may have been invested on the day he made his will. We may be able to prove this by a broker; and this and other circumstances may amount to such contemporaneous acts. [The Lord Chief Baron. You suggest that something may be proved which is directly denied by the answer. You knew the fact of the joint purchase, and might have been prepared with evidence to shew a trust in the wife. The onus of proving the trust lay upon you.] The point of election might be argued at the hearing. [The Lord Chief Baron. She has made her election; she must give up the rest of the property; and I wish to know whether she is in possession of the rents of any of the property.]

Simpkinson, in reply. It appears by the answer that she was in possession of the rents and profits of the freehold cottage, and resided in another of the houses till January last, when she was removed; that she has received none of the rents of the leasehold, and that they have sold the furniture.

The Lord Chief Baron. I am satisfied upon the affidavits and the answer, that the defendant Sarah Stevens is not in possession of any other part of the testator's property; therefore, there is no reason why the property in question should be retained to answer the purposes of justice. I am of opinion, upon all the decisions, that this is the absolute property of the defendant. The transfers were made to the husband and wife in their joint names, and **[75]** there is no evidence to shew that these transfers were coupled with any trust. I am of opinion, therefore, that, as it is her absolute property, and she has made her election, the injunction must be dissolved. There is no suggestion by the plaintiffs that they can prove any fact beyond what is already in evidence; and, even if they could, they would have no ground for the application, inasmuch as they are not taken by surprise, by any thing contained in the answer. She has not insisted on any right to which she was not properly entitled; there was, therefore, no ground for the injunction, and the plaintiffs ought not to have made the application. Dissolve the injunction, with costs.

ANONYMOUS. Nov. 20th, 1834.—An application under the 1 Will. 4, c. 47, s. 11, for an infant heir or devisee to convey must be made by petition and not by motion.

This was a creditor's suit; and an application was made by motion, that an infant heir might be directed to join in a conveyance to a purchaser, under the stat. 1 Will. 4, c. 47, s. 11. Sed per Curiam. Similar applications have been usually made by petition. That is the safest and most correct way.

EX PARTE PASMORE. IN THE MATTER OF THE LONDON BRIDGE ACTS. Nov. 22nd, 1834.—Tenant for life of lands sold under the provisions of the London Bridge Act (10 Geo. 4, c. cxxxvi.) is not entitled to his costs out of the fund arising from the sale.

[S. C. 4 L. J. Ex. Eq. 17.]

The petitioner in this case was tenant for life of certain freehold estates, situate in Cannon Street and Clement's Lane, in the city of London. The premises had been purchased by the mayor, commonalty, and citizens of the city **[76]** of London, under the provisions of the 10 Geo. 4, c. cxxxvi., and other acts passed for improving the approaches to London Bridge. Upon the occasion of this purchase the petitioner had employed a surveyor of eminence to meet the city surveyor to value the premises. They valued them at 4866l., and the same sum was accordingly paid by the purchasers into the Bank of England, in the name of the Accountant-general of this Court, and placed to his account, as directed by the act. The petition prayed a reference to the Master to take an account of the costs, charges, and expenses which the petitioner had been put to in having the premises surveyed and valued, and to tax the costs of the petitioner in making out the title, and respecting the conveyance of the estate, and also the costs of this petition, and that the Accountant-general might be directed out of the said 4866l., so standing in his name, to pay such costs, to be certified by the Master; and that the Accountant-general might lay out and invest the residue in his name, to the same account, &c.

The 10 Geo. 4, c. cxxxvi., s. 30, in substance enacts that, if any money shall be agreed or awarded to be paid for any tenements or hereditaments purchased by virtue of this act, which shall belong to any body politic, corporate, or collegiate, or any trustee or trustees, or other person or persons who have no power to give a valid receipt for the same, or to sell and convey the same premises, otherwise than by virtue of this act, such money, if amounting to 200l., after deduction (if necessary) of the costs of impanelling a jury, shall be paid into the Bank of England, in the name of the Accountant-general of the Court of Exchequer, &c., and shall, when so paid in, be applied, under the direction of the said Court, to be signified by an order made upon petition, in the purchase or redemption of the land-tax, or discharge of any debt or debts, or such other incumbrances as the said Court shall au-**[77]**-thorize to be paid, affecting the same tenements or hereditaments; or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation of the said Court, in the purchase of other tenements or hereditaments, to be conveyed and settled to the like uses, &c. as the tenements or hereditaments which shall be purchased as aforesaid, stood settled or limited; and, in the meantime, and until such purchase, the said money shall be invested by the Accountant-general in his name, in the purchase of 3l. per Cent. Consols, the dividends and annual produce thereof to be paid to the persons interested.

Mr. Spurrier, in support of the petition. The Court has power, under this act, to award the costs in question to the tenant for life. Upon sale of the premises the fund to be invested in the Accountant-general's name is the whole fund which remains, after deducting the expenses of managing it. There ought, therefore, to be a reference to the Master to see what are the expenses incurred. It is said that Lord Chief Baron Alexander decided the contrary; but that case must have turned upon the particular circumstances. It is clearly within the jurisdiction of the Court to manage the fund for the benefit of all parties interested. Suppose it to be otherwise, and that this tenant for life had only the income arising from these houses, the consequence might be that she would lose the whole of it. Besides, under such a construction, what

becomes of the interest of those in remainder? In the administration of funds in general, Courts of equity are in the habit of regulating the expenses attending such administration. This act cannot contemplate that the Court should have power at its discretion to lay out and invest the money, but not the means of paying the incidental costs. The Court cannot have the power of managing the fund with-[78]-out the power of carrying that management into full effect.

Mr. Wood, for the mayor and corporation of the city of London, observed that the costs prayed for by this petition must fall upon the tenant for life; that this had arisen from an omission in the act, and that it had been so held by former Judges.

ALDERSON, B. In the present question I consider myself bound by the high authority of Lord Chief Baron Alexander; but I also rely on the terms of the act of Parliament, independently of that authority. In construing this act we ought to see what it is over which I have jurisdiction. Now the jurisdiction is given to the Court by the 30th section. That section enacts that the money agreed or awarded to be paid for the tenements to be purchased by virtue of this act shall, under the circumstances therein mentioned, be paid into this Court; and that, upon petition to this Court, the money so paid in shall be applied, under its direction, in the discharge "of any debt or debts, or such other incumbrances," as the Court shall authorize to be paid, affecting the same tenements. Here, the word "debts" means debts for which the estate is pledged; the word "incumbrances" means incumbrances on the estate itself. The act then goes on to say that, where such money shall not be so applied, the same shall be laid out, under the like directions of the Court, in the purchase of other tenements, to be conveyed to the same or the like uses to which the original tenements stood limited; and that, in the meantime, "the said money" shall be invested in the funds. I think, therefore, that "the said money" means the money agreed or awarded to be paid, as mentioned at the beginning of this section. Then I find no power given to the Court, if the parties disagree, to settle the amount of the money to be [79] so invested; and no power given to a jury to give compensation for expenses, such as that now claimed between the tenant for life and others interested in remainder. No doubt this is a great defect in the act of Parliament, but I am obliged to conform to it. I am obliged to administer the law, and not to make it.

EX PARTE LAYFIELD. IN THE MATTER OF THE LONDON BRIDGE ACTS. Nov. 22nd, 1834.—Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the London Bridge Act (10 Geo. 4, c. cxxxvi.), are entitled to their costs out of the corpus of the fund arising from the sale.

The petitioners, William and Thomas Layfield, were trustees under the marriage settlement of R. T. Dole and Mary Ann, his wife, under which settlement certain premises in Sherborn Lane, in the city of London, were conveyed to the petitioners and their heirs, upon trust to pay the rents, &c. to R. T. Dole, for his life; and, after his death, to Mary Ann Dole, for her life; and, after the death of the survivor of the said R. T. Dole and Mary Ann Dole, to sell and dispose of the same; and, out of the monies to arise from the sale, in the first place, to pay the costs and expenses attending the same; and then to invest the surplus in the funds, or at interest upon government or real securities, and to stand possessed of such monies, upon certain trusts, for the benefit of the children of R. T. Dole and Mary Ann, his wife.

The scite of the above-mentioned premises being required for the approach to London Bridge, they were accordingly valued by a jury at 2020l., which sum was paid into the Bank of England by the mayor and commonalty of the city of London, in the name of the Accountant-general, as directed by the act. The petition alleged that surveyors' and other professional charges, incurred by the petitioners in and about the valuation of the said property, tracing out the title, and conducting the inquiry [80] before the jury, amounted in the whole to the sum of 50l. 3s. 6d. over and beyond the charges paid by the mayor and commonalty and citizens; and it prayed a reference to the Master to tax the costs of the petitioners incident to this petition, as between solicitor and client; and that, thereupon, the Accountant-general might be directed to pay the petitioners such costs, together with the said sum of 50l. 3s. 6d., out of the before-mentioned sum of 2020l., and that the residue might be invested in the funds upon the trusts of the settlement.

Mr. Ching, in support of the petition. Trustees are always entitled to take their

charges out of the trust property; that is to say, out of the corpus of the property; for that is for the benefit of all parties. They are never paid out of the dividends or rents. In this case the trustees ought to have been paid out of the purchase-money before it was brought into Court; however, they are still entitled to be paid out of the principal. Why should they be made to wait till the children come of age? The children must ultimately pay these costs, when the money is paid out of Court; there is no reason, therefore, why the trustees should not be paid immediately. Such parties as are sui juris consent. These charges are always considered as incumbrances upon property; and the act expressly mentions "incumbrances." The question of trustees has never yet come before the Court.

Mr. Simpkinson, Mr. Chandless, and Mr. W. Paynter, for the tenants for life, did not press their claim for costs after the decision in *Ex parte Pasmore* (ante, p. 75); but they urged that the trustees had an equitable lien upon this money for the amount of their costs. The act of Parliament extends to "incumbrances," the most general word affecting [81] property. All costs are incumbrances. In truth, the property was not out of the trustees until after the costs were incurred, so that their claim arose antecedently to the act. Besides, their costs are provided for by the settlement. After the death of husband and wife, they might sell, and apply the money in the first place to the payment of their costs. They could not do this during the lifetime of the husband and wife; but the act removes this difficulty, and authorizes them to sell before the time limited by the settlement. Are they to be deprived of their costs because the act of Parliament gives them an earlier opportunity of doing a legal act? It is, in fact, a sale in execution of the trusts of the settlement.

Dec. 2nd.—ALDERSON, B. Upon inquiry I cannot learn that any application of this nature has ever been made on behalf of trustees. Finding, therefore, no precedent to the contrary, and thinking that the justice of the case requires that I should make the order, I will direct the expenses of the trustees to be deducted out of the fund in Court. According to the rules of equity, the trustees would ultimately be entitled to be paid out of the corpus of the fund itself. Under the circumstances, therefore, of this particular case, I see no reason why they should not have immediately what they are entitled to ultimately.

Petition granted.

[82] PRICE *v.* ASSHETON. Nov. 26, 29, 1834.—In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee, the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these lettters: Held, that they were so far evidence of such agreement, as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee.—Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old.—One having a power to lease at the most improved rent agrees to grant a lease at a rent to be estimated at a fair valuation without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. Quære, whether such a lease is consistent with the terms of the power?

[S. C. 4 L. J. Ex. Eq. 3. See further, p. 441, post, and 4 Y. & C. Ex. 562.]

The plaintiff was lessee of two houses, one situate in Cannon Street, the other in St. Lawrence Pountney Lane, under two leases for twenty-one years, each dated the 13th November, 1812, originally granted to one Atkinson. In the year 1816, the defendant William Assheton, by virtue of his marriage settlement, became tenant for life of the premises, with a power to lease for thirty-one years, at the most improved rent. The leases held by the plaintiff having nearly expired, the present bill was filed by him for the specific performance of an alleged agreement by the defendant to renew these leases, and for an injunction to restrain two actions of ejectment. The bill alleged that in the year 1822 the plaintiff applied to the defendant for a reduction of his rent, or that he might be permitted to make certain alterations, in order to enable him to underlet part of the premises. That, in consequence of this proposal,

the defendant sent a surveyor to the premises, to ascertain the nature of the improvements proposed; but he subsequently wrote a letter, observing that the alterations would be of no ultimate advantage to him, and declining to grant an extension of the term. That the plaintiff then wrote a letter to the defendant, containing a farther explanation of the proposed alterations; and that the defendant, on the 10th June 1823, called on the plaintiff, when the plaintiff explained to him the alterations he intended to make, and the probable costs. That at this interview the defendant declined to reduce the rents, but agreed to grant a new lease of the two houses and premises for the further term of twenty-one years, to commence from the expiration of the leases before mentioned, at such **[83]** rents as the premises should upon a fair valuation be worth at the expiration of the leases; but not to exceed the former rents, nor calculating any thing by reason of the improvements; and that, upon such occasion, the defendant promised to the plaintiff to sign an agreement in writing, to the effect of the verbal agreement, and to forward it to the plaintiff next day. The bill then alleged that, in consequence of the defendant's promise at this interview, he on the following day wrote and sent to the plaintiff the following letter, dated 11th June, 1823:—

"Sir,—From the conference we had yesterday relative to the houses which you have an unexpired lease of, in Cannon Street and Lawrence Pountney Lane, it seems you are desirous of altering the premises in Cannon Street, so as to enable you to carry on your professional engagements with more advantage; and to make which alteration, you inform me, will not cost less than 280l. or 300l. Under this supposition, I wish you to understand that at the expiration of the lease granted to Mr. Atkinson, I shall not demand a higher rent of you than is at present paid; and moreover, if at that time it should be considered upon a fair valuation that the premises are not worth the rent that they are now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time. I must however beg to observe, it has frequently occurred that Mr. Gell has written to me respecting the difficulty of obtaining the rent at the time usually paid by Mr. Atkinson, though never demanded till some time after it became due. I shall therefore, under this arrangement between us, expect that all the covenants of Mr. Atkinson's lease will be more strictly attended to. Hoping this will meet your views on the subject,—I remain, Sir, your obedient, humble servant,

"WM. ASSHETON, Jun."

[84] The bill further alleged that the plaintiff, not considering the defendant's letter sufficiently explanatory as to both the houses, he, on the 13th of June, sent to the defendant the following letter:—

"Cannon Street, 13th June, 1823.

"Sir,—I received your letter of the 11th, for which I beg to return you my best thanks. I perceive you only mention alterations in Cannon Street, whereas I stated to you that part of them were to the house at the corner of Lawrence Pountney Lane (the front windows, &c.), both of which houses communicate together in part by an opening through the party wall. You will much oblige me, therefore, by dropping me a line explanatory of this, stating whether you intend to include in the sum mentioned the alterations and improvements of both houses, as well as the renewal of both leases, on the terms you mentioned.—I am, Sir, your most obedient,

"R. Assheton, Esq. "R. PRICE."

In answer to which the bill stated that the plaintiff received the following letter:—

"2 Keppel Street, June 13th, 1823.

"Sir,—The alterations you mentioned to me it was your wish and intention to make, included those both of the house in Cannon Street and Lawrence Pountney Lane, and of course my intention of granting a lease to you would apply equally to both houses.—I am, Sir, your obedient, humble servant,

"WM. ASSHETON, Jun."

After stating the foregoing correspondence, the bill contained this averment: "And the said letters so written by said defendant, Wm. Assheton, were and contained a complete binding agreement on the part of the said defendant for the said renewal of said leases to plaintiff." **[85]** The bill then alleged that the plaintiff, relying on

the said agreement being duly performed on the part of the defendant, immediately commenced making the alterations; that he greatly improved the premises, and expended in such alterations and improvements a sum of money exceeding the sum of 300l., and that he thereupon gave to the defendant due notice of such alterations and improvements. That the defendant afterwards refused to renew the leases.

The defendant, by his answer, admitted the interview between him and the plaintiff stated in the bill, but denied that on that occasion he had promised to grant the plaintiff a new lease for the term of twenty-one years, or any other term. He admitted the two letters alleged by the bill to have been sent by him to the plaintiff; but he neither admitted nor denied the intermediate letter sent to him by the plaintiff.(*a*) He said that he had been advised by his solicitors that he could not, consistently with his power of leasing, grant a new lease, pursuant to his letter of the 11th of June, 1823. He stated that neither he nor his solicitors had received any regular notice of the alterations, though he believed the plaintiff had mentioned them to his solicitors. He believed the alterations were slight, and that, so far from being beneficial, they had greatly injured the premises. He denied that the plaintiff had paid all the rent due in respect of the said leases; alleging, on the contrary, that the plaintiff had been very irregular in his payments, and that in July, 1827, the rent was obliged to be raised by distress, and that the rent due at Michaelmas last was still unpaid. He then alleged that, in 1828, the plaintiff had been discharged under the Insolvent Act; that no mention was made in his schedule of the agreement or contract of which he now sought the **[86]** specific performance; but that, on the contrary, he had stated in his schedule, and sworn before the commissioners, that he had assigned all his interest in the premises to his mother, Margaret Price, for certain sums of money, which she had advanced to him at different times, for the purposes of his business. He submitted that, if the agreement was such as this Court would execute, the assignees under the Insolvent Act ought to be made parties to the suit.

An injunction nisi having been obtained to stay the proceedings at law,

Mr. Simpkinson and Mr. Rogers now shewed cause against dissolving the injunction. This is a bill for the specific performance of the agreement stated in the bill. The plaintiff, however, is not bound to abide by the written agreement only; he may give evidence of a parol agreement, if consistent with the statement made in the bill. *Spurrier* v. *Fitzgerald* (6 Ves. 548), *Gregory* v. *Mighell* (18 Ves. 328), *Clinan* v. *Cooke* (1 Sch. & Lef. 22). The Court, therefore, will not interfere in this stage of the cause to deprive the plaintiff of his equitable relief. *Attwood* v. *Barham* (2 Russ. 186). By the terms of the agreement, the lease was to be renewed or the rent ascertained at a "fair valuation." This expression is not too vague for the Court to act upon in decreeing a specific performance; for, in *Gaskarth* v. *Lord Lowther* (12 Ves. 107), a contract for sale at a fair valuation was executed. The authority of this case was recognised in *Milnes* v. *Gery* (14 Ves. 400), where, however, the bill was dismissed because the valuation was to be by two persons, one to be chosen by each party, and the Court had no jurisdiction to have the value ascertained in any other way than the parties themselves agreed. The same principles **[87]** were acknowledged in *Blundell* v. *Brettargh* (17 Ves. 232), and *Gregory* v. *Mighell* (18 Ves. 328). But, independently of any dispute as to the wording of the agreement, there is in this case evidence of part performance. There is on the face of the answer a sufficient admission that the plaintiff laid out money upon the premises. It is admitted that, upon his application for a new lease, the plaintiff pointed out to the defendant the intended alterations and improvements. In the letter of June, 1823, the defendant refers to these alterations. It is stated in the bill, and not denied by the answer, that the plaintiff laid out more than 300l. upon the premises; at all events, there is no allegation in the answer or in the correspondence, that the money was not laid out. It is stated in the bill, and admitted by the answer, that notice of the improvements was given to the defendant or his agents; and there was no complaint of the alterations not having been made. What the defendant has said in his answer, though evasive, is perfectly consistent with the fact of the alterations having been made. He doth not know whether the plaintiff expended a large sum of money, exceeding 300l. He hath been informed that the plaintiff hath made some alterations, but he believes them to be slight, and that in so doing he hath

(*a*) This letter was therefore proved upon the present occasion by the affidavit of the plaintiff. See *Taggart* v. *Hewlett*, 1 Mer. 499.

greatly injured the premises. There is nothing inconsistent in this with the case made by the plaintiff. There was clearly an agreement between the parties, and on the strength of it the plaintiff laid out his money. The only thing which can reasonably be contended against the agreement is that the term for which it is made is not distinctly stated in the written part of it. But in *Hyde* v. *Skinner* (*c*) the lessor covenanted to renew the lease, at the request of the lessee, within the term; the lessee did not request, but his executors re-**[88]**-quested, within the term; and Lord Macclesfield compelled the lessor to renew. It is true that Lord Macclesfield said that the request of the executors for a fifty-year lease was too much; for it might have been as well for one hundred or two hundred years; but, he added, "the usual term for leasing being for twenty-one years, let the defendant demise the premises to the plaintiff for twenty-one years, or for any lesser term, as the plaintiff shall elect." Now, the parol agreement upon which we proceed, and to evidence which we produce the letters, was for the term of twenty-one years. Supposing even we were driven to proceed upon the letters as a written agreement, they at all events contain the word renew, and that must be applied to the subject-matter. We go farther; for, if the Court shall be satisfied that the money has been laid out by the plaintiff, it will, notwithstanding the omission of the term, adopt the course of Lord Redesdale, in *Clinan* v. *Cooke* (1 Sch. & Lef. 22). That was a stronger case than this. There the bill proceeded on a written agreement, and the term was omitted. One of the objections was that the term not being stated the agreement was imperfect and could not be executed, and the Court refused to decree the specific performance of it. Lord Redesdale, however, went on the consideration that there was no part performance; for if there were, he would have thought it his duty to direct inquiries; and he went very fully into the question of part performance. The other points urged by the defendant are immaterial: first, that he has no power to grant the lease, though admitted to be a tenant for life with power of leasing for thirty-one years; second, that the plaintiff having formerly taken the benefit of the Insolvent Act, his assignees should have been made parties. This question your Lordship decided by overruling the plea.

[89] Mr. James, contrà. The frame of the bill excludes the new features which are sought to be introduced by the plaintiff's counsel. It states two letters of the defendant, and adds that they "were and contained a complete and binding agreement of the said defendant." The bill, therefore, proceeds upon these two letters only, and no testimony aliunde can be admitted to shew the nature of the agreement. *Brice* v. *Bletchley* (6 Madd. 17). Now these letters contain no promise on the part of the defendant to renew the former lease, but to grant a new lease, to be at a new and reduced rent. All the argument, therefore, derived from the case of *Hyde* v. *Skinner*, is superfluous. Moreover, though the defendant speaks of granting a new lease, he specifies no term; and there is no case in which it has been held that an agreement to grant a lease for an uncertain term is such an agreement as the Court will enforce. *Gordon* v. *Trevelyan* (1 Price, 64) is decisive of this point. In that case the plaintiff Gordon had been a tenant of the defendant Trevelyan. Upon a new valuation being made of the farms, the plaintiff applied to the defendant to have a lease on the same plan with those usually granted to his other tenants. To this the defendant acceded by letter in the following terms:—"As you desire a lease on the same plan with my other tenants, you shall certainly have one." Upon this the plaintiff claimed a lease for fourteen years, alleging that to be the usual term of the defendant's leases. He accordingly brought his bill for the specific performance of the agreement, and obtained an injunction to stay proceedings at law. The Court, however, dissolved the injunction, being of opinion that, to constitute an agreement for a lease, the term and conditions should either be actually expressed, or the treaty should bear some reference by which they might be ascertained; and that otherwise it is not an agreement of which a Court of **[90]** equity can decree a specific performance. *Clinan* v. *Cooke* (1 Sch. & L. 22) and *Harnett* v. *Yielding* (2 Sch. & L. 549) are authorities to the same effect. The latter case likewise decides that equity will not decree specific performance against a party not competent to execute. Now, it is inconsistent with the defendant's power of leasing to grant a lease upon the terms demanded by the plaintiff. [The Lord Chief Baron. The defendant says in his letter—"I should not object to

(*c*) 2 P. W. 196. See the observation of Lord Hardwicke on this case, 3 Atk. 88.

grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." It may be a question whether taking the rent without reference to the improvements is not inconsistent with the power. If it be worth the tenant's while to pay rent, and also to make improvements, it shews that the rent taken by the landlord is not (according to the terms of the power) the most improved rent.] Lastly, the insolvency of the plaintiff will prevent his receiving the assistance of a Court of equity. *Buckland* v. *Hall* (8 Ves. 91), *Crosbie* v. *Tooke* (1 Myl. & K. 431), *Morgan* v. *Rhodes* (id. 435). [The Lord Chief Baron. The insolvency of the intended lessee is clearly an objection to the specific performance of a contract for a lease. There is no dispute as to the general doctrine; but how does that apply to the circumstances of this case?] A decree for specific performance is not ex debito justitiæ, but arises from the indulgence of a Court of equity, and is to be granted with great caution. That is a doctrine which your Lordship has held in many important cases. This is not a common insolvency. The plaintiff has, through the medium of his insolvency, repudiated the contract. He has shewn on oath that he has no interest in the premises. In 1828 he became insolvent, and in his examination before the Commissioners he denied that **[91]** he had any interest in the premises. In his schedule, likewise, he stated that he had assigned the premises for a valuable consideration to his mother, Margaret Price. Either, therefore, there was no agreement at all which could be enforced, or, if there were, he suppressed it from his assignees. If he suppressed it, can he ask the Court to enforce an agreement so suppressed? [The Lord Chief Baron. Suppose a man is insolvent, and five or six years afterwards is in affluent circumstances, will that bar him of the relief sought by this bill?] It is apprehended it would. But, at all events, the circumstances of this plaintiff in 1834 are not better than they were in 1828. The defendant has several times distrained for rent, and the Michaelmas rent is now due: these are breaches of covenant which will prevent the Court from continuing the injunction, or enforcing the agreement for the new lease. *Thompson* v. *Guyon* (5 Sim. 65).

Nov. 29th.—THE LORD CHIEF BARON. This is a bill filed for the specific performance of an agreement for the renewal of a lease, and the question is whether the injunction shall be dissolved, and the possession in consequence changed; or whether the injunction shall be continued to the hearing. It appears, on the pleadings, that an agreement for a lease was entered into between the parties, and a certain sum of money was stipulated to be laid out in repairs on the premises; and it appears, from certain letters, that, in consideration of the sum to be laid out, some further lease of the same description should be granted. But then it is objected that the injunction must be dissolved, because it does not appear what are to be the terms of the intended lease, particularly the terms in point of duration. Now, in looking to the pleadings, there appears to me to be evidence to shew that the lease agreed to be given was **[92]** intended to be a renewed lease; that is, a renewal of the old lease; and, therefore, in point of duration, coinciding with the former lease. The evidence is not conclusive, but there is evidence arising out of the correspondence between the parties. In the first place, it is not probable if a party stipulate to lay out a sum of money, and a lease is to be granted in consideration of such sum, that some understanding should not take place as to the extent and duration of this new interest. But it further appears that a letter was written by the plaintiff to the defendant, dated the 13th of June, 1823, in which the plaintiff speaks of the intended renewal. An answer is returned to this letter by the defendant, and he does not object that he never intended a renewal, but adverts to other topics. This, therefore, is evidence that it was intended to be a renewed lease; that is to say, a lease of the same duration as the former lease. In addition, reference was continually made to the covenants of the former lease, and Messrs. Baker and Hodgson, the solicitors of the defendant, were requested to take measures for granting a new lease. They do not object to that mode of putting the case, but say that it is premature to enter into the consideration of a new lease until the expiration of the former. I cannot say that this is not evidence leading to the conclusion that it was intended there should be a renewal of the former lease; I cannot, therefore, on this objection at least, consider myself justified in dissolving the injunction.

But then it is said that the lease agreed to be granted was inconsistent with the power of leasing in the lessor. Now that power, as I find it set out in the answer, is a power to lease for thirty-one years; but the intended lease was only for twenty-one

years: therefore, as far as concerns the duration, it was within the terms of the power. But it is said that, according to the power, the best improved rent is to be reserved; while, according to the stipulations in the agreement, the rent was to be fixed by valu-**[93]**-ers at a fair valuation, with reference to the improvements to be made, and the rent was in no event to exceed the rent paid under the former lease. Now if, at the time of valuation, the new rent should be less than the rent originally stipulated to be paid, then it would not be the best improved rent; but this state of things must depend upon the valuation. This, therefore, is not an argument which can be used in support of the motion for dissolving the injunction. But then another question of some nicety arises, namely, whether, although money was to be laid out by the plaintiff, and the rent to be estimated by the valuers, without reference to the money so to be laid out, that is within the terms of the power? That may be a question of some nicety, to be decided on the hearing of the case, when the terms of the power are before the Court. Primâ facie, a rent so reserved is not an improved rent; but here it was stipulated that the improvements should be made by the tenant, in consideration of the new lease. It is difficult, therefore, to say whether that can be considered as an infringement of the power.

Then there is this further objection, namely, the insolvency of the plaintiff, or rather his discharge under the Insolvent Debtors' Act; but it appears that this discharge took place seven years ago, and there is nothing in the answer which shews that the debts have not all been discharged. That, therefore, cannot be urged as an objection in this stage of the cause. There are other objections arising out of former breaches of covenants in the existing lease, and neglect and delay in the payment of rent. It is unnecessary, however, to enter into this part of the defence; I have considered it with attention, and am of opinion that those objections would not justify me in dissolving the injunction.

Injunction continued. The parties entering into terms as to paying the rent into Court, withdrawing notices, &c.

[94] TAYLOR *v.* SHEPPARD. Nov. 26, Dec. 1, 1834; Jan. 28, 1835.—Where the time for answering has expired, and an attachment is duly taken out, the defendant cannot demur; and where the demurrer is filed on the same day on which the attachment issues, the latter has the priority, without regard to hours.—An active step taken in a cause by defendants in contempt is not rendered valid by the subsequent tender of the costs of the contempt. Where, therefore, defendants in contempt, having put in answers which were excepted to, obtained the previous order, and afterwards tendered the costs of the contempt, the order was discharged for irregularity.—Where exceptions are taken to separate answers which are substantially the same, one previous order is sufficient.—Semble, that defendant obtaining the previous order need not also take out an order nisi for dissolving the injunction.

[S. C. 4 L. J. Ex. Eq. 7. See further, p. 271, post.]

Motion. That the writ of attachment issued against the defendants in this cause for want of an answer—the order for an injunction bearing date the 21st day of November instant—and the writ of injunction issued thereupon, may be set aside, and discharged with costs; and that the demurrer filed by the said defendants may be received and set down for argument on the next day for arguing demurrers.

The bill in this case, which was to restrain proceedings at law against the plaintiffs for the amount of a bill of exchange, and goods sold and delivered, was filed on Thursday, the 13th of November last. No answer or other pleadings being filed on the 20th, the plaintiffs' solicitor, as appeared by his affidavit, on the morning of the 21st obtained and issued an attachment against the defendants. Having so done, he immediately proceeded to Westminster, and, being informed that no answer had been sworn at the sitting of the Court, caused the motion for an injunction to stay proceedings at law to be entered. When this entry was made, he was not aware that any steps had been taken by the defendants.

In support of the present motion the affidavit of the clerk to the defendants' clerk in court was read. He stated that, on the morning of Friday, the 21st of November, and not later than five minutes after nine o'clock, as the deponent verily believed, he

filed and delivered over to the plaintiffs' clerk in court a demurrer by all the defendants to the plaintiffs' bill. That before the office closed on the 20th, he informed Mr. F. Milne, one of the side clerks, that he should have a demurrer to deliver over in this cause before the sitting of the Court the next morning. That, at the time he gave such information, he had the demurrer in his possession, but he did not then **[95]** file the same, having understood from the solicitor of the defendants that they did not wish the same to be filed sooner than was necessary to prevent an injunction; and he having no doubt but that the same being filed before the sitting of the Court would be in time. The solicitor of the defendants likewise stated by his affidavit that, when he entered an appearance for the defendants, he was informed by his clerk in court that, to prevent an injunction, the defendants must file an answer or demurrer before the sitting of the Court on the 21st instant.

Mr. Kindersley, in support of the motion. The attachment cannot issue till the Court sits. The common injunction issues only for two reasons: either because the defendant has taken out an order for time to answer, or because, not having taken such an order for time, there is no defence on the record on the part of the defendant, and, therefore, the plaintiffs are entitled to attach. Any defence on the record, whether demurrer, or plea, or answer, will equally prevent an attachment. This also is the admitted practice, that, if an answer is filed in the morning before the sitting of the Court, then, even if the attachment be issued at the opening of the office on the same day, that attachment goes for nothing; nay, even if an answer is not on the file, but is sworn before one of the Barons before the sitting of the Court, then the attachment, under the same circumstances, is a nullity. On what principle, then, can it be contended that, if a demurrer or plea be put in, the same course is not to be pursued? The same rules must apply equally to one mode of defence as to another.

Mr. Simpkinson and Mr. Kenyon Parker, contrà. The object of the defendants was delay; for it appears that the clerk to the defendants' clerk in court had the demurrer in his possession on the 20th: why, then, was it **[96]** not filed on that day? They have gone a step too far, and have placed themselves in contempt. By the seventh general rule, every defendant shall put in his answer within eight days after his appearance and the bill filed; and, in default of putting in his answer as aforesaid, an attachment is to be awarded against him. One of these days is the day of appearance (1 Fowler, 222). By the ninth general rule, every defendant in contempt must pay the costs of his contempt before his answer can be accepted, and no defendant in contempt shall put in a demurrer or dilatory plea. Here the defendants are in contempt and cannot demur. *Mellor* v. *Hall* (2 Sim. & Stu. 321). [The Lord Chief Baron. In that case the demurrer was filed after the issuing of the attachment. Here they say that the demurrer was on the file at five minutes after nine o'clock, and before the sitting of the Court, which was before the attachment.] The attachment having been properly taken out relates to the first moment it might have issued, and is, therefore, regular. *Whitehouse* v. *Hickman* (2 Sim. & Stu. 102), *Ibbotson* v. *Booth* (id. 103).

Kindersley, in reply, contended that the attachment was irregular, because it could not be considered as an attachment for want of a defence on the record until the sitting of the Court, before which time the demurrer was filed. But the Court held the attachment regular. He was then proceeding to move that, notwithstanding the regularity of the attachment, the demurrer might be received and set down for argument; when, upon the objection of the plaintiffs' counsel, the Court called upon him to shew whether he could make an application of this nature until he had cleared his contempt?

Kindersley. Upon payment of the costs of the con-**[97]**-tempt, the defendant is at liberty, even upon the present motion, to make the application. In *Blunden* v. *Terry*, Minute Book, Easter Term, 1803, the following motion is entered:—"Mr. Hollist—that the attachment sealed by the plaintiff, at the expiration of the eight days after the delivery of the bill, may be set aside, this being a country cause; and that the plaintiff may accept the demurrer filed for the defendant." It must be admitted that no order was granted on this motion; but immediately afterwards appear the following entries in the same cause:—"Mr. Trower—for an injunction on an attachment for want of answer. Ordered." "Mr. Hollist—that the plaintiff may accept the defendant's demurrer on clearing his contempt. Ordered." This is an authority to shew

that the Court, under circumstances, will allow the defendant to clear his contempt without putting him to file his answer; and also, in a case like the present, without putting him to the expense of making a new motion for that purpose.

THE LORD CHIEF BARON. Upon the first point, the case which was first cited in argument appears to be against you; but, at all events, to obtain the object which you now seek, it appears that in strictness you must come again before the Court. The present motion is specifically to get rid of an attachment for irregularity; this, therefore, must in strictness be disposed of before you can make the other application, which must be done by a distinct motion. There was a distinct motion for that purpose in the case in the minute book. The plaintiffs insist upon the objection, and therefore this motion must be dismissed with costs.

Dec. 1st.—On a subsequent day, Mr. Kindersley, having obtained leave and given notice for that purpose, moved that the defendants, notwithstanding the attachment, might file **[98]** their demurrer, and that the demurrer might be received and set down for argument; the defendants having tendered and submitted to pay the costs of the contempt.

Mr. Simpkinson, contrà. The only mode which a defendant has of clearing his contempt is by filing an answer and tendering the costs of the contempt. While in contempt he is not at liberty to be heard on the merits of the case. *Vowles* v. *Young* (9 Ves. 172). In Chancery this rule is carried so far that, if the costs are refused by the plaintiffs, the defendant must get an order to clear his contempt. *Green* v. *Thomson* (1 Sim. & Stu. 121). That is not necessary in this Court, but the defendant must, at all events, put in his answer. [The Lord Chief Baron. In this case the defendants never intended to answer, but to demur. They were, by accident, too late. You say they must answer. If that be so, it is a very hard measure of justice. They do not want to go into the merits.] By the general rule of this Court no party in contempt can demur. There is no case to the contrary, except the case cited from the minute book, which was a motion of course. The defendants, however, may have the full benefit of the demurrer by their answer.

Mr. Kindersley, in reply. The general rule that a defendant in contempt cannot be heard on the merits is not disputed. But here the motion is actually in reference to the contempt. If the argument on the other side were to prevail, you could not even move to discharge the contempt. The Court may deviate from its own rules under special circumstances; and the rule in question has been relaxed on several occasions. Beames. Ord. 178; Gilb. For. Rom. 71; Wy. Prac. Reg. 165; *Harvey* v. *Matthew* (1 Dick. 30); *Barnes* v. *Wilson* (1 Russ. & Myl. 1). In *The Attorney-General* v. *Mayor of Carlisle* (2 Sim. 427) the defendants not having put **[99]** in an answer, the plaintiffs issued an attachment and distringas against them; that, according to the general rule, would have prevented them from demurring; afterwards, under an arrangement between the parties, an order for time was substituted for the attachment; the defendants then applied for leave, notwithstanding the order for time to put in a general demurrer; this was opposed by the plaintiffs, but the Vice-Chancellor granted the motion, observing that he could not conceive what harm would arise from it. Now had the attachment been allowed to stand, the defendants would clearly have been in contempt, and the arrangement of the parties, in substituting for the attachment the order for time, could make no difference.

THE LORD CHIEF BARON after some consideration said that he thought there was no case on the authority of which he could grant this motion. Besides, it appeared on the face of the proceedings that the parties who demurred might have filed the demurrer at an earlier period. The delay had taken place because the defendants did not wish that it should be filed earlier than was necessary to prevent an injunction. Under these circumstances the motion must be refused with costs.

Jan. 28th, 1835.—The injunction and attachment having issued against the defendants for want of an answer on the 21st of November, they on the 13th of the following month put in a joint and several answer. To this the plaintiffs filed exceptions. The defendants submitted to answer these ex-**[100]**-ceptions, but afterwards separated in their defences: one of them, Richard Calvert Sheppard, putting in a separate further answer; the two others, a joint and several further answer. The plaintiffs took fresh exceptions to these answers and obtained two rules to argue these exceptions; but

afterwards being advised of the sufficiency of the answer of R. C. Sheppard, they abandoned the rule which they had obtained against him. The defendants however refused to accept the abandonment and obtained the previous order.

A motion was now made on behalf of the plaintiffs to discharge this order for irregularity. In support of the motion the affidavit of the plaintiffs' solicitor was read, stating his information and belief that the defendants had not since they had submitted to answer the first exceptions, tendered or paid to the plaintiffs' clerk in court or their agents the costs of the contempt occasioned by the attachment, and consequently that they were in contempt at the time of obtaining that order; moreover, that they had not obtained any order nisi to dissolve the injunction since the filing of the aforesaid further answers.

For the defendants the affidavit of their solicitor was read, stating that the separate further answer of R. C. Sheppard arose from the circumstance of his being in London and the other defendants being in the country at the time it was put in; and that it was so put in to avoid expense; and that the further answers were precisely the same except in the alterations made necessary by the separation. The affidavit also stated that the deponent had on the 26th of November tendered to the plaintiffs' solicitor 1l. 10s. for the costs of the attachment which he had refused to receive; and that the deponent had likewise this day tendered the same costs to the plaintiffs' clerk in court, but that he had refused to receive the same.

[101] Mr. Simpkinson and Mr. Kenyon Parker, for the motion. When this order was obtained, the defendants were in contempt. If the party tendering costs does not eventually perform the duty for which the process of costs was awarded, the other party may proceed as before. The answer being insufficient, and therefore amounting to no answer, the plaintiffs may take up their old process, as if no tender of costs had been made. But, even if they were entitled to an order of this nature at all, they have not obtained it in the regular manner. For first, they should have obtained two previous orders; *Eastwood* v. *Dobree* (1 Y. & J. 508), *Allanson* v. *Moorsom* (2 S. & S. 478); and secondly, they should have obtained two orders nisi to dissolve the injunction. Now they have obtained only one previous order, and no order nisi at all.

Mr. Kindersley and Mr. John Romilly, contrà. It must be conceded that the defendants, in submitting to answer the first exceptions, treated their original answer as insufficient, and remained for a time in contempt. But they have since put in further answers, and have tendered the costs of the contempt. The costs were not tendered till after the previous order was obtained; but the contempt is substantially removed by filing the further answer; not by payment of costs. The costs are merely accessory to the principal act, and relate back to the time of filing the further answer. They have, therefore, done all they can to clear the contempt. It is said there should have been two previous orders. No doubt, if there are different sets of exceptions, there must be different orders. On that ground *Eastwood* v. *Dobree* was decided. So in *Allanson* v. *Moorsom*, there were two distinct sets of exceptions, and two orders of reference were required. In many cases that is necessary, because one answer may be **[102]** good, the other bad. Here the answers mutatis nominibus are the same. The objection that no orders nisi were obtained is untenable. The object of an order nisi to dissolve an injunction is to give the plaintiff time to look into the answer, to see that it is sufficient, and to enable him to determine whether he will shew cause on the merits or by exceptions. If that object is obtained in another manner, the order nisi may be dispensed with. *Lacy* v. *Hornby* (2 Ves. & B. 291). Now the previous order is sufficient for that purpose. It gives the plaintiff notice that, in case the exceptions are overruled, he must be prepared to shew cause on the merits.

The Lord Chief Baron.(*b*) The difficulty in the way of the defendants is that they did not tender the costs of the contempt till it was too late. I do not think the authorities shew that two previous orders were necessary. The question as to the order nisi may be more doubtful. But I think that the defendants, not having tendered the costs before they obtained the order in question, must be considered to have been in contempt. I regret that they should suffer by a mere point of form; but, nevertheless, the practice of the Court must be observed in all cases. There

(*b*) Lord Abinger.

would be no rules of practice at all, if we were to advert to minute circumstances for the purpose of bending those rules. I must adhere, therefore, to the regulation that a party must get rid of his contempt before he can take any active step in the cause. The obtaining the previous order is, emphatically, a step taken by the defendants. If they had done any thing in resisting a motion brought against them, my decision might possibly have been otherwise: but this is an original step which they have taken for their own security. There is one ground which I should be glad to yield to, if any thing would **[103]** warrant me in so doing—and that has been very ingeniously put—namely, that the tender of costs related back to the time of filing the answer. One would like, however, to see some authority for that proposition. In the absence of any such authority, I cannot say that a tender made the day before yesterday related back to some antecedent period, so as to clear the contempt. The order was obtained before the defendants had any right to it, and must therefore be discharged and, I am afraid, with costs.

The order as to costs was afterwards suspended.

SPARKE *v.* MONTRIOU. Nov. 27th, Dec. 1st, 23rd, 1834.—Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession.—The Court will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even though the plaintiff may have an interest in such deeds; but, under circumstances, the Court will direct them to be proved before the examiner.—The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such compulsion would be inequitable.

[See 4 Y. & C. Ex. 563.]

In this case two motions were made for the production of deeds and papers admitted by the answers of the defendants Montriou and Carvick respectively. The application in each case was that the defendant may be ordered to leave in the hands of his clerk in court the several deeds, documents, papers, and writings, admitted by his several answers filed in this cause, or the schedules thereto respectively, to be in his possession, custody, or power, and particularly certain indentures, &c.; and that the said several deeds, &c. may be produced at the hearing of this cause, or that the said defendant may be ordered to produce the said several deeds, &c. to the said plaintiff's solicitors, and to the examiner, for the purpose of proving the same, and at the hearing of this cause.

According to the statement in the bill, Richard Moore **[104]** was indebted to Peter Firmin in the sum of 1200l., secured by a judgment entered up in Trinity Term, 1806. In 1810 Moore mortgaged certain real estates to Ezekiel Sparke, for 1200l. Afterwards Moore contracted to sell other estates, of very considerable extent and value, to W. L. Ogden, for which Ogden was to pay a large deposit. Ogden declining to pay the deposit without some security, Sparke, who was a friend of Moore, assigned his mortgage to Ogden for that purpose, under an agreement that when the purchase was completed, the security should be re-assigned. The deposit was accordingly paid. Ogden afterwards granted an annuity to one Allen, and assigned Sparke's mortgage to secure the annuity. Allen assigned to the defendant Carvick. In the meantime Sparke had obtained an assignment of Firmin's judgment. Before the completion of the contract for the sale of the real property, Ogden died, and all the interest of Moore in the premises was conveyed to the defendant Montriou upon trust to carry the contract into execution with Ogden's representatives, or abandon it upon their receiving the difference of the purchase-money. Montriou entered into an agreement with Ogden's representatives to rescind the contract, which was done. Moore and Sparke both died. Moore's real estates were purchased by Hart Logan. The bill was filed by the widow and personal representative of Sparke against the defendants Montriou and Carvick, Willoughby Moore, the son and heir-at-law of Moore, and Hart Logan; praying for the benefit of the judgment, and

of Sparke's mortgage deed; that Carvick's annuity might be paid off out of the purchase-money due from Hart Logan; that the lands covered with Sparke's mortgage might be reconveyed as a security for his mortgage money; for an account of what was due to him for principal and interest; and payment of his debt.

Mr. Wakefield now moved for the production of the **[105]** deeds by the defendant Montriou, observing that Montriou was a trustee for the plaintiff. The application was made in the alternative; either that the deeds might be produced at the hearing, or that they might be produced before the examiner, for the purpose of being proved. Proof of the deeds was what the plaintiff mainly required.

Mr. O. Anderdon, contrà. The bill contains no charge as to the possession of deeds and documents, and no prayer for their production. The schedule is an answer to a different bill, the bill having been changed by amendment. The deeds are the title deeds of the defendant himself. Some authority ought to be cited for the proposition, that because a person sets forth a schedule of deeds, they are therefore to be produced. If A. has title deeds in which B. has an interest, B. ought to file his bill for their production, and not proceed by interlocutory application. Suppose one party states certain deeds as part of his own case, is the other party entitled to their production upon the mere allegation that the former party is a trustee?

Mr. Wakefield, in reply. Moore was a trustee for Sparke to the extent of Sparke's mortgage; and Moore's interest being now vested in Montriou, the latter is a trustee for the plaintiff. The contract between Moore and Ogden's representatives having been rescinded is no reason why Sparke's representative should be deprived of his mortgage money. Sparke likewise was possessed of a judgment overriding all the securities. The plaintiff, therefore, has a primâ facie case. The object of the motion is that the deeds may be produced at the hearing or proved before the examiner. The plaintiff is satisfied with the alternative: proof of the deeds is all that we require. The principle by which the Court is guided in ordering the production of deeds is laid down by Lord **[106]** Eldon, in *Evans* v. *Richard* (1 Swanst. 7). It depends on whether the deeds are by reference incorporated with the answer, and made part of it. Here the deeds are sufficiently incorporated with the answer. Those of the 11th and 12th February, 1811, the conveyance to Ogden, are set out and referred to in these terms: "As by the said indentures, reference being thereunto had, will more fully and at large appear." The conveyance to Montriou and other deeds are comprised in the schedule; and the schedule is expressly referred to in the answer. The answers shew that the plaintiff has an interest in those deeds; and the Court will not presume that the defendant has inserted in his schedule deeds in which the plaintiff has no interest. In *Church* v. *Barclay* (16 Ves. 435) the defendant Barclay admitted the possession of certain deeds; the cause came on to be heard, and the plaintiff failed. On appeal, the plaintiff had primâ facie no case for the relief he sought, and yet production of the deeds was ordered. In *Unsworth* v. *Woodcock* (3 Madd. 432) the defendant denied the plaintiff's case from beginning to end; yet that made no difference, and the order was made.

THE LORD CHIEF BARON was of opinion that the defendant had by his reference to the deeds made them part of his answer, and that he was primâ facie bound to produce them. There might be reasons for not producing them; but if so, it was incumbent on the defendant to shew what those reasons were.

The order made was that the defendant Montriou should furnish the plaintiff's solicitors with the names, descriptions, and residences of the attesting witnesses to the deeds, and that the deeds should be produced before the examiner to be proved, and at the hearing of the cause.

[107] Mr. Wakefield then moved for the production or the proof of the deeds admitted by the answer of the defendant Carvick.—Upon the occasion of Ogden's assigning Sparke's mortgage to Allen as a security for the annuity granted to Allen, the mortgage deeds were deposited with Allen. Upon Allen's assignment, they were deposited with Carvick. These and other deeds are mentioned and referred to in the body of the answer, in the terms "but for his greater certainty, &c." The plaintiff is entitled to their production. They afforded no defence to the defendant; they form no part of the defendant's case, and it cannot be for the benefit of the defendant to resist the application. On the other hand, proof of the assignment of Sparke's mortgage, and of the contract which existed between Ogden and Sparke, is material to the

plaintiff; and proof of those deeds is all that is required. The defendant, by referring to them, has made them part of his answer, and is bound to produce them.

Mr. Wigram, contrà. The plaintiff is in the situation of a mortgagor, who files his bill for redemption, and insists that he has a right to call on the mortgagee to produce his deeds. The bill prays that the defendant Carvick may be paid what is due to him; and now, before the hearing of the cause, he is to be compelled to produce his deeds. The answer to such an application is that he is not bound by any rule of law to disclose his securities before he is paid. In a case before Lord Kenyon, where a similar application was made, his Lordship said he would advise the mortgagee to put his deeds into a box, and sit upon the box till the mortgage money was actually put into his hands.(*a*) In *Buden* v. *Dore* (2 Ves. sen. 445) Lord Hardwicke said he would not compel a discovery of the deeds and **[108]** writings of the defendant's title, though, if there was any charge in the bill, that the defendant had in his power deeds and writings of the plaintiff's title, an answer must be given to such a charge. In *Wilson* v. *Foster* (1 Younge, 280) the demurrer was allowed, because the deed related to the defendant's title, and the plaintiffs had no interest in it. Here, it is true, the plaintiff has an interest in the deeds, but subject to the defendant's annuity. The same doctrine is now held in the Court of Chancery, though formerly that Court was more severe on the defendants than this Court, and used to compel them to produce deeds in cases where this Court would not. *Tyler* v. *Drayton* (2 S. & S. 309), *Bolton* v. *Corporation of Liverpool* (1 Mylne & Keen, 88). The notice of motion extends to six different documents. The bill contains no charge that these documents are essential to the plaintiff's title; they are, therefore, not referred to by the defendant in answer to such a charge, nor is there any thing in the answer distinguishing one from another, but they are stated as part of his own title. There is no rule that, because a deed is stated or referred to in the answer, therefore it must be produced. The reference is necessary for the defendant; for if the statement in the answer was not coupled with a reference, the answer would be read without qualification. *Cox* v. *Allingham* (Jacob, 337). [The Lord Chief Baron. The reservation is merely in favour of the party who makes it. He states his belief of the document; but for greater certainty refers to it when produced.]

Mr. Wakefield, in reply. Carvick is not a mortgagee, he is the grantee of an annuity charged upon real estate. A mortgagee has an absolute estate at law, and until redemp-**[109]**-tion, the mortgagor is out of his estate. But in the case of an annuity, the estate, subject to the annuity, is the grantor's. Ogden was not a mortgagee as between Sparke and Carvick. [The Lord Chief Baron. The legal estate is in Ogden, and he hands over the title deeds as a security to Allen.] For the purpose only of securing the annuity. Allen never could foreclose. [The Lord Chief Baron. May not the assignee of that security, supposing there was no assignment of the mortgage, make use of Ogden's name?] Not as against Sparke. He is a trustee for Sparke, subject to the annuity. If I assign a legal estate to secure an annuity, the annuitant is trustee for me, subject to the annuity. Ogden is repaid. I am, therefore, entitled to say, give me back my mortgage, subject to the annuity. The assignee cannot go beyond the annuity; if he became a mortgagee, it was only a mortgage for that particular purpose; he cannot treat it as a mortgage for his own purposes. Besides, it has never been determined that a mortgagee is not to produce his deeds for the purposes of proof. In the case in Vesey the deeds made out the defendant's title in which the plaintiff had no interest. The same remark applies to the other cases. But has it ever been decided that a plaintiff, having an interest and not even looking into the deed, is not entitled to have it proved? In *Cox* v. *Allingham* the deed was lost. Suppose the defendant had said he believed the deed as set forth in the bill to be true, but for his greater certainty referred to a copy of it in the schedule to his answer, would not the Court have said produce the copy, and allow it to be proved? In *Tyler* v. *Drayton* all the deeds but those disputed were produced. Here the plaintiff seeks the proof of that which is common title between her and this defendant; and the proof is absolutely necessary as against the other defendants. It is said that the bill contains no charge as to the deed being **[110]** in the power or custody of the defendant. Now the deeds are set out in the bill, and there is a charge that they are

(*a*) See the observations of Lord Eldon, in *Postlethwaite* v. *Blythe*, 2 Swan. 256.

fraudulent and void against the plaintiff, or that the said defendant Montriou ought to be declared a trustee of the premises for the plaintiff.

Dec. 23rd.—THE LORD CHIEF BARON, after taking time to consider the case, made the following order:—That the deeds should be produced before the examiner for the purpose of being proved, but without prejudice to the question whether or not the defendant should be bound to produce them at the hearing: with respect to which it was to be considered as if the deeds were not proved, but as if the witnesses were present at the hearing. The deeds to be in Court at the hearing.

HARWOOD *v.* FISHER. Nov. 28th, Dec. 1st, 23rd, 1834.—Where the first husband of a woman entitled to a legacy of 600l., chargeable, in default of personalty, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200l. a piece, but received the consideration from one only of the devisees, taking interest on the 400l. due from the two others. Held, that to the extent to 400l. this was not a reduction of the legacy into possession; and that to a suit instituted by the woman and her second husband to recover what was due on the legacy, the representatives of the first husband were not necessary parties.—Where facts are stated in the answer which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the Court will, on motion, permit the minutes of the decree to be amended, with a view to ascertain the truth of those facts.

[S. C. 4 L. J. Ex. Eq. 10.]

George Fisher devised his real estates, subject to an annuity to his wife for her life, to his three sons John, George, and William, as tenants in common in fee. He bequeathed his personal property to W. Pallet and E. W. Elam, whom he appointed his executors upon trust, after payment of his debts, to raise 600l. a piece for his two daughters; the residue he bequeathed amongst his children equally. In case of deficiency in his personal assets, he charged his real estates with the payment of the two sums to be raised for his daughters' fortunes.

[111] Mary, one of the testator's daughters, married, first, Francis Phillips, and secondly, the plaintiff Harwood. The present bill was filed by the plaintiff and his wife against the devisees, the surviving personal representatives of the testator, and the husband of the testator's other daughter who was deceased, praying for the establishment of the will, for an account, &c., and for payment of what should be found due in respect of the said legacy bequeathed to Mary Harwood.

It appeared that Francis Phillips had received from John Fisher 200l. in part payment of this legacy. The account given of this transaction in the answer of the devisees was this: That Phillips having met with some difficulty in getting the legacy from the executors, one of them having become bankrupt, it was verbally agreed between Phillips and the three devisees, that they should each pay Phillips 200l. for the legacy to his wife, and for her share of the residue, upon the understanding that Phillips should allow these sums to remain at interest at 5l. per cent. per annum, and not call for payment of the principal, unless he was in urgent want of it; the devisees to take upon themselves the risk of recovering the legacy and residue. The answer then went on to state that John Fisher paid his 200l. to Phillips, but that George and William continued to pay interest for their respective debts to Phillips during his lifetime, and after his decease, and during the widowhood of Mary Harwood, to the executors of Phillips. The answer then set forth the will of Phillips, by which he bequeathed 400l. to his executors, upon certain trusts, for the benefit of his widow and sons; and the defendants alleged their belief that the sum of 400l. so bequeathed was the sum remaining due from George and William Fisher.

Mr. Simpkinson and Mr. Gresley, for the plaintiffs.

[112] Mr. Geldart, for the defendants, the devisees, objected that the representatives of Phillips ought to have been made parties to the suit, and that in their absence the Court would not decree payment of the 400l. to the plaintiffs, without directing an inquiry as to the circumstances of the agreement.

Mr. Simpkinson, in reply. The inquiry asked for will only incumber the suit.

There was no purchase of the interest which Phillips had in right of his wife. There was no consideration moving to Phillips and his wife. The money to be paid was not secured by bond or any other personal security. This was a mere agreement to assign. An actual assignment by a husband of his wife's choses in action is a reduction into possession, but not a mere agreement to assign. [The Lord Chief Baron. The devisees said to Phillips, if you will allow us to stand in your place against the personal estate, we will pay you such and such sums. Is not that a consideration? It may be inadequate; but is it not a consideration? They are interested in the personal estate being made available, and are to see to the payment of the legacy.] They were equally entitled against the personal estate, without any such agreement.

Dec. 1st.—THE LORD CHIEF BARON, after taking time to peruse the answer, was of opinion that there was no reduction into possession by Phillips in his lifetime, and therefore that his representatives were not necessary parties to the suit, and the decree must be as prayed.

Dec. 23rd.—On a subsequent day, Mr. Geldart moved that the minutes of the decree might be amended by inserting a declaration that the Master, on the application of any party, might be at liberty to state special circumstances **[113]** concerning the legacy bequeathed to Mary Harwood. He stated that he had affidavits to prove that a promissory note was given to Phillips by George and William Fisher to secure the 400l. He contended, however, that, without the aid of the affidavits, there was enough on the face of the answer to warrant the application, and to induce the Court to interfere. A statement in the answer, particularly when there is no contradictory evidence, is sufficient to ground a reference to the Master. It is the ordinary practice in the Exchequer for the Master to report special circumstances. Seton on Decrees, pp. 12, 24.

Mr. Simpkinson, contrà, contended that the course which had been taken was contrary to all practice; it was rehearing the cause upon affidavit.

THE LORD CHIEF BARON at first inclined to the opinion that the only course was to apply for a rehearing. His Lordship, however, ultimately acceded to the application; observing that if the evidence turned out in favour of the defendants, he ought not to proceed with the suit in its present shape; if it turned out against them, they would have to pay the costs.

Motion granted.(*a*)

[114] GOMPERTZ *v.* BEST. Nov. 29th, Dec. 1st, 1834; Jan. 15th, 1835.—Where exceptions are taken to the Master's certificate, with a general allegation that the Master is wrong in "all the particulars" complained of; then, if one of the exceptions is overruled, all must be overruled; but the exceptant will be allowed to amend, on payment of costs.—Prolixity in an answer is impertinence; but it is a question of degree. Therefore, in a bill for an account of money transactions between the plaintiff and the defendant, it having been required that the defendant should set forth in a schedule a variety of minute particulars concerning certain securities which were alleged to have been deposited with him: Held, that it was not an act of impertinence to annex to the answer a schedule with columns.

[S. C. 4 L. J. Ex. Eq. 17. See further, p. 619, post.]

The answer in this case had been referred for scandal and impertinence. The Master certified the answer not to be scandalous or impertinent. The plaintiff took exceptions to the Master's certificate, "For that the said Master hath, in and by his said certificate, certified that the said defendant's answer to the said complainant's bill is not in any particular scandalous or impertinent; whereas the said Master ought to have certified that the passage contained in the said answer, commencing &c., and that the passage contained in the said answer, commencing &c. are scandalous and impertinent; and that the passage contained in the said answer, commencing &c. is impertinent, &c." and so on. "In all which particulars the said complainant doth

(*a*) See *Blount* v. *Bestland*, 5 Ves. 515.

except to the said Master's certificate, and humbly appeals therefrom to the judgment of this honourable Court."

The exceptions coming on to be argued, the Court was of opinion that the Master was right upon the first point.

Mr. Elderton, for the defendant, then submitted that the exceptions must be overruled altogether. Where the exception includes several distinct matters, but is in fact general, and the report appears right in any one instance, the exception must be overruled. *Hodges* v. *Salomons* (1 Cox, 249), *Green* v. *Weaver* (1 Sim. 404), *Wagstaff* v. *Bryan* (1 Russ. & M. 30), *Pearson* v. *Knapp* (1 Mylne & K. 312).

Mr. Wakefield, contrà. The words, "In all which particulars, &c." are words of course annexed to all excep-**[115]**-tions. In *Pearson* v. *Knapp* the Master of the Rolls dwells on the words in the frame of the exception itself; not on the words at the end of it. In this case there is an allegation in each passage of the exceptions that the Master is wrong. It is alleged that the Master did so and so, whereas he ought to have done the contrary. The exceptions do not conclude with a general averment that the Master is wrong in all the particulars; but each passage is concluded with a particular averment to that effect. In *Russell* v. *Dyke* (not reported) the exceptions, which were in the same form as the present, were amended in Court by adding the words "or some of them."

THE LORD CHIEF BARON. I consider myself bound by the decisions, though I confess I do not see distinctly the reason of them, or why the exceptions should not be taken reddendo singula singulis. But, as the objection is only one of form, I shall allow the plaintiff to amend his exceptions, upon payment of costs.

Exceptions overruled; the plaintiff to be at liberty to amend them by inserting in the body of the exceptions the following words:—"Whereas the said Master ought to have certified that, in the particulars hereinafter mentioned, or some or one of them, the said answer is either scandalous and impertinent, or impertinent, that is to say."

Jan. 15th, 1835.—The plaintiff having made his amendment, the exceptions came on again for argument. One ground of exception **[116]** was that the Master had not reported one of the schedules to the answer to be impertinent. The bill had been filed for an account of money transactions between the plaintiff and defendant, and contained a great variety of charges relative to certain securities, deposited with the defendant in the course of these transactions, as collateral securities. The interrogating part of the bill, which was founded on these charges, was very minute; requiring the defendant to set forth when and on what occasions, and in whose presence, these securities were deposited; what was their nature and amount; whether they had subsequently been exchanged for others, made productive, or been parted with by the defendant, and been subsequently re-deposited; and, if parted with, when and to whom, and for what consideration, &c. &c. The defendant, in answer to these several queries, set forth the information required in a schedule with columns.

Mr. Wakefield, in support of the exception. There may be impertinence in manner as well as impertinence in matter. Prolixity is impertinence in manner. *Slack* v. *Evans* (7 Price, 278, n.). Here, by putting the schedule in columns, fourteen words only go to a folio, which occasions very great additional expense.

Mr. Elderton, contrà. The bill alleges every species of fraud against the defendant, and therefore a full answer was necessary for his defence. The columns are stated as shortly as possible; it is the clearest mode for the purposes of the Court, and it has been required by the bill. The expense has not been occasioned by the form of the schedule, but by the mode of computation adopted in the office with respect to columns in schedules. In *Slack* v. **[117]** *Evans* the defendant set out tradesmen's bills, which was clearly impertinent. In *Parker* v. *Fairlie* (1 S. & S. 295) the answer was very long, stating the very language of certain affidavits and certificates, on which the defendant relied. The Master thought them, stated at this length, to be impertinent; but Sir John Leach held otherwise, observing that he could not think it useless on the part of the defendant to set them forth in hæc verba. *Lowe* v. *Williams* (2 S. & S. 574) and *Bally* v. *Williams* (1 M'Clel. & Y. 334) are authorities to the same effect. The latter case completely meets the present point.

Mr. Wakefield, in reply. We complain of the manner, not of the quantity of matter. The cases cited have no application, because in them there was verbal materiality, which is not so here. The opinions of the other Equity Judges were

contrary to that of Lord Eldon, who thought prolixity impertinence. In some cases, as matters of account, it is necessary to use columns; here it is not necessary. The defendant might as well set forth letters in columns, with their date, signature, &c., in separate columns. There is no occasion to give information in this manner.

THE LORD CHIEF BARON.(*d*) I think the exception must be overruled. I am sorry that there should have been a difference of opinion amongst judges upon a subject in which they were much better versed than I can be. I am disposed to agree with Lord Eldon in thinking prolixity impertinence; but it is a question of degree. Degrees may exist of very gross impertinence; for if you might give information in ten words, and you give it in a thousand, how can it be said that that is not impertinent? **[118]** There is no occasion to lay down a general rule on the subject, it must depend on the circumstances of each particular case. In the present case it is not necessary to carry it to such an extent as to make this answer impertinent. I do not see that there is necessarily any prolixity in this case. The answer, if differently stated, might have been longer or shorter than it is at present, but I cannot say that there is any difference so great as to warrant my holding it impertinent as it now stands. It appears from *Slack* v. *Evans* as if the Master in that case had reported the answer pertinent; but then he seems to have added something further, for he says, "he cannot do justice without a special reference being made to him to inquire into some prolixity not impertinent." The Master appears to have thought that it was necessary to have a special reference as to prolixity. That case only shews that Lord Eldon was of opinion that prolixity was a species of impertinence; but it does not shew that this case is a case of prolixity. I can easily understand that in some cases the use of columns may be very proper. A solicitor is frequently forced to turn the answer prepared for the perusal of counsel into something like a schedule.

Exception overruled.

[119] THE REV. WILLIAM BARNES, Clerk, *Plaintiff;* JOHN STUART, LEONARD SEVERS, WILLIAM FALL, AND CATHERINE ROBINSON, *Defendants.* Dec. 2, 6, 1834; Jan. 16th, 1835.—Issue directed to try the validity of a modus laid for a very small district; though the map attached to the answer varied from that given in evidence by the defendants, and though the defendants relied on evidence of reputation to prove the bounds of the district.—The lands of smaller monasteries, which were surrendered to the king after the 27 Hen. 8, c. 28, and were, at the time of their surrender free from tithes, are within the protection of 31 Hen. 8, c. 13, s. 21.—To shew that a monastery held lands discharged from tithes by prescription at the time of its dissolution, positive evidence must be given that the monastery existed prior to the time of legal memory; but if this evidence be given, its possession of the lands before that period may be left to presumption. —Under the general pleading that the lands were, at the time of the dissolution, held discharged "by prescription, or other lawful ways and means," the defendants may give evidence of any legal discharge.—A witness is not disqualified from proving the payment of a modus, on the ground of being an owner of the lands in question, unless it be clearly proved that he is an owner at the time of his examination.—The stat. 3 & 4 Will. 4, c. 42, s. 26, does not render a man, who was sworn before the act, a competent witness afterwards. Whether that act extends to equitable proceedings, quære?—Matthew Paris is not evidence of the establishment of the order of Franciscans in Italy.

[S. C. 4 L. J. Ex. Eq. 25. See 4 Y. & C. Ex. 563.]

Bill, by the rector of Richmond, in the North Riding of Yorkshire, against four occupiers of lands, for an account and satisfaction of great and small tithes. Defence, by two of the defendants, a modus; by the other two, an absolute exemption from all tithes.

1. As to the modus.

The material allegations of the answer were in substance these: That the farms and lands occupied by the defendants respectively are part and parcel of a certain ancient district of land, formerly parcel of the possessions of the masters and brethren

(*d*) Lord Abinger.

of the late dissolved hospital of St. Nicholas, near Richmond, in the county of York. That the said ancient district of land, from time whereof the memory of man is not to the contrary, hath consisted of, and the same now consists of, the several closes, or pieces or parcels of land mentioned and set forth in the map or plan annexed to the defendants' answer by way of schedule; and that the same is, and from time immemorial hath been, bounded in such manner as is stated in the said map or plan. That from time whereof the memory of man is not to the contrary, there hath been paid, and payable, and of right ought to be paid at Easter in every year, or so soon after as lawfully demanded, by the owners or occupiers for the time being of the lands forming part of the said ancient **[120]** district, including the farms and lands so occupied by the defendants as aforesaid, to the rector of the rectory of Richmond aforesaid, for the time being, the sum of 1l. 19s. 11d., as a modus or customary payment, for and in lieu and full satisfaction of the tithes of all titheable matters arising, growing, and renewing, in and upon the lands within the said district, including the lands so occupied by the defendants as aforesaid, &c.

The map attached to the answer varied from that given in evidence by the defendants. The former included two or three closes, which were omitted in the latter, and vice versâ. The map attached to the answer contained about 172 acres.

Mr. Boteler and Mr. G. Richards, for the plaintiff.

Mr. Simpkinson, Mr. Spence, and M. Wigram, for the defendants.

The plaintiff relied on his common-law right as rector.

The documentary evidence for the defendants consisted of the Pipe Roll of 18 Hen. 2 (to prove that the hospital existed before the time of legal memory); the Ecclesiastical Survey, 26 Hen. 8 (to prove that it had lands before the dissolution); a grant of 27 Eliz. (from which it appeared that the possession of various lands of the hospital had been concealed by the brethren); and a variety of title-deeds, beginning with a deed of 1641, in which the lands comprised in the grant of Eliz. were described by their modern names. To prove the payment of the modus the defendants put in acknowledgments under the hands of three successive rectors of Richmond, from April 13, 1776 to 1824. These were expressed to be for the sum of 1l. 19s. 11d., for a modus in lieu of tithes arising out of lands some time belonging to the dissolved priory of St. Nicholas. The earliest of these was signed by Francis Blackburne, the then rector. The names of the persons sharing the modus were indorsed on the receipt.

[121] The parol evidence for the defendants, as to the payment of the modus, was that of Mr. Bowes, whose testimony, it will be seen, was objected to. They also read the depositions of two of the plaintiff's witnesses, to the effect that no tithes had, to their knowledge, been paid for certain specified lands, which were part of the St. Nicholas lands.

To rebut this evidence the plaintiff's counsel put in a series of books kept by the successive rectors, with a view to prove that the alleged modus originated in a composition for hay tithe, and that the word modus did not occur till within a comparatively late period. They likewise produced parol evidence to shew that sums, by way of composition, had been paid for some of the lands.

To prove a series of receipts given by former rectors for the modus, and also to prove the payment of the modus within the time of living memory, the defendants produced Christopher Bowes. In his deposition respecting the payment of the modus, this witness stated "that, as one of the owners of the said lands, he had repeatedly paid the same to the rector for the time being." In another deposition respecting the boundaries of the district, he said that he had his information on that subject "from various persons, and particularly from Thomas Hutchinson deceased, on the occasion of the deponent purchasing three closes or parcels of land, described in the plan produced at his examination, and comprised within the said district." The name of the witness appeared upon certain closes described in the plan.

On the part of the plaintiff the testimony of this witness was objected to, on the ground of interest.

For the defendants. Admitting the witness to be interested, he may at all events, prove the receipts. *Thompson* v. *Perryman* (Younge, 598). As regards the admissibility of **[122]** evidence, there is a difference in this Court between the proof of exhibits and the proof of facts. You may bring a witness into Court to prove a fact, depending merely on hand-writing, and the other side cannot cross-examine him. It is

clear, therefore, that the Court does not think it necessary to give so much protection to the proof of documents as to the proof of facts. [Alderson, B. But, if it were suggested to the Court that the witness was incompetent, the Court would examine him as to that point. *Turner* v. *Burleigh* (17 Ves. 354). There can be no ground of distinction between one fact and another to be deposed to by an interested witness. The case of *Thompson* v. *Perryman* is no authority for such a distinction, for there the witness was examined on both sides.] The objection is, at all events, removed by the 3 & 4 Will. 4, c. 42, s. 26. When the witness was examined, that act had not passed, but it is now in existence and ought now to operate; for, under the circumstances of this case, this is the only period when the objection can properly be made. *Perigal* v. *Nicholson* (Wightw. 63; 2 E. & Y. 583). The case, therefore, as to this point, must be treated as if it were at law, and the evidence must be admitted. It may be said that the act was not intended to apply to proceedings in equity, especially as there is an express direction that the name of the witness shall be indorsed on the record of the judgment in the action: but will not this direction be held to apply by analogy to equitable proceedings? Besides, the claim of the plaintiff is purely a legal right. The account is the only ground for the proceedings being drawn into equity. The effect of the act is to strike out a ground of legal incompetency. If Bowes' evidence is rejected, a party's legal rights are varied; and, in order to prevent this, a Court of equity must of necessity send the case to law. Could this have been contemplated by the legislature? Another circumstance is that it does not appear distinctly that Bowes is **[123]** now the owner of lands which he purchased. He says that while he was owner he paid his share of the modus.

ALDERSON, B. That is the difficulty which I have upon the subject. It does not appear clearly that, at the time of his examination, the witness was owner of those lands. That cannot be left to presumption. I should not reject the witness at Nisi Prius without putting the question, is he now an owner? I must admit the evidence de bene esse. With respect to the act of Parliament, the legislature certainly never intended that it should apply to equitable proceedings; and I doubt whether the analogy contended for could be admitted. The statute has made the evidence of an interested witness admissible conditionally. At law the condition is performed by his name being indorsed on the record; can the condition be performed in equity, by an indorsement of his name on the decree? I have considerable difficulty on that point: it is a statutable rule of evidence. On another point introduced in the argument, I have no doubt upon the construction of the act. It relates only to the time when the witness is sworn. It will not render a man, who was sworn before the act, a competent witness afterwards.

The defendants then proposed to read the deposition of Bowes as to the boundaries of the district. The purport of it was that he knew the lands mentioned in the map or plan produced to him at the time of his examination; that, with certain exceptions which he specified, they formed a well-known tract, district, or parcel of land, known by the name of St. Nicholas; that the boundaries of the said lands were, with the said exceptions, accurately described in the plan; and that the said district had invariably consisted of the same number of acres during his knowledge of it. He then stated that "he had heard from various persons, and particularly from **[124]** Thomas Hutchinson, now deceased, &c., that the extent, name, and boundaries of the said district are and were such as deponent hath described and distinguished."

Objected for the plaintiff. This is a private right, and the hearsay evidence cannot be admitted. The modus is laid as a farm modus, and calling it a district can make no difference. Evidence of reputation is not admissible to establish a farm modus. *Lonsdale* v. *Heaton* (1 Younge, 58), *Lord Anson* v. *Hodges* (not reported on this point). In the latter case the district was much larger; but the Master rejected the evidence, and the Vice-Chancellor concurred in the propriety of his decision.

For the defendants. The cases cited apply only to farms. This is the case of a district. The same point occurred in *Rudd* v. *Wright* (Younge, 147), where Alexander, C. B., directed an issue as to the modus for the district of Great Hodsock. The Judge who tried the issue admitted evidence of reputation to prove the boundaries. Application for a new trial was made to Lord Lyndhurst, upon the ground of the inadmissibility of the evidence. Lord Lyndhurst refused the new trial, and went very fully into the present question. The difference between a farm and a district appears from the case of *Byam* v. *Booth* (2 Price, 231; 3 E. & Y. 716), where

one of the issues was to try the extent of the district. The objection that the defendants have treated it as a farm modus is of little weight, and ought not to deprive them of any benefit arising from the fact of this being a district.

For the plaintiff. *Byam* v. *Booth* has no application. In *Rudd* v. *Wright* the motion for a new trial was made on several grounds; and this, probably, was not considered **[125]** a material point. That case was, however, cited in the later case of *Lord Anson* v. *Hodges*, and yet the evidence was not received.

ALDERSON, B. I cannot distinguish the case of Great Hodsock from the present. That was described in the pleadings as an ancient farm and lands; and the judgment of the Lord Chief Baron speaks of it as a district. The principle upon which evidence of reputation is admitted is of a public nature and applies to public rights. In *Weekes* v. *Sparke* (1 M. & S. 679) Dampier, J., puts it upon the right footing. Speaking of a modus, he says, "That, strictly speaking, is a private right; but has been considered as public, as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district." Are the occupiers here so numerous as to make this a question of a public nature? If I were not pressed by the authority of the case cited, I should have no difficulty in rejecting the evidence. No Judge, in addressing a jury, could tell them that it was worth a farthing.

The evidence was received de bene esse.

The case was then argued generally for the defendants. The evidence establishes, first, that the lands were part of the possessions of the hospital; secondly, that they, with other lands, have been immemorially covered with the payment of this modus. It is not of the essence of the modus that the answer should be true in every particular respecting the extent of the lands. It is not a question of ownership, but whether the lands were covered with this fixed payment before the time of legal memory. Is it necessary that the extent of the lands should be laid with such nicety that the variance of half **[126]** an acre should be fatal? There is a variation, no doubt, between the map in the answer and the map given in evidence. But the evidence of Bowes supports the former. In *Byam* v. *Booth* (2 Price, 231; 3 E. & Y. 716) there was much greater confusion of boundaries than there is in this case, and the Court directed an issue to try the extent of Bromley Grange. Here there is, at least, sufficient evidence to send the case to a jury.

For the plaintiff. The defence stated in the answer is inadmissible. The modus is alleged to be paid by the owners and occupiers of part of the district, in respect of the whole. [Alderson, B. The answer is not very clearly drawn in this respect, but I think it may be taken to mean that the modus is paid by the owners or occupiers of all the lands together, each of which forms part of the district. There is no evidence which supports the schedule of the answer. Bowes' evidence does not entirely support it; and if his evidence is rejected, there is none to connect the lands with the modus. Neither is there any evidence to shew that proprietors named in the receipts occupied the whole district, so as to make out the whole 1l. 19s. 8d. It may be said that the object of this payment, whether as a composition for all tithes, or for the tithes of hay only, or for a modus, is the proper subject of inquiry before a jury. But it is to be remembered that Francis Blackburne, the first rector who gave these receipts, was himself the owner of great part of the property and therefore interested in establishing a modus. It is to be remembered, also, that the word modus was first introduced into the rectors' books by Francis Blackburne. Before this time the several sums mentioned in those books were expressed to be paid as compositions for the tithes of hay, and afterwards simply as compositions. Amongst them is a sum paid for St. Nicholas' Close, a close which **[127]** is included in the district. If that sum was paid as a composition for tithes, and we submit that it was, the alleged modus must fail, notwithstanding the long period for which it has been paid. *Short* v. *Lee* (2 J. & W. 464; 3 E. & Y. 1013), *Fisher* v. *Graves* (1 M'Clel. & Y. 362; 3 E. & Y. 1186). Upon the whole we submit that the defendants have failed in establishing the identity of the lands in question, and the payment of the modus; and that a sufficient primâ facie case has not been shewn to induce the Court to grant an issue.

The Court reserved judgment, but intimated that an issue would be directed.

2. As to the exemption.

The answer of the two defendants who relied on a total exemption from tithes alleged in substance as follows:—That the three several closes or parcels of land,

respectively occupied by them, are part and parcel of the scite and possession of the monastery or religious house of White Friars, Friars Carmelites or Minors, in Richmond; and which scite and possessions were, by prescription or other lawful ways and means, held and enjoyed by the abbot and monks of the said monastery, at the time of the dissolution thereof, absolutely acquitted and discharged, as well in the hands of themselves as of their lessees or tenants, of and from the payment of all tithes whatsoever, as well great as small, yearly growing, arising, or renewing thereon. That the scite and possessions of the said monastery were surrendered by the abbot and monks of the said monastery to the crown, in the 30th year of the reign of Hen. 8, and were held by the crown freed and discharged from the payment of all tithes whatsoever.

[128] The documentary evidence for the defendants consisted of the King's writ to the sheriff of Cumberland of the 32nd Edw. 1, in behalf of the Friars Minors of Richmond, commanding him to deliver up a monk, who had stolen some property of one of the brethren; a surrender of the possessions of the monastery in the 30th Hen. 8; an inquisition post mortem of Ralph Gower, of the 9th Eliz., finding him seised in fee of the scite and possessions of the Friars Minors lately dissolved; a grant of the 15th Eliz., on the attainder of John Gower, the brother of Ralph, of all the lands within the ambit of the walls of the late Friars Carmelites to Thomas Wray and Nicholas Metcalfe, and the heirs and assigns of Wray; and then a series of deeds, deducing the title from Wray to the late husband of one of the defendants.

To prove the identity of the lands, the defendants' counsel produced parol evidence to shew that an ancient wall was still in existence; that all the property within the wall was called by the general name of the Friary; and that the lands in question were part of that property. For evidence of non-payment of tithes, they relied on the testimony of two of the plaintiff's witnesses, who deposed to the payment of tithes for other lands in Richmond; but stated that, to the best of their knowledge, the lands in question had never paid tithes.

To rebut the evidence of nonpayment, the plaintiff's counsel produced certain entries from the rectors' books, which, however, were not conclusive. To prove that some part of the lands had come into the possession of the Friary since the time of legal memory, they produced, from the Patent Roll of 42 Edw. 3, a license of mortmain from the crown to different persons, enabling them to grant to the warden and brothers of the Friary certain lands contiguous to their manse, for the purpose of enlarging it. Also, in the course of the argument,

[129] Mr. Boteler, for the plaintiff, in order to shew that the Friary itself was founded since the time of legal memory, proposed to read, as matter of general history, the account given by Matthew Paris of the establishment of the order of Franciscans under Pope Innocent the third.(*a*)

Mr. Simpkinson, for the defendants, objected that this was an English history.

Alderson, B., after adverting to the observation of Lord Ellenborough, in *General Picton's case* (30 How. St. Tri. 492), said that he was disposed to think that Matthew Paris was not evidence of the establishment of an Italian order; but if the plaintiff could produce an Italian history or a translation he would receive it.

Upon the general question of exemption, Mr. Boteler and Mr. G. Richards, for the plaintiff, relied on the common-law right of the rector.

Mr. Simpkinson, Mr. Spence and Mr. Wigram, for the defendants. First, although this was one of the smaller monasteries, yet, if its possessions were free from tithes at the time of the surrender, they are within the protection of 31 Hen. 8, c. 14, s. 21, which continues the exemption from tithes in certain abbey lands, which were exempted previous to their surrender or dissolution. By the sixth section of 27 Hen. 8, c. 28, which dissolves the smaller monasteries, power is given to the king to continue such of them as he shall think fit. This monastery was so continued; for the king took a surrender of it in the 30th year of his reign. Now *Walklate* v. *Wilshaw* (Degge, Pars. Coun. 326) and *Tate* v. *Skelton* (4 Gwill. 1503; 3 E. & Y. 1379) are authorities to shew that the **[130]** protection of 31 Hen. 8, c. 14, s. 21, is extended to the lands of all monasteries, whether small or great, which came to the crown after the 4th of February, 27 Hen. 8. These cases are confirmed in *Towrie* v. *Pearson* (1 Wood, 13; 1 E. & Y. 411), *Leigh* v. *Downes* (1 Wood, 124), *Wood* v.

(*a*) The passage proposed to be read was from pp. 339, 340, of the edition of 1640, under the year 1227.

Bulstrode (2 Wood, 289), *Hastings* v. *Toon* (3 Wood, 455), *Pritchett* v. *Honeyborne* (1 Y. & J. 135).

Secondly, the lands of this monastery, at the time of its surrender, were held freed and discharged from the payment of tithes. It must be conceded that actual nonpayment of tithes at the time of the surrender cannot be proved; but the Court adopts in these cases the same principle as is adopted in cases of modus; it will not require impossibilities; but, if there be uncontradicted evidence of living witnesses for a long period, the Court carries back their evidence and considers their testimony sufficient to found a presumption of nonpayment at the time of the dissolution. It is sufficient to shew that at the time of the dissolution the lands belonged to the monastery, and that no tithes have been since paid. The Court will draw the inference that they were properly discharged. *Nash* v. *Mollins* (Cro. Eliz. 206; 1 E. & Y. 100). [Alderson, B. It was only the mode of pleading that was in issue there. All that that case decided was that it was sufficient to plead that the prior had held the lands time out of mind discharged of tithes, without shewing how they were discharged.] *Lamprey* v. *Rooke* (Ambl. 191; 2 E. & Y. 148) is, at all events, an authority for the proposition advanced. Lord Hardwicke there says that if lands appear to have been part of the dissolved monasteries, and there is no evidence of the payment of tithes for those lands at any time, Courts will consider them as discharged by some way or other, before the dissolution, in the hands of the abbot, &c.; **[131]** and that it is sufficient to allege that they were part of the possession, &c., and were, at the time of the dissolution, by prescription, composition, or by other lawful ways and means discharged from payment of tithes. To the same effect is the language of Lord Coke in *The Archbishop of Canterbury's case* (2 Rep. 46; 1 E. & Y. 113, 117), as are also the cases of *Cooke* v. *Butt* (6 Mad. 53; 3 E. & Y. 1060), and *Matthews* v. *Fitch* (3 E. & Y. 1238). In *Ingram* v. *Thackston* (2 Gwill. 819; 3 E. & Y. 1242) the three Barons held that from the long nonpayment of tithes for part of certain abbey lands, called Bromley Grange, an absolute exemption for that part might be presumed, although other parts of Bromley Grange had paid tithes. [Alderson, B. The Lord Chief Baron there held that the exemption was only quamdiu propriis manibus. I think he was right and the other Barons wrong. In modern times the case would have been decided differently.] The more modern cases of *Donnison* v. *Elsley* (1 M'Clel. & Y. 1; 3 E. & Y. 1393), and *Humphreys* v. *Wagstaff* (1 Russ. & M. 529), shew strongly the efficacy of proof of nonpayment of tithes for a long period. In the latter case this species of proof was given, and the Master of the Rolls held that nonpayment from the time of the dissolution might be presumed; and that from this circumstance, combined with the fact of the abbey being in possession of the lands at the time of the dissolution, an absolute discharge from tithes might be presumed.

But it may be contended that this monastery was established since the time of legal memory; that proof of exemption must always depend on prescription; and that, therefore, as there is no prescription in this case, the defence of exemption must fail altogether. There is no direct evidence when the monastery was founded. There **[132]** is evidence, however, from which it may be presumed that it was founded before the time of legal memory. [Alderson, B. That cannot be left to presumption; there must be some distinct proof of it. It was so laid down by Richards, C. B., on the motion for the new trial in *Markham* v. *Smith*. He cited a case from *Gwillim* (*a*) in support of his observation.] But according to the language of the same learned Judge, in another stage of the same case, "competent evidence is admissible to enable a Court of judicature to infer it" (3 E. & Y. 1073). The question, therefore, is still open, What is competent evidence for this purpose? We have not, it is true, strict direct proof that the abbey was in existence, or that the lands were enjoyed with it before the time of legal memory. But we have evidence of its existence as far back as the time of Edw. 1; and that it was then possessed of personal, if not of real, property. Is not this competent evidence, from which to infer its existence prior to the time of legal memory? And coupling this presumption with the evidence of the nonpayment of tithes, to what can that nonpayment be referred, but to a legal exemption existing at the time of the dissolution?

But even assuming that this monastery was founded since the time of legal

(*a*) *Clavill* v. *Oram*, 4 Gwill. 1354; 3 E. & Y. 1369.

memory, would not the Court presume a legal discharge where lands have been held five hundred years free from tithes? [Alderson, B. If the exemption arises subsequently to the time of legal memory, must you not shew a special discharge? Does not general pleading throw upon you the necessity of proving prescription?] In *Price* v. *Downes* (1 Wood, 522), the discharge was pleaded generally, and the Court were so well satisfied that this allegation was made out that they dismissed the bill; yet according to the catalogue of the greater monas-**[133]**-teries, the priory of Sheen, to which the lands in question belonged, was founded long after the time of legal memory, namely, by Henry 5 in the year 1414. Similar observations apply to *Powell* v. *Powell* (2 Wood, 166; 1 E. & Y. 765), *Lambert* v. *Cumming* (Bunb. 138; E. & Y. 790), *Save* v. *Lodge* (2 Wood, 366), *Hastings* v. *Toon* (3 Wood, 455). The monastery of Grace Dieu, mentioned in the last case, was founded in the time of Hen. 3, according to Speed. [Alderson, B. The last was a case of prescriptive discharge according to the report; and Speed cannot be cited as evidence to the contrary. Speed's statement was not offered to the consideration of the Court.] In all these cases the discharge was pleaded generally, and it was held sufficient. In the present case, the pleading is that the lands were discharged by prescription or other lawful ways and means. If, therefore, we cannot avail ourselves of prescription, we have a right to shew that the lands have been discharged by composition, grant, bull, or otherwise; and upon evidence of nonpayment long continued, the Court will presume this. [Alderson, B. The question is whether that proposition is consistent with the admission that the fact did take place after legal memory. Does any case go that length? Must not the bull or grant be free from the time whereof the memory of man runneth not to the contrary?] The Court will presume a grant of tithes since legal memory. *Oxenden* v. *Skinner* (4 Gwill. 1513; 3 E. & Y. 1384). Grants in all cases may be presumed where they are consistent with the possession. Here there was a spiritual body, capable of obtaining a grant; and therefore a grant may be presumed in this as well as any other case.

Mr. Boteler and Mr. G. Richards, for the plaintiffs. **[134]** The cases which have been cited on the other side are mere simple cases of prescription, and do not involve the question whether, on the failure of prescriptive evidence, the Court will go on to presume a bull or grant. The question here is, in truth, not one of prescription, but whether, where a monastery has been founded after the time of legal memory, the possessions of it can be protected from the payment of tithes, by presuming a bull or grant. It must be admitted that the language of Lord Hardwicke in *Lamprey* v. *Rooke* (Ambl. 191; 2 E. & Y. 148) bears out the defendants in their argument; but not so the case itself: for the estate of Stonar belonged to the abbey in question in the time of William Rufus. The opinion of Lord Coke in *The Archbishop of Canterbury's case* was extrajudicial; and was entirely disapproved of, and held not to be law in *Slade* v. *Drake* (Hob. 295; 1 E. & Y. 314, 319), in which the observations of Lord Hobart are decisive of the present case. The cases of *Cooke* v. *Butt* (3 E. & Y. 1060) and *Matthews* v. *Fitch* (3 E. & Y. 1238) were cases of prescription. The same observation applies to that of *Humphries* v. *Wagstaff* (1 Russ. & M. 529), which was also treated by Sir John Leach as a case of prescription. It is true that in the present case the defendants, in the first instance, endeavour to set up a prescriptive defence; but so far from shewing that the lands in question have belonged to the monastery from time immemorial, they do not even shew that the monastery itself existed before the time of legal memory. In *Clavill* v. *Oram* (4 Gwill. 1354; 3 E. & Y. 1369), where it was admitted that the religious house had existed from time immemorial, it was not therefore presumed that the lands in question, in that case, had been immemorially attached to the house; but Doomsday Book was produced in order to prove that fact. That case was confirmed by *Markham* **[135]** v. *Smith* (11 Price, 126; 3 E. & Y. 1071). In the case of *Donnison* v. *Elsley* (1 M'Clel. & Y. 1; 3 E. & Y. 1393) Chief Baron Alexander decided against the defendant. The observation of the learned Judge in that case, which is mainly relied upon by the present defendants, is a mere dictum, entirely unnecessary to the decision. But allowing the defendants the full benefit of that case, and also of *Norton* v. *Hammond* (1 Y. & J. 94), all that they decide is this: that if the religious house be proved to have existed from time immemorial, and to have had lands at the time of its dissolution, those lands may be presumed to have been attached to the house from time immemorial. In those cases, however, only one presumption was admitted; in the present case the Court is called

upon to make two presumptions; namely, both that the house has existed and that the lands have belonged to it from time immemorial. [Alderson, B. A spiritual person may prescribe in non decimando. Is that true in all monasteries? Is not that confined to immemorial monasteries? It is worthy of consideration, whether the Court cannot require some proof that it is an immemorial spiritual body, before it allows it to prescribe at all.] That is certainly the law. In *Pritchett* v. *Honeyborne* (1 Y. & J. 135) Chief Baron Alexander says, "It is necessary to shew not only that the lands were in the hands of the monastery at the time of the dissolution, but that they had been in their hands discharged by prescription. This is the least burden which a defendant in a tithe suit, insisting on a non decimando, can be expected to carry." Another circumstance in this case is that it appears from the grant for enlarging the house in the time of Edw. 3 that part of the possessions of this monastery came to it since the time of legal memory; therefore, as the defendants do not define these lands, both these **[136]** and all other lands of the monastery must stand on the same footing, and they cannot avail themselves of a prescriptive defence for any part.

But beyond this, the defendants have attempted to shew that even where a monastery has been founded within the time of legal memory, and the lands were held discharged from tithes at the time of the dissolution, an absolute discharge may be established, if not by prescription, at least by the presumption of a bull or grant. We submit that the defence of prescription precludes the other mode of defence; but, at all events, no such conclusion as that contended for can be drawn from the cases. In *Towrie* v. *Pearson* (1 Wood, 13; 1 E. & Y. 411) a bull was produced, or evidence was given of its existence. *Powell* v. *Powell* (2 Wood, 166; 1 E. & Y. 765) merely turned upon prescriptive evidence. The defence was title to tithe (in which the production of the original deed would be unnecessary) or exemption by prescription. That case, therefore, cannot be cited as an authority to shew that a bull or grant may be presumed within the time of legal memory. In *Lambert* v. *Cumming* (Bunb. 138; 1 E. & Y. 790) the abbey was founded before the time of legal memory, but the order of monks was changed in 1090. The change could make no difference; but, at all events, the defence was prescriptive. In *Save* v. *Lodge* (2 Wood, 366) the grant from Ric. 2 to the abbey was produced. Dugdale has printed the grant. It was not an original grant, but a confirmation of all former grants; and as the monastery had existed prior to legal memory, there was no difficulty in presuming that the former grants were made before legal memory. In *Hastings* v. *Toon* (3 Wood, 455) the defence was prescriptive, though the monastery was not founded till after the time of legal memory; but the point now under discussion passed sub silentio, and upon **[137]** prescriptive evidence the defendants were held to succeed. The case of *Oxenden* v. *Skinner* (4 Gwill. 1513; 3 E. & Y. 1384) is quite against the doctrine for which it was cited. There, a portion of the tithes, which had been severed from the rectory at the Conquest, was granted to the dean and chapter of Rochester in the time of Queen Elizabeth, but no possession was ever given to them. Lord Kenyon ruled that from long possession of the tithes by the owners of the estates, a grant by the dean and chapter might be presumed. But this was not a presumption of a grant of all the tithes against the rector, but of a portion of them, severed from time immemorial, against persons who had never had possession of them. Upon the whole, there can be no such presumption as that claimed for the defendants. A bull must be dealt with as a composition real; and a deed creating a composition real cannot be presumed from the long nonpayment of tithes. *Escourt* v. *Kingscoate* (4 Madd. 140; 3 E. & Y. 948). They must then give some evidence of the bull having issued. Neither can a grant be presumed under the same circumstances. Deeds must be produced, or evidence of such deeds given, making the tithes the subject of conveyance. *Heathcote* v. *Aldridge* (1 Madd. 236; 3 E. & Y. 728).

Mr. Simpkinson, in reply. It is not incumbent on persons claiming under a religious house to shew distinctly and unequivocally that their claim existed before the time of legal memory. In *Slade* v. *Drake* it is laid down that discharge in abbots must now be proved à posteriori; for no man living can now speak to the time of abbots. Now discharge à posteriori is correctly explained in Degge, p. 330. He says, "What was done before the dissolution of abbies must now be proved by what has been done since; for if monastery lands have been held all **[138]** the time of memory since the dissolution, freed from the payment of tithes, it shall be intended

they were so held before." In all the cases cited from Wood the evidence begins with the surrender of the monasteries. And in all these cases the monastery was founded subsequent to the time of legal memory. If the argument on the other side is good, what becomes of these cases? It is said that a bull or grant cannot be presumed; that you must prove the bull or grant by production, or give distinct and unequivocal evidence that such a document existed. In support of that proposition the opinion of Lord Hobart is cited; but that opinion is unsatisfactory. He says that in general there is no mischief in discharges created since memory, if they be true, and the original unknown; for they may be supposed and pleaded by prescription; but that in abbey land where the abbey was founded or the lands purchased, since the time of memory, there can be no reasonable presumption of a lawful discharge, because there is no prescription; and that to presume such a discharge is as much as to say all abbies have discharges for all their lands. This opinion of Lord Hobart was unnecessary for the decision of that case; and there is no reason why the Court may not presume an absolute discharge in abbey lands since the time of memory, as well as it may presume any thing else. *Mead* v. *Norbury* (3 Bligh, 211, 235).

Jan. 16th, 1835.—ALDERSON, B. This was a bill filed by the plaintiff the rector of the parish of Richmond, in Yorkshire, against the defendants, for an account of all their titheable matters.

The two first defendants set up as a defence that the lands occupied by them formed part of an ancient district of land formerly belonging to the masters and brethren of Saint Nicholas' Hospital, and that a modus of 1l. 19s. **[139]** 11d. is payable at Easter annually, in lieu of all the tithes of the lands comprised within such district. They annex to their answer a schedule of the lands comprising the district.

The two last defendants, Ford and Robinson, set up a different defence. They allege that the lands in their occupation were part and parcel of the scite and possessions of the monastery of the late White Friars, Friars Carmelites or Minors, at Richmond, one of the smaller monasteries; and that the abbot and monks of that monastery held them at the dissolution by prescription, or other lawful ways and means, absolutely discharged from the payment of all tithes.

Upon the first question, I intimated at the hearing my opinion to be that unless on further investigation it should be materially changed, I should feel it to be my duty to direct an issue to inquire into the validity of the alleged modus; and on further consideration I see no reason to alter that determination. I fully, however, agree with what is stated by Lord Eldon in the case of *Bullen* v. *Michell* in the House of Lords (4 Dow. P. C. 297; 3 E. & Y. 757), that it is the duty of this Court, and it is not the first time that I have had occasion to make the remark, to decide both on the law and on the fact; and that I ought not, merely in order to dispatch business or to get rid of some portion of my own responsibility, to send an issue to be tried by a jury where the conclusion mainly depends on the effect of written or printed documents, or on undisputed oral testimony. It is obvious that in such cases the Court is a much fitter tribunal than the jury for the purpose of determining the cause. But there is another class of cases in which the imperfect mode of taking parol evidence in this Court places us in a situation of no ordinary difficulty in ascertaining facts. No one can read the depositions taken in **[140]** a Court of equity, without being satisfied that it is only on tolerably clear cases of fact that they can afford real information. Where the individual credibility of the witness becomes important, which it always does where there is contradictory testimony, the Court must direct an issue, because in no other way can this be properly weighed and determined. What is really wanted is the oral examination and cross-examination of the witnesses; and the assistance of a jury is, as it seems to me, only incidental to this important object. I for one should be quite as well, and perhaps better satisfied, if, instead of directing issues, the trial of which often miscarries and causes infinite expense to the parties, it were competent to this Court in such cases, either to direct an issue, or to require the oral examination of witnesses to take place before itself, on an issue previously defined. The conscience of the Court, I should apprehend, would quite as well be satisfied by its own immediate conclusion on the evidence, as it could be mediately through the opinion of the jury; who, in cases of this description, are sometimes not altogether free from prejudice. If I thought, therefore, that no more light could be thrown on this case by further investigation, I should feel it to be my duty now to determine it; but when I am called upon to decide as to the

validity of the modus set up by the first two defendants, I am not able to satisfy myself fully either way, upon the evidence now before me. I wish to give no opinion on this part of the case at present. The materials now before the Court are sufficient to raise a question of some doubt, which I think it is probable may be settled by more full inquiry. I purpose, therefore, to direct an issue in the terms of the modus set forth in the defendants' answer and schedule, but with directions to the Judge, inasmuch as there probably will be some inaccuracy discovered in the setting forth of the district to indorse any **[141]** special matter on the postea which may be required for the just determination of the case, reserving all question of costs till the issue shall have been disposed of.

I now proceed to the consideration of the second question. The monastery in question, although one of the smaller abbeys, was not surrendered to the crown until 30 Hen. 8. It is clear, therefore, I think, that this is a monastery within the exception contained in the 31 Hen. 8. The 21st section of that act extends the exemption to all abbey lands, where the surrender to the crown was subsequent to February 4 in the 27 Hen. 8. It has been usual to speak of the exemption as confined to the greater monasteries, because the far greater number of the smaller abbeys were dissolved by the 27 Hen. 8. The true construction of the act, however, applies to all, whether great or small, surrendered after the given date. It is probable that the dissolution of the monastery in question was, under the 6th section of 27 Hen. 8, postponed for a short time. The actual surrender has been proved in this case, and is of the date of 19th January, 30 Hen. 8. This part of the defendants' case is, therefore, well made out. I think, also, that it is clearly established that the lands occupied by the defendants belonged to the abbey at the time of the dissolution.

It only, therefore, remains to be proved that the abbot and monks held these lands discharged from tithes at that period. Now this they might do, either by unity, bull, real composition, or prescription: and there is no doubt that on these pleadings it is open to the defendants to prove a discharge by any lawful means. The authority of Lord Hardwicke, in the case of *Lamprey* v. *Rooke* (Ambl. 291; 2 E. & Y. 148), and there are other authorities to the like effect, satisfies me that this may be done. But I am by no means satisfied **[142]** that this alters the nature of the proof required, although in the cases a general form of pleading is allowed in order to establish the case in point of fact.

Now the proof here given is, first, a warrant to the sheriff of Cumberland, 32 Edw. 1, for the apprehension and surrender to the abbot and community of one of their own body, who had ran away with part of the property of the convent. And this document, which neither carries the existence of the corporation so far back as the time of Rich. 1 nor shews that at the time of Edw. 1 they possessed lands, is all that the defendants produce to establish their case, in addition to the modern usage of nonpayment of tithes. According to the authority of *Clavill* v. *Oram* (3 E. & Y. 1369), and *Markham* v. *Smith* (11 Price, 126; 3 E. & Y. 1071), this proof would not be sufficient; for the Court in those cases required proof, independent of the fact of nonpayment, that the monastery was founded before time of memory, and that it was in possession of lands at that period. It has been said that this doctrine was overruled by Lord Chief Baron Alexander in the case of *Donnison* v. *Elsley* (1 M'Clel. & Younge, 1; 3 E. & Y. 1393). To a certain extent it undoubtedly was so, but no case has yet been decided in which both the facts of the antiquity of the abbey and the possession of the lands were inferred from the modern usage only.

In these cases of conflicting authorities, it is well to have recourse to principle and analogy.

It has been decided, and I apprehend that the law is now settled on that point, that you cannot infer a real composition within time of memory from the mere payment of a given sum in lieu of tithes. Why is this so? Probably, because the only rational inference is that from what has been long done, and for which no beginning can be found, you ought to conclude that the same thing has **[143]** been done before time of memory. From a mere payment, therefore, you infer a payment before legal memory, arising from some parol agreement between the parties: but you do not infer a composition-real, because that is a payment which originates by an express document or deed, made under particular sanctions, and executed by particular individuals, for the express purpose of preservation in future, and originating after the time of Rich. 1. Now to draw such a complicated inference of various facts,

instead of the simple and obvious one before mentioned, would not be conformable to right reasoning; the Court, therefore, requires some additional fact to be added to the proof of non-perception and payment of a fixed sum, before it infers a composition-real.

So again, in the case of exemption by bull: there must be some proof, at least, that such a document existed, because the existence of such a document, after legal memory, is not the proper and natural inference from the mere proof of nonpayment of tithes. It seems to me that the foundation of an abbey before a given period is a fact of a similar description. It must have been done by some formal act of incorporation, of which it is reasonable to expect some traces to be left. I am, therefore, at present induced to think that the opinion of the Court in *Clavill* v. *Oram* and *Markham* v. *Smith* is, at least to the extent of requiring some additional proof of the existence of the abbey itself before legal memory, well founded; but I fully concur with Lord Chief Baron Alexander in holding that where such proof has been given as to the antiquity of the foundation itself, from which properly to infer the two further facts of continued nonpayment of tithe, and that the lands in question belonged to such an abbey at the time of the dissolution—that those lands had also belonged to it from the time of its foundation, and consequently before legal memory.

As this point was very fully and ably discussed in the **[144]** course of the argument, I have thought it right to examine the authorities, and to deliver my opinion upon it; but it is not necessary for me to hold in this case that, even if the evidence of modern usage as to nonpayment of tithes had been satisfactory to my mind, the plaintiff would, notwithstanding, be entitled to a decree against these defendants; for if the law were otherwise, it seems to me quite impossible to say that there is any satisfactory evidence of such nonpayment in this case. The only witnesses on this subject are Thomas Bradley and Ottiwell Tomlin, who were examined for the defendants; and Leonard Robinson and P. Brackenbury, who were witnesses for the plaintiff. Bradley only proves that the lands belonged to the Friary; but neither he nor Ottiwell Tomlin say one word about their not having paid tithes. Of the other two witnesses, one, Leonard Robinson, is only twenty-six years of age, and has known the premises only eight years; and all that he says as to the nonpayment is found in an exception contained in his answer to the tenth interrogatory. If taken literally, it would include the particular closes in question; but the attention of the witness is not called to the specific fact; he is speaking of two classes of land, the one which pays without dispute, the other the lands in question, of which, with some exceptions, the tithes have not to his knowledge been paid. This evidence is scarcely worth consideration.

The only remaining evidence is that of Pierce Brackenbury, aged sixty, who has lived from his infancy at the place, and was employed between 1795 and 1803 or 1804 as a tithe collector. He says that all the lands comprised in the maps in this suit have, with some trifling exceptions, paid neither tithes nor satisfaction nor composition for tithes. His evidence, therefore, is clearly incorrect, for it would negative the payment of the modus respecting which I have directed an issue. It is clear that on this vague and incorrect evidence I ought not to act; **[145]** I therefore think that there must be a decree against the two last defendants, Ford and Robinson, for an account of all tithes due, and with costs.

Decree accordingly.

THE PRINCIPAL, FELLOWS, AND SCHOLARS OF JESUS COLLEGE, in the University of OXFORD, *Plaintiffs*; RICHARD GIBBS, THOMAS EDWIN GIBBS, SAMUEL PLUMB, AND DANIEL PLUMB, *Defendants*. Dec. 8th, 11th, 1834; Jan. 16th, 1835.—To a bill filed for an account of tithes, an answer containing an alternative of inconsistent defences is bad in toto. Therefore, where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining statute of 13 Eliz.: Held, that this alternative was inadmissible; that the latter branch of it could not be rejected as surplusage; and that the plaintiffs were entitled to a decree.—A party who is directly interested

in the event of an action or suit, by being liable for the costs, cannot be rendered a competent witness under the provisions of the stat. 2 & 3 Will. 4, c. 42, s. 26.—The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of that document.—The taking of a husbandry lease bonâ fide by a religious house is not within the Statute of Mortmain.

[S. C. 4 L. J. Ex. Eq. 42. See further, p. 445, post.]

Bill against four occupiers of lands in the parish of Tredington, in the county of Worcester, for an account and satisfaction of great and small tithes, since the 12th of May, 1833. Defence—farm moduses.

The rectory of Tredington consists of several townships and hamlets, and is held in undivided portions. At the time of the execution of the indenture hereinafter mentioned, and thenceforth until the institution of the present suit, the Rev. Dr. Jane and the Rev. Thomas Hopkins were joint rectors of the parish. By an indenture of demise, dated the 7th of November 1832, and executed between Jane and Hopkins of the one part, and the plaintiffs of the other part, the said Jane and Hopkins demised to the said plaintiffs all and singular the great and small tithes, yearly arising, &c. out of the parish of Tredington; excepting out of the said demise, unto the said rectors, all and all manner of Easter offerings, mor-**[146]**-tuaries, &c., to hold the said tithes and tenths to the plaintiffs and their successors for the time being from the 12th day of May 1832, for and during the term of twenty-one years, if they, the said rectors, should so long live and continue rectors of the said parish.

The bill alleged that, by virtue of this demise, the plaintiffs were entitled to receive the tithes in kind; and it stated certain notices which had been served upon the several defendants, requiring them to set out their tithes, and stating that, after the 12th of May 1833, the several compositions or money payments of 17s., 7s., and 18s. 6d., theretofore paid by the defendants respectively, would no longer be received.

The answer, after stating the defendants' belief that the several sums of 17s., 7s., and 18s. 6d. had, from time immemorial, been paid and payable yearly as moduses, in lieu of tithes for their respective occupations, alleged as follows:—"And these defendants say they respectively humbly insist upon such payments as moduses; but, in case such yearly payments, or any of them, for any reason, be not good and valid moduses from time immemorial, which these defendants do not admit, then they humbly insist that the same are and must be taken to have been payable as or by way or by virtue of a good and valid real composition, made by and with the assent of all parties whose concurrence or assent was necessary therein and thereto; and before the restraining statute made and passed in the 13th year of the reign of Queen Elizabeth." In conclusion, the defendants submitted whether the plaintiffs were, as a body corporate, capable of taking such lease as aforesaid, and they claimed the same benefit as if they had pleaded or demurred to the bill.

Mr. Boteler and Mr. G. Richards, for the plaintiffs. The defendants say that the plaintiffs, as a body corporate, are not capable of taking a lease; they, therefore, deny the plaintiff's title. On the other hand, admitting the plain-**[147]**-tiff's title to be good, they set up moduses in respect of the several farms and lands in their occupation; insisting, however, that if these are not moduses, they are compositions real, made with the assent of all parties before the restraining statute of 13 Eliz. As to the first point, the taking a lease for a very long term of years is certainly mortmain within the 17 Edw. 1, which ordains that no person, religious or other, buy or sell, or under the colour of any gift or lease or any other title, receive lands or tenements, whereby such lands or tenements may anywise come into mortmain. But it is too clear to admit of any doubt that a religious body, taking a mere common husbandry lease, is not within the Statute of Mortmain. In Brooke's Abridgment (Bro. Mortmaine, pl. 27) it is said by Nele, "Lease for 100 or 200 years is mortmain for the length of time; for colour of a term, &c." Brooke cites from 3 Edw. 4, fol. 13, 14; and the distinction is there clearly stated. Nele there says, "Where a small term has been recovered or given to a religious man, as twenty years or forty years, that is not contrary to the statute de religiosis; otherwise in case it was of a term of 100 or 200 years, so that by long continuance of possession, it might perhaps continue for ever, and come into mortmain. But of a small term the law will not take notice." To the same effect is Viner (Vin. Abr. Mortmain (B.), pl. 21), though his observation

in the margin is wrong, as to a supposed mistake of Brooke. To the same effect, likewise, is 4 Hen. 6, fol. 9, pl. 1. Besides, it is clear that neither the 17 Edw. 1 nor the 15 Rich. 2, c. 5, apply to tithes. The object of these statutes was to prevent the inheritance of lands from coming into religious houses.

Then, with respect to the moduses, the defendants have no right to an alternative defence. They may insist either upon a modus or a composition real, but not upon both. In *Bennett* v. *Neale* (Wightw. 324; 2 E. & Y. 630), on a bill for tithes by a rector, the **[148]** defendants set up a modus. At the hearing, the evidence did not apply to an immemorial payment, but it was contended that it was admissible to prove a composition real. Wood, B., would have admitted it, but the rest of the Court were against him, and thought that the defence of a composition real and a modus stood on distinct grounds. It must be admitted that they did not in this case plead in the alternative; but Graham, B., said that a composition real had always been considered, from the earliest time, as a totally distinct head of defence from a modus decimandi. There was afterwards a second suit in this matter, in which the defence set up was a composition real; but the defendants failed.(*a*) In *Ward* v. *Shepherd* (3 Price, 608; 3 E. & Y. 795) the defendants insisted on a composition real; the evidence went to establish a modus, and the plaintiff had a decree. In a second suit, that of *Fielder* v. *Meynell* (not reported), the defendant set up a modus, and succeeded. There, however, the point was not carried so far as it is in this case. The defences were separate, the pleaders thinking they could not put both defences on the record; but in *Leach* v. *Bailey* (6 Price, 504; 3 E. & Y. 953) the pleading was in the alternative, and was held to be bad: that case, therefore, is decisive of the present. If this mode of pleading be allowed, every rank modus may be turned into a composition real; and the clergyman will never know to what point he ought to direct his evidence.

Mr. Simpkinson, Mr. Sidebotham, and Mr. W. Eagle, for the defendants, gave up the objection as to the invalidity of the lease, and proceeded to argue the question of pleading. These defences are not inconsistent, and the **[149]** pleading is allowable. In *Atkins* v. *Hatton* (2 Anstr. 386; 2 E. & Y. 403) it was held that a payment set up in an answer as a modus or composition real is not bad for uncertainty. *Haywood* v. *Nicholls* (3 Gwill. 1120; 3 E. & Y. 1272), *Franklin* v. *Holmes* (3 Gwill. 1229; 3 E. & Y. 1307), *Carte* v. *Ball* (3 Atk. 496; 2 E. & Y. 103), and *Nagle* v. *Edwards* (3 Anstr. 702; 2 E. & Y. 427; 2 Eagle on Tithes, 366, n.), are likewise authorities in favour of the defendants. [Alderson, B. The defendants set up one defence, but do not say whether it is a modus or a composition real. They insist upon some payment, but say it is either one thing or another—they do not know which. It is a very ambiguous answer. In *Atkins* v. *Hatton* the Court treated it as a plea of a modus; not as an alternative plea. Besides, the composition was stated to have been immemorially paid; it was not, therefore, in fact, a composition real. That case however is the strongest in your favour. Under that you may be entitled to go into the question of modus, though not to go into the question of the composition real.] There are various authorities to shew that where the same answer insists on a modus and on a composition from year to year requiring notice, the Court may reject the one defence and enter into the consideration of the other. *Atkins* v. *Lord Willoughby de Brooke* (2 Anstr. 397; 2 E. & Y. 406), *Bishop* v. *Chichester* (2 Bro. C. C. 161; 3 E. & Y. 1354), *Wolley* v. *Brownhill* (M'Cleland, 317; 3 E. & Y. 1152). In *Skipwith* v. *Pickering* (1 Wood, 265) the defendants insisted on all the legal discharges from tithes that could be made out. In *Wilkinson* v. *Foot* (1 Wood 129), the defendant insisted on a sum payable by way of modus or composition. In *Travis* v. *Oxton* (3 Wood, 523; 3 E. & Y. 1248) the wording of the issue was, "whether the tilt penny paid by the occupiers of **[150]** houses within the townships of Great Sutton and Little Sutton to the vicar of the parish of East Ham had been paid and accepted as modus or composition in lieu and satisfaction of tithe hay." The cases of *Gurdon* v. *Sell* (1 Wood, 136) and *Humphreys* v. *Wagstaff* (1 Russ. & M. 529) are likewise authorities in favour of the defendants. [Alderson, B. The difficulty in this case is that you set up an alternative, which requires a different species of proof from the defence which you first insist upon: a mode of pleading certainly calculated to embarrass the party. In *Skipwith* v. *Pickering*, the defendants could not have set up a

(*a*) *Bennett* v. *Skeffington*, 4 Price, 143; Dan. 10; 3 E. & Y. 827.

modus, though they could insist on any thing that went to the total discharge of tithes. In *Wilkinson* v. *Foot* and the other cases there was no difference between the modus and composition. You are setting up in the alternative a composition real which is a different thing. You say that the payment either did or did not exist from time immemorial: there is the difficulty.] An error in one part of the defence does not vitiate the whole. A defendant is not required to set forth his defence with technical precision. There is no rule in equity against duplicity in pleading, though there is at law. There is a great difference between bills to establish, and answers insisting on a modus. In *Scott* v. *Allgood* (4 Gwill. 1369) the same modus was set out both in the answer and in a cross bill filed by the defendants against the rector; the cross bill was dismissed for insufficiency in the statement of the modus while the answer was established. *Ellis* v. *Saul* (2 E. & 360) and *Jenkinson* v. *Royston* (5 Price, 495; E. & Y. 896) are authorities to shew that second alternatives in an answer may be rejected as surplusage. In *Chichester* v. *Price* (2 Younge) a modus was pleaded payable "on or about" a certain day, and Lord Lyndhurst held the **[151]** modus well laid and rejected the words "or about" as surplusage. In *Williams* v. *Goodchild* (2 Eagle on Tithes, 367), the defendant pleaded both title to tithe and exemption from tithe, and this was held to be good. The same thing was done in *Powell* v. *Powell* (2 Wood, 166; 1 E. & Y. 765). Generally it is sufficient in this Court if a good defence can be collected from the terms of the answer. *Lamprey* v. *Rooke* (Ambl. 291; 2 E. & Y. 148), *Swyer* v. *Weld* (2 Wood, 18), *Whitehead* v. *Flintoft* (2 Wood, 462), *Harpur* v. *Salt* (2 Wood, 468), *Bishop of Oxford* v. *Collins* (3 Wood, 359), *Wetherhead* v. *Bradshaw* (3 Wood, 426), *Dean and Chapter of Ripon* v. *Parker* (4 Wood, 122), *Trin. Coll.* v. *Barrington* (4 Wood, 279), *Delves* v. *Lord Bagot* (4 Wood, 298), *Beevor* v. *Taylor* (4 Wood, 506), *Dean and Canons of Windsor* v. *Robinson* (4 Wood, 545), *Uhthoph* v. *Lord Huntingfield* (2 E. & Y. 649), *Prevost* v. *Bennett* (1 Price, 236; 2 E. & Y. 705).

Mr. Boteler, in reply. The defendants have made the most of their defence and this is not a case for the indulgence of the Court. The pleading in question is clearly alternative; it is not a second pleading of a modus. In *Ward* v. *Shepherd* (3 Price, 608; 3 E. & Y. 795), a case similar to the present, the pleader did not think himself at liberty to put this species of pleading on the record; in *Leach* v. *Bailey* (6 Price, 504; 3 E. & Y. 953) it was resorted to and did not succeed. The Court expects clear pleading. The case of *Nagle* v. *Edwards* (3 Anstr. 702; 2 Eag. Tithes, 366, n.) stands alone; the parties there must have waived the objection. *Haywood* v. *Nicholls* (3 Gwill. 1120; 3 E. & Y. 1272) was a feigned issue under an inclosure bill and is inapplicable; but in that case was cited **[152]** a case of *Smith* v. *Goddard*, where the defendant, having put in two answers, the first insisting on a modus, the second on a composition real, the Court held him to his first answer. On what grounds this was done does not appear; but it must have been on special grounds, because, from a note in Gwillim (3 Gwill. 1122), it appears that that case was decided on special circumstances. *Franklin* v. *Holmes* (3 Gwill. 1129; 3 E. & Y. 1307) was a case at law and turned on the question, what should be evidence of a composition. A class of cases has been brought forward in which a modus has been insisted upon, but, if not a good modus, then a composition from year to year. Now in these cases the plaintiff is put to little or no difficulty; there are not, as there are in this case, distinct masses of evidence against the plaintiff: all the evidence would apply simply to the modus; and it is settled that the defendant cannot insist on a temporary composition if there is not a modus. Here there are two substantial defences; payment either in one way or in another. Another class of cases has been adduced, of which the leading case is *Atkins* v. *Hatton* (2 Anstr. 386; 2 E. & Y. 403), and in which, it is said, the very point now before the Court was under discussion. Now the very contrary of this is the fact. The words "composition real" were mentioned in those cases, but the composition real was stated to have existed time out of mind. The Court in effect said, it is not a composition real; the defendants mean no more than an immemorial payment by way of composition. The form of the issue proposed in this case is conclusive; it was merely upon the modus. If a composition real had been taken into consideration there would have been a double issue; namely, whether there was a composition real or a modus. In *Wilkinson* v. *Foot* (1 Wood, 129), *Gurdon* v. *Sell* (1 Wood, 136), and other **[153]** cases, the word composition only is introduced. In *Travis* v. *Oxton* (3 Wood, 523; 3 E. & Y. 1248) the question was not whether the tilt penny was a good modus

or not, but whether it had been paid as a modus or composition. [Alderson, B. It was in fact to shew the extent of the endowment.] In *Skipwith* v. *Pickering* (1 Wood, 265), and other cases relating to abbey lands, a general mode of pleading has been allowed; but, even then, they have not let in any general defence, but that of prescription or immemorial grant. Another class of cases has been cited, in which it has been considered that the Court would reject the second alternative, or, where there was any uncertainty, reject the words which made the uncertainty. But, in the cases cited, the surplusage was of minor importance; as, for instance, where the expressions "on or about," and "owners or occupiers," had been used. Then *Williams* v. *Goodchild* (2 Eagle on Tithes, 367) and *Powell* v. *Powell* (2 Wood, 166; 1 E & Y. 765) have been cited, to shew that it is allowable in the same defence to set up exemption from tithes and title to tithes. In *Williams* v. *Goodchild* the defendant insisted that the lands in question were part of the glebe or demesne lands of the dissolved monastery of St. Peter's, Westminster, to whom the advowson and manor of Hendon, in which the lands were included, belonged; that these lands belonged to the monastery at the time of its dissolution; that the monastery held these lands discharged from tithes, or entitled to the tithes thereof; and that, after the dissolution, the advowson and manor of Hendon were granted in fee to the person under whom the defendant claimed. In this case, therefore, only that particular sort of exemption was pleaded, which arises from unity of possession; there was not any distinct allegation of exemption from tithes and title to tithes. Besides, it does **[154]** not appear that any decree was ever made in this case. The case of *Powell* v. *Powell* is similar to that of *Williams* v. *Goodchild*. The union of chapel and lands within the abbey might exist in that case, as well as the union of manor and lands in the former case. But there was not an allegation of a distinct title to tithes, standing independent of the exemption which was claimed. Lastly, a variety of cases have been cited to shew that it is sufficient, if a good defence can be collected from the terms of the answer. Now, of these cases, *Whitehead* v. *Flintoft* (2 Wood, 462) was a compromise; in *Beevor* v. *Taylor* (4 Wood, 506) the defendant merely insisted on an annual composition; and, in almost all the other cases, an account was decreed. Upon the whole, no mode of pleading like the present has ever been allowed or established. The case of *Leach* v. *Bailey* (6 Price, 504; 3 E. & Y. 953) was decided on principles which ought to govern the present case; and Horace's rule, "Denique sit quod vis simplex duntaxat et unum," is here peculiarly applicable.

Alderson, B., at the close of the argument, observed that the question of pleading, which had been raised, deserved much consideration, and he should postpone his judgment.

The cause was then argued upon the merits; but, as the judgment of the Court was ultimately given with reference solely to the question of pleading, the arguments on the merits are omitted.

In the course of the cause the defendants offered to read the evidence of Thomas Gibbs, who was a defendant in another suit instituted by the same plaintiffs for tithes in the same parish.

Mr. Boteler, for the plaintiffs, objected that the witness **[155]** was incompetent. He had admitted in one of his depositions that he had entered into an agreement to bear a portion of the costs of this and certain other suits instituted by the plaintiffs for a similar purpose.

Mr. Simpkinson and Mr. Sidebotham, contrà. The agreement is illegal, and amounts to maintenance, and is such as a Court of justice will not enforce. The agreement is not merely respecting this suit, but a variety of other suits mentioned in the deposition. Now jointly to defend a tithe suit, where the defences are of a distinct nature, is maintenance. *Oliver* v. *Bakewell* (4 Gwill. 1381). The principle of that case applies to the present. The witness therefore cannot be considered as having a pecuniary interest, but only a moral bias, of which this Court will take no notice. But, supposing the agreement to be legal, and the witness liable for costs, still he would be rendered competent by the provisions of the 3 & 4 Will. 4, c. 42, ss. 26, 27: and, if a bill were afterwards brought against him for contribution, as in *Stone* v. *Yea* (Jacob, 426), the record of the decree in the present suit, which must necessarily be produced on that occasion, would, by bearing the indorsement of his name, operate in his discharge. A decree of this Court is equivalent to a judgment at law.

ALDERSON, B. There is no doubt that the evidence of this witness is not admissible. Upon the first point, if an action were brought against him, he could not set up his own maintenance in bar of the action; nor can he say in this Court, I have done an illegal act, of which I shall avail myself. As to the second point, the case is not within the act. The witness is certainly interested in the result of the suit; but the act only applies to results which may be given in evidence between parties who are privy in estate, **[156]** or connected by some custom. This is the ordinary case of a person interested directly in the event of a suit. He may lose or gain, according as the suit succeeds or fails; and that is not provided for by the act, nor was it ever intended.(*a*)

Upon the defendants offering to put in evidence a copy of the rector's book, the original of which had been produced by Mr. Hopkins, Mr. Boteler objected to its reception, the defendants having in their possession the original book: at all events, if this evidence were entered as read, the defendants must pay the costs.

Mr. Simpkinson, contrà, contended that it was necessary for the defendants to be prepared with the secondary evidence, inasmuch as the witness might have refused to produce the book.

ALDERSON, B. You could not have proved it by secondary evidence, unless the document had been in the possession of a party not bound to produce it. You cannot produce secondary evidence of a document, if a witness refuses to produce the original. He does it, it is true, at his own peril; but you have no remedy, except an action against him. He is liable to make good to you in damages the loss which you have sustained. I do not mean to say that you have not adopted a rational course; but you, having the original, must pay the costs of your extra precaution.

Jan. 16th, 1835.—On this day the cause stood for judgment.

ALDERSON, B. There are two questions in this case. The one preliminary, depending on the alleged inaccuracy **[157]** of the pleadings; and the other, whether, supposing the pleadings to be sufficient, the Court on the merits ought to decree in favour of the plaintiffs, or direct an issue to try the validity of the moduses on which the defendants rely.

The plaintiffs contend that on the pleadings as at present framed, they are entitled to a decree, inasmuch as the defence set up by the answer is wholly ambiguous and calculated to mislead them; and, consequently, that I ought not to allow the defendants to go into proofs to establish either branch of the defence. On this point numerous cases have been cited, and I have had considerable difficulty in coming to a conclusion upon them. I think, when we advert to the course of the proceedings in a Court of equity, that some restriction of this kind seems well founded in principle. The fact that a defendant is obliged to swear to the truth of his answer would of itself necessarily exclude inconsistent statements. For how could a defendant be permitted to attest, by his oath, the truth of two statements wholly irreconcileable with each other? But although this would be impossible to be permitted, on account of the perjury which would thereby be introduced, it would not necessarily follow from thence that an alternative statement might not be allowed. For a party might swear truly enough that the fact was either in one or the other of two ways. The difficulty, however, would be that then there is in truth no answer at all upon oath. For no one can affirm that the defendant means to swear really to his belief as to either the one or the other of the two branches of the alternative. I think, therefore, that upon principle, such an answer must be bad; for a statement of two or more inconsistent propositions in the alternative is only a mode of making two inconsistent statements upon oath, without incurring the guilt or running the risk of perjury. Besides, if two inconsistent statements are to be thus allowed, being put as branches of one alternative proposition, it is impos-**[158]**-sible not to see that any number would fall within the same rule; and the whole advantage, if there be any, of a statement on oath by the defendants' answer to the plaintiffs' bill would be lost, by a most obvious evasion, under the authority of the Court. Unless, therefore, some clear and distinct decision of a Court of equity could be produced, establishing the propriety of such an alternative statement in an answer, I should be disposed to decide against it.

(*a*) See *Braithwait* v. *Coleman*, 2 Harrison's Index, 1046.

Let us then examine the authorities and see how far they are conclusive upon this question.

I can lay no stress upon the cases of *Haywood* v. *Nichols* (3 Gwill. 1120; 3 E. & Y. 1272) and *Franklin* v. *Holmes* (3 Gwill. 1129; 3 E. & Y. 1307), because, being issues directed out of the Court of King's Bench, they appear to me to have no bearing at all on this point.

The other cases may be ranged under different divisions, as where, on the pleadings, an immemorial payment is alleged, which is called, in some cases, a modus or composition; *Atkins* v. *Lord Willoughby de Brooke* (2 Anstr. 397; 2 E. & Y. 406); or an immemorial composition real or modus; *Atkins* v. *Hatton* (2 Anstr. 386; 2 E. & Y. 403). Instances of such pleading are also to be found in *Wilkinson* v. *Foot* (1 Wood, 129) and *Travis* v. *Oxton* (3 Wood, 523; 3 E. & Y. 1248). But all those cases are materially distinguishable from the present. They are all instances of immemorial rights. In truth, a modus and an immemorial composition real are established by precisely the same evidence, and there is no solid distinction between them. Such vagueness of statement is allowed, because no one can be supposed to know the original nature of a right which commenced before the time of legal memory.

Then there is the case of abbey lands, in which, ac-**[159]**-cording to Lord Hardwicke, in *Lamprey* v. *Rooke* (Ambl. 291; 2 E. & Y. 148), followed afterwards by *Skipwith* v. *Pickering* (1 Wood, 265), *Humphreys* v. *Wagstaff* (1 Russ. & M. 529), and other authorities, it is allowable to state the discharge generally by prescription or some other lawful means; but this is an indulgence arising out of the statute, which gave the exemption in general language. It seems, therefore, to be taken as a rule in pleadings in equity, contrary to the case of *Slade* v. *Drake* (Hob. 295; 1 E. & Y. 314) at law, that an answer stating that the lands in the hands of the abbey at the time of the dissolution were held discharged of tithes, would be sufficient. And certainly, if that were so, the expression that they were discharged by prescription, or some other lawful means, would not alter the case. In the present case it would not be sufficient for the defendants to plead that their lands were discharged, because they are required to shew, by their answer, how they are discharged. This class of cases, therefore, seems to me to be distinguishable also. In this class I include also the cases of *Williams* v. *Goodchild* (2 Eagle on Tithes, 367), and *Powell* v. *Powell* (2 Wood, 166; 1 E. & Y. 765); for the title there set up must, I think, have been a title in the abbey, both to the tithes and to the lands titheable. In other words, a discharge, either by immemorial unity or by prescription, was there allowed to be pleaded in the case of abbey lands.

There is another class of cases in which the defendants have been allowed to make and to state two grounds of defence—one a modus, another a composition undetermined by notice; such are the cases of *Atkins* v. *Lord Willoughby de Brooke* (2 Anstr. 397; 2 E. & Y. 406), and *Wolley* v. *Brownhill* (M'Cleland, 317; 3 E. & Y. 1152). But there no inconsistent facts are stated in the answer. The defendant **[160]** avers the existence of an immemorial payment, and that no notice has been given to determine it. The latter fact is immaterial, if the point be proved; it may become material if the Court give credit to the plaintiffs' case. But there is no inconsistency between the facts stated in the answer. Both may be true. This naturally brings me to that class of cases in which it is laid down that the defendant may deny the plaintiff's title, and also set up a defence against it. *Carte* v. *Ball* (3 Atk. 496; 2 E. & Y. 103) is an instance of this being done. But here, also, there is no inconsistency. The defendant is not called upon to admit or deny the plaintiffs' case; he may be wholly ignorant of it; and it is sufficient, if he can truly state this, to call on the plaintiff to prove it to the satisfaction of the Court. Nor, indeed, if the defendant denied the plaintiff's title, would there be any real inconsistency in afterwards pleading an exemption. For it may be quite true that another person, and not the plaintiff, is primâ facie entitled to the tithes, and that against such other person the defendant has a good defence. Nothing in such a case as this is opposed to the principle which I set out with in this examination, that an answer is bad which either contains inconsistent defences, or an alternative of inconsistent defences, which would only be the same thing in an evasive mode.

There remain only a series of instances which have been adduced of similar pleadings. *Swyer* v. *Weld* (2 Wood, 18), *Wetherhead* v. *Bradshaw* (3 Wood, 426), *Trinity College* v. *Barrington* (4 Wood, 279), *Dean and Chapter of Ripon* v. *Parker*

(4 Wood, 122), *Dean of Windsor* v. *Robinson* (4 Wood, 545), where it is said similar objections might have been taken. We cannot tell whether they were taken or not; but certainly in all the above cases the plaintiffs succeeded. I cannot, therefore, treat **[161]** these as authorities. *Whitehead* v. *Flintoft* (2 Wood, 462), and *Delves* v. *Lord Bagot* (4 Wood, 294; 3 E. & Y. 1331), seem to have ended by some compromise between the parties. The former, indeed, may have turned on the failure of the proof as to the plaintiff's title; and, if so, the correctness or incorrectness of the defendant's answer would have become immaterial. I have not adverted to the cases of moduses pleaded as payable by the owners or occupiers, because I do not think that an alternative pleading in the sense here meant. Nor do I mention the case of *Prevost* v. *Benett* (1 Price, 236; 3 E. & Y. 705), except to say that there the modus seems to have been correctly pleaded.

Upon the whole, then, I can find no case out of the numerous decisions which the great industry of the defendants' counsel has brought before me, which seems at variance with the principle with which I set out.

On the other hand, however, I find a direct and plain authority in accordance with it. I allude to the case of *Leech* v. *Bailey* (6 Price, 504; 3 E. & Y. 953), where Lord Chief Baron Richards, whose long experience in Courts of equity entitles his judgment to peculiar weight, expressly decided that such alternative pleading was bad, and could not for a moment be allowed. Founding myself, therefore, on the principle supported by one clear authority, and not contradicted, as it seems to me, by any of the various authorities cited, I have come to the conclusion that an answer so framed is bad, and cannot be sanctioned by the Court.

But then, is that the case here? This answer first states several moduses, as having been immediately paid in the usual form, and then proceeds thus:—"And these defendants say that they insist upon such payments as moduses; but in case such payments, for any reason, be not good and valid moduses, or a good and valid modus, **[162]** from time immemorial, which they do not admit, then they insist that the same must be taken to have been payable as or by virtue of good and valid real compositions, or a good and valid real composition, made by and with the assent of all parties, whose concurrence or assent was necessary therein or thereto, and before the restraining statute made and passed in the 13 Eliz."

Now this appears to me liable to the above objection. The payment is in truth pleaded, first, as immemorial, and so a modus; and, secondly, as not immemorial but good as a real composition before the 13 Eliz., and after Rich. 1. Now, can a party be allowed to swear that it is either immemorial or not immemorial, and yet good either way? For the reasons I have above given, I think he cannot do so.

Can I, then, reject this latter part as surplusage? Various authorities have been cited for this purpose. In *Ellis* v. *Saul* (1 Anstr. 332; 2 E. & Y. 360) a modus was not correctly stated, and the Court permitted the words "a short time before 13th February," which caused the ambiguity, to be struck out. Again, in *Jenkinson* v. *Royston* (5 Price, 495; 3 E. & Y. 896), redundant words were treated in the same way. In *Uthoff* v. *Lord Huntingfield* (1 Price, 237; 2 E. & Y. 649), the Court, in order to attain the justice of the case, went still further. There the modus was pleaded as payable from time immemorial to the rector of the united parishes of H. and C., and the union of the parishes was within legal memory. The Court, however, directed an issue whether, from time immemorial, the modus had been payable to the rector of H. till the union, and afterwards to the rector of H. and C. But these are all cases of verbal inaccuracy, and could not have embarrassed the plaintiff in conducting his case; they resemble the case in which I have just given judgment, of an incorrectness in the schedule as to the east district, in respect of which the modus is paid.

[163] There remain only the two cases of *Nagle* v. *Edwards* (3 Anstr. 702; 2 E. & Y. 427) and *Leech* v. *Bailey* (6 Price, 504; 3 E. & Y. 953), which are in direct opposition to each other as to this point. In the former the Court allowed the defendant to go into the case, notwithstanding he had pleaded inconsistent defences. In the latter, Lord Chief Baron Richards made a decree for an account on this very ground; and, as such a decree is not conclusive on the subject, I think that the latter is the best precedent for me to follow. It is to be observed that, in *Nagle* v. *Edwards*, the Court might be influenced to give the defendant the indulgence of being heard, by their desire to settle the question in future, which they did, by ultimately making a decree for the plaintiff on the merits. If in the case before me, the defendants'

evidence had wholly failed to set up a modus, I should probably have contented myself with determining the case on that ground alone. But the evidence of the defendants in that respect is such as might not improbably have induced me to direct an issue. I have not arrived at so clear an opinion on that point as to induce me to decide at once in favour of the plaintiffs.

Upon the whole, I think that, on the preliminary objection, I ought to make a decree, directing an account to be taken of the tithes due, and that the decree should be with costs, but with liberty to the defendant to have this specially so stated that, in case there be any further litigation on this point, the present decision may not prejudice them as to the merits.

This will decide all the questions in the other cases,(*c*) and makes it unnecessary to distinguish the case against Thomas Gibbs from the rest.

[164] HADOW *v.* BARNETT AND OTHERS. Dec. 12th, 1834.—Where a modus is laid with exceptions, it may be proved by some witnesses who speak to a general modus, and others who speak to the exceptions.—A second set of depositions taken upon the same interrogatories, rejected.—Semble, that the decision in *Willis* v. *Stone*, 1 Y. & J. 262, is questionable.

This was a tithe suit, and the defendants set up various moduses. Of these, one was laid as a modus for all tithes except the tithes of milk and of wood, and with some other specified exceptions. With a view to prove this modus, one of the witnesses deposed to a modus covering every description of tithes whatever. It was objected that his evidence could not be read, as he proved a totally different modus from that which had been laid in the answer; but per

ALDERSON, B. I think it can be read, valeat quantum. In some cases the Court could not admit evidence of this nature, because it did not know to what point the evidence was to be directed. Here the defendant says he can prove the general modus by some witnesses, and qualify it by others.

In the same suit a witness had been examined in the country for all the defendants, except Joseph Barnett, and had afterwards been examined in London upon the same interrogatories, for all the defendants. It was stated at the bar that there was a total variance between the depositions taken on the first, and those taken on the second examination; and it was submitted that the second depositions must be rejected, except perhaps as they related to the defendant Barnett.

The Court admitted the depositions as they related to the defendant Barnett, and rejected them as to the other defendants.

In the same suit Mr. Boteler, for the defendants, observed that, inasmuch as the defendants had not by their **[165]** answer alleged any special custom in support of the exemption claimed by them from payment of tithes for wood cut for fuel and husbandry purposes, he apprehended they could not resist a decree for the tithe of wood. That in *Willis* v. *Stone* (1 Y. & J. 262) it had been decided that wood cut for husbandry purposes is liable to the payment of tithes, unless there is a special custom to the contrary; but he said that the decision in that case, though it had been followed in other instances, was a very questionable one, and had never been approved by the profession.

Alderson, B., apparently assented to this observation, but said that, if the case should ultimately turn upon this point, it would be better that he should decide it upon the authority of *Willis* v. *Stone*, and that the defendants should carry the case to the House of Lords, upon appeal from his decision.

It did not, however, become necessary to decide this point, the defendants failing in their defence for want of evidence.

Mr. Simpkinson, Mr. Duckworth, and Mr. Younge, for the plaintiff.

Mr. Boteler, Mr. Wigram, and Mr. Perry, for the defendants.

(*c*) There were several other suits between the same plaintiffs and other defendants.

[166] EX PARTE NORTHWICK. IN THE MATTER OF THE LONDON AND BIRMINGHAM RAILWAY COMPANY. Dec. 23rd, 1834.—Where an act of Parliament establishing a railway company, authorized the company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold: Held, that a tenant for life, who had redeemed the land tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company.—The costs of an application to the Court under such an act of Parliament, to have the purchase-money applied in the redemption of the land-tax, will be allowed, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.

[Followed, *In re Bethlem Hospital*, 1875, L. R. 19 Eq. 459.]

The petitioner, Lord Northwick, was tenant for life, under certain settlements, of considerable estates in the parish of Harrow. In the years 1806, 1808, and 1812, he redeemed the land-tax upon several portions of these estates, and the aggregate amount of the several sums paid for the redemption was 1124l. 16s. 1d.

By the 3 Will. 4, c. xxxvi., the London and Birmingham Railway Company are empowered to purchase lands for that undertaking, of corporations, tenants for life, tenants in tail, &c. The word "lands," by the terms of the act, includes "tenements and hereditaments."

Under the 39th section of the act, the money to be paid for the purchase of any land of any corporation, tenant for life, &c., shall, if it exceed 200l., be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, according to the provisions of the stat. 1 Geo. 4, c. 35; there to remain until the same shall, by order made upon petition in the Court of Exchequer, be applied either in the purchase or redemption of the land-tax, or in the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled to the same uses; or until the same shall by a like order be laid out in the purchase of other lands to be settled to the like uses, as the lands which shall be so purchased stood settled or limited.

The 42nd section enacts that where, by reason of any disability or incapacity of any party entitled to the lands to be taken by the Company, the purchase-money shall be required to be paid into the Bank of England, to be applied in the purchase of other lands to be settled to the like uses, it shall be lawful for the Court to order the **[167]** expenses of such purchases, together with the necessary costs and charges of obtaining such order, to be paid by the Company out of the monies to be received by virtue of the act.

The petition stated that the petitioner had contracted with the Company for the sale to them of some parts, and the enfranchisement of other parts, of the settled lands; and that in pursuance of those contracts, and by virtue of the act, the Company had paid into the Bank of England two sums, amounting together to 1776l, 17s. 4d., which were then standing in the name of the Accountant-General. The petition likewise stated that the sum of 1124l. 16s. 1d., so paid for the redemption of the land-tax, was advanced by the petitioner out of his own proper monies; and he submitted that the same having been expended for the benefit of the estates, he was entitled to be repaid the amount.

The petition prayed that, out of the said sum of 1776l. 17s. 6d., the Accountant-General might be directed to pay to the petitioner the sum of 1124l. 16s. 1d., in repayment of the sums advanced and paid by him for the redemption of land-tax on parts of the said settled estates as aforesaid; that he might be directed to pay the residue to the receiver-general, for the purpose of redeeming the land-tax on other parts of the said estates; and that it might be referred to the Master to tax the petitioner his costs, charges, and expenses of this application, and incidental thereto; and that such costs, when taxed, might be paid to the petitioner by the said company, &c.

Mr. Lovat, for the petition.

Mr. Younge, for the Company, expressed a doubt whether the petitioner could claim to be repaid what he had laid out in the redemption of the land-tax before the

passing of the act. If he could, then another question was whether, under the terms of that act, the petitioner was entitled to [168] the costs of this application? According to the act, costs were only to be allowed when the money was to be laid out in the purchase of lands to be settled to the like uses. Here the residue of the money, after repayment to the petitioner, was to be applied to redeem the land-tax on other parts of the estates.

THE LORD CHIEF BARON said he thought the application came within the spirit of the act, and granted the petition.

MEMORANDA.

On Friday, the 21st November, 1834, Lord Brougham resigned the Great Seal, which was on the same day delivered by his Majesty to Lord Lyndhurst, who for some weeks afterwards continued to hold the office of Lord Chief Baron, together with that of Lord High Chancellor of England.

On Tuesday, the 23rd December, Lord Lyndhurst sat as Chief Baron in the Equity Court for the last time. On the rising of the Court, his Lordship announced to the bar that it was the last day of his sitting in that Court, and briefly expressed his acknowledgments for the attention he had uniformly received from the members of the bar practising in this Court. Upon which Mr. Boteler addressed his Lordship as follows: "As your Lordship will not sit here again, I trust you will permit me, before you leave this Court, to express to your Lordship the deep sense which the Counsel practising at this bar entertain of the kindness and attention which they have uniformly experienced from your Lordship during the time you have presided in this Court. I may truly assure [169] your Lordship that the advantages they have derived can never be forgotten."

During the vacation after Michaelmas Term, Sir James Scarlett, Knt., was appointed by his Majesty to the office of Lord Chief Baron of the Court of Exchequer, and was called to the degree of the coif, and gave rings with the motto "Ingenuas per artes," and was soon afterwards created a Peer by the title of Baron Abinger, of Abinger in the county of Surrey, and of the city of Norwich.

Lord Plunkett resigned the office of Lord High Chancellor of Ireland, and was succeeded by Sir Edward Burtenshaw Sugden, Knt.

Frederick Pollock, Esq., one of his Majesty's Counsel, was appointed to the office of Attorney-General, vacant by the resignation of Sir John Campbell, and was knighted; and William Webb Follett, Esq., was appointed to the office of Solicitor-General, vacant by the resignation of Robert Monsey Rolfe, Esq., and was knighted.

His Majesty was pleased to appoint the following gentlemen to be his Counsel learned in the law, namely, Charles Henry Barber, William Burge, Edward Jacob, Fitzroy Kelly, Richard Torin Kindersley, John Miller, Thomas Joshua Platt, Henry John Shepherd, Walker Skirrow, George Spence, Christopher Temple, Daniel Wakefield, and James Wigram, Esquires. Accordingly, in the course of Hilary Term, 1835, they were severally called within the bar of the various Courts.

On Sunday, the 11th January, 1835, being the day before the commencement of Hilary Term, Mr. Justice Taunton died. He was succeeded in his office of one of the Justices of the Court of King's Bench, by John Taylor Coleridge, Esq., Serjeant at Law, who was thereupon knighted.

[170] BRYAN *v.* PARKER. Jan. 16th, 1835.—A double issue may be directed to try the validity of a farm modus; the inquiry being, 1. As to the existence of the ancient farm. 2. As to the payment of the modus.

Motion to vary the minutes of the decree. The bill was filed by the rector of Woodham Waters, alias Woodham Walter, in the county of Essex, for an account of the tithes of lands in the defendant's occupation. The defence was a modus, which was stated in the answer in the following manner:—"That from time whereof the memory of man is not to the contrary, there hath been, and is now, situate within the parish of Woodham Waters, otherwise Woodham Walter, a certain ancient farm, or tract of land, heretofore called or known by the name of the Park Lands, formerly the estate of William Fytche, Esq., afterwards of Thomas Fytche, Esq., containing in the whole 917 acres, 1 rood, and 29 perches, or thereabouts, and comprising the several

pieces or parcels of land set forth and particularly described in the first schedule to this defendant's answer annexed. And this defendant further saith that, from time whereof the memory of man is not to the contrary, a certain good and lawful usage hath been established, whereby the rector for the time being of the said parish of Woodham Waters, otherwise Woodham Walter, became, and hath always been, and now is, entitled to, and ought to accept from the occupiers of the said lands comprised in the said schedule, and the said occupiers are liable to pay, and ought to pay, and have been accustomed to pay to the said rector, at Michaelmas old style in every year, a certain modus or ancient customary payment of 1l. 6s. 8d., for and in lieu and in full satisfaction of the tithes of all and singular the titheable matters and things yearly arising, growing, renewing, and increasing, in and upon the said lands comprised in the said schedule."

The cause came on to be heard in February, 1834, before Lord Lyndhurst, C. B., when an issue was directed **[171]** to try the validity of the modus. The issue was drawn up in the terms of the answer, but was in a double form: namely, first, whether from time, &c., there hath been and now is situate within the parish of Woodham Waters, otherwise Woodham Walter, in the pleadings of this cause mentioned, a certain ancient farm, &c.; and secondly, whether from time, &c., a certain good and lawful usage hath been established, &c.

The object of the present motion was to make the issue single, by reducing it into the following form; namely, Whether from time, &c., a certain good and lawful usage hath been established, whereby the rector for the time being of the said parish of Woodham Waters, otherwise Woodham Walter, became, and always has been, and now is entitled to and ought to accept from the occupiers of a certain ancient farm or tract of land, heretofore called or known by the name of the Park Lands, containing in the whole 917 acres, 1 rood, and 29 perches, or thereabouts, and comprising the several pieces or parcels of land set forth and particularly described in the first schedule annexed to the defendant's said answer, put in to the said plaintiff's bill; and the said occupiers are liable and ought to pay, and have been accustomed to pay to the said rector at Michaelmas old style in every year, a certain modus or ancient customary payment of 1l. 6s. 8d., for and in lieu and in full satisfaction of the tithes of all and singular the titheable matters and things yearly arising, growing, renewing, and increasing, in and upon the said lands comprised in the aforesaid schedule.

Mr. Boteler, for the motion. In *Bree* v. *Beck* (1 Younge, 211) the answer was stated in the same way as in this case, and the issue was directed as a single issue. *Bailey* v. *Sewell* (1 Russ. 239), before Sir Thomas Plumer, is the only case to the con-**[172]**trary. In a late case before the Vice Chancellor, his Honour was pressed to direct an issue in the double form; but he refused to do so, and said that the decree in *Bailey* v. *Sewell* was wrong. Upon appeal to Lord Lyndhurst, his Lordship was of the same opinion, and observed that if the double issue were allowed, you might as well, upon an issue devisavit vel non, add an inquiry as to the particulars of attestation, or the state of mind of the testator.

Mr. Jervis, contrà, said that there was no pretence for this application. The proposed issue assumed that there was an ancient farm, whereas that was the first thing to be proved at the trial.

THE LORD CHIEF BARON. I know from my own experience at Nisi Prius that issues of this nature are frequently very difficult to be comprehended. If the proposed issue had been put in such a form that no Judge or jury could doubt about it, I should have had no objection to the alteration. But it is not suggested that any real advantage will be gained by the change; and I think the two issues cannot be misunderstood. I shall therefore refuse the application; but as there are cases in its favour, it must be without costs.

TARLETON *v.* HORNBY AND OTHERS. Jan. 15th, 16th, 23rd, 1835.—In general an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud.

[See further, p. 333, post.]

The bill stated that, previous to the year 1802, the plaintiff had been in partnership with Daniel Backhouse and others, and that they purchased plantations in the [173] West Indies, as part of the partnership assets. That the partnership was dissolved in 1802; and that in March, 1808, a deed was executed, whereby Backhouse sold to the plaintiff all his interest in the partnership for the sum of 40,000l., to be secured by different bonds. That, soon after the execution of this deed, the plaintiff had discovered that he had been imposed upon by Backhouse; that the liabilities of the partnership had been greater, and the value of the property less, than had been supposed; and that Backhouse knew of this before he executed the deed. That the plaintiff, accordingly, instituted proceedings in Chancery to set aside the deed, and that an issue was directed to try its validity; but that, owing to the absence of the plaintiff's leading counsel and other circumstances, the verdict was found against him, establishing the deed. That in March, 1815, the plaintiff, being on the point of embarking for Holland, in order to effect some beneficial arrangements for the partnership estate, executed certain conveyances of his real and personal estate for the benefit of his wife and children; and that, in the same month, he proceeded to Rotterdam. That, immediately after his departure, the executors of Backhouse, who was then dead, being desirous of depriving the plaintiff of the means of unravelling the fraudulent conduct of Backhouse, and preventing the plaintiff from setting aside the deed of March, 1808, entered into a conspiracy to ruin the plaintiff; and, in order thereto, sued out a commission of bankrupt against him; and that two of the executors caused themselves, together with the defendant Barnes, to be made assignees under the commission; that there was collusion between the plaintiff's eldest son, the defendant, John Collingwood Tarleton, and the assignees; and that, by their joint fraudulent contrivances, they procured the deeds of 1815 to be set aside; and likewise, by means of an order in the alleged bankruptcy, procured the sale of the plaintiff's interest in [174] an estate, called the Collingwood Estate, to J. C. Tarleton, at an undervalue; which estate the said J. C. Tarleton afterwards mortgaged to the assignees of Backhouse. That the assignees had received divers large sums of money on account of the plaintiff's estate and effects, much more than sufficient to pay the debts, which, in fact, had been paid in full, with interest. That the plaintiff had frequently applied to the defendant, John Collingwood Tarleton, to deliver up possession of the estate so purchased, and to account for the rents and profits; and that he had also applied to the assignees to come to an account, and pay him the surplus; but that the defendants had refused to comply with such requests.

The bill contained many general charges of fraud and collusion against the defendants; and, amongst other things, it charged that they conspired to prevent the plaintiff from returning to England; the son representing to him that his return would expose him to penalties for nonsurrender under the bankrupt laws, but that, if he continued to absent himself, an arrangement might be effected with his creditors.

The bill contained an allegation that all the debts proved under the commission had been fully paid and satisfied by and out of the plaintiff's estate and effects, and the proceeds thereof; and that, after payment thereof, there remained, and does now remain, or ought to remain, in the hands of the said assignees, a large balance or surplus of the plaintiff's estate and effects.

The bill prayed that the said defendants, the assignees, may, under the decree of this Court, account for all and singular the real and personal estates and effects of the plaintiff, which have been possessed or received by them under the commission, or which, but for their wilful neglect or default, might have been received, and of their application thereof; and that they may be charged and made liable to answer for all loss or damage arising from [175] the improper sale and disposition thereof, or any part thereof; and may be decreed to pay and transfer to the plaintiff the surplus thereof which may remain, after payment and satisfaction of all the debts proved under the said commission, and all interest payable thereon respectively, and the expenses of the commission; and that the aforesaid sale to the said J. C. Tarleton may be declared fraudulent and void as against the plaintiff; and that the last-named defendant may account for the rents, profits, and produce of the Collingwood Estate; and that all necessary directions may be given for effectuating the several purposes aforesaid, and for general relief.

To this bill, which was filed against the assignees and John Collingwood Tarleton,

and no other party, James Barnes, one of the assignees, put in a general demurrer for want of equity.

Mr. Rolfe, Mr. Spence, and Mr. Booth, in support of the demurrer. For the purpose of sustaining this demurrer, we must admit the truth of all the facts stated in the bill to their fullest extent. We must admit that all the debts have been paid; that there is a large surplus; that the property has been sold at an undervalue; and all the other allegations contained in the bill. There is great difficulty in this, no doubt; but the answer is, your course is simple, you have a festinum remedium, to which you are bound to recur; you have no right to file a bill against the assignees to account in a Court of equity. It is not to be contended that, under very special circumstances, the bankrupt may not file a bill against his assignees. On a particular occasion Lord Hardwicke permitted it; but he did it with a view to get the judgment of the House of Lords. In general, however, there is no choice given to the bankrupt, either to come here, or to seek his remedy under the bankruptcy: and, even if there was such a discretion, the present would be considered an exception; for **[176]** it would amount to the most gross oppression, to call assignees to an account for transactions of twenty years' standing. The bankrupt, under the first Bankrupt Acts, was treated as a criminal, and the whole of his property was placed at the disposal of his assignees. But, by the fourth section of 13 Eliz. c. 7, the commissioners shall, upon request made by the bankrupt, not only make a true declaration to the bankrupt of the employing and bestowing of the lands, tenements, goods, and chattels paid and satisfied to the creditors, but also make payment to the bankrupt of the overplus. The commissioners, therefore, were to administer the property, subject to the controlling power of the Lord Chancellor. There was no application to the Lord Chancellor, except where there had been a previous application to the commissioners. The statutes of James were to the same effect (1 Jac. 1, c. 15, s. 3; 21 Jac. 1, c. 19, s. 3). As regards the surplus, these were the only acts in force at the issuing of this commission, and by these acts only was the bankrupt entitled to the surplus. It is clear, therefore, there was abundant jurisdiction before the commissioners and the great seal. But it was said on a former occasion that the purchase by John Collingwood Tarleton made a difference. That is not so; for, if a party fraudulently conspires with the assignees, he brings himself within the jurisdiction in bankruptcy; and, when once under that jurisdiction, he remains so. *Ex parte Pease* (1 Rose, 232). Besides, it is stated in the bill that John Collingwood Tarleton purchased under an order in the bankruptcy; therefore, upon the specialties of this case, independent of the general question of jurisdiction, the bill will not lie. The natural and obvious remedy was by petition to supersede the commission. To this end the bankrupt was bound to conform to the bankrupt laws and surrender himself. Is it to be said that **[177]** you cannot have the obvious remedy without surrendering; but, if you take another extraordinary remedy, this condition may be dispensed with. Besides, the bill does not merely pray for the surplus, admitting all the proceedings in the bankruptcy, but it seeks to have the whole account taken again, which has been taken before a court of competent jurisdiction. To entertain this bill, therefore, would be to make this Court a court of appeal from the jurisdiction in bankruptcy. In *Kirkpatrick* v. *Dennett* (1 S. & S. 411), the bare notion of administering bankruptcy in the Court of Exchequer was considered by Sir John Leach as an absurdity. All the authorities are against this bill: *Clarke* v. *Capron* (2 Ves. jun. 666), *Spragg* v. *Binkes* (5 Ves. 583), *Hammond* v. *Atwood* (3 Madd. 158). The case, however, which is most directly in point, is that of *Saxton* v. *Davis* (18 Ves. 72; 1 Rose, 70), which is not distinguishable from the present. In that case it does not appear whether the debts were all paid or not, but the payment of the debts can make no difference in the principle; for, if this Court could entertain such a bill, a creditor would have the same right to apply here in case the debts were not paid, as the bankrupt would have in case of a surplus.

Upon the whole, therefore, the Court will not decree this account; and there being no other relief besides account prayed against the assignees, they ought not to have been made parties. It is true the bill states the order in bankruptcy under which the sale to J. C. Tarleton took place, and charges the assignees with collusion in the sale; but it prays no costs against them; and it is clear that if a person against whom no particular relief is prayed is made a party to a bill on the ground of fraudulent collusion, the plaintiff must pray costs against him, or a demurrer will lie: *Le Texier* v. *Margravine of Anspach* (15 Ves. 159).

[178] There are also grounds of demurrer ore tenus. It is alleged by the bill that John Collingwood Tarleton, after purchasing the property in question, suffered a recovery, and mortgaged it to the executors of Daniel Backhouse. They ought therefore to have been made parties to the suit. The children of the bankrupt, who, it is alleged, took interests in the property under the deeds of 1815, ought also to have been made parties.

Mr. Simpkinson, Mr. Kindersley, and Mr. Wigram, in support of the bill. The bill is consistent with the principles of a Court of equity. It has two objects: one to call the assignees to account for the surplus which they have in hand, and to make them answerable for their malpractices in the administration of the bankrupt's effects; the other to set aside a fraudulent sale of part of the estates of the bankrupt. It is said that the plaintiff's only mode of proceeding is in the bankruptcy; that all the interest of the bankrupt is divested by the assignment; and that it is only under certain clauses in the Bankrupt Act that he has any property at all. This is irreconcileable with Sir William Grant's decision in *Charman* v. *Charman* (14 Ves. 580), in which it was held that a devise is revoked only sub modo by the bankruptcy of the devisor. But it is said that the plaintiff ought to have surrendered himself; that is to say, he ought to have acknowledged the validity of a commission, which he has all along contested. That was not necessary. There is nothing in the Bankrupt Act which affects the jurisdiction of Courts of equity. When the Chancellor had jurisdiction it might be convenient either to entertain the jurisdiction in bankruptcy or direct a bill. But that does not apply at present. There is nothing which compels you to apply to the Court of Review in the first instance, **[179]** and nothing which prevents the assignees from being parties to a bill. There are many cases in which Courts of equity have entertained bills by bankrupts before application has been made in the bankruptcy. In *Hitchcox* v. *Sedgwick* (2 Vern. 156) the language of Lord Commissioner Hutchins in reference to this point is remarkable, as he speaks of a sale being set aside "even upon petition;" which shews that the jurisdiction by bill was then an ordinary jurisdiction. In *Bromley* v. *Goodere* (1 Atk. 76) Lord Hardwicke observed that bills are frequently brought in cases of bankruptcy for settling the demands of creditors. He does not say that bills cannot be brought except under the sanction of the Judge in bankruptcy; and it is clear that a direction given to file a bill does not give the Court a jurisdiction which it had not before. In Cooke's Bankrupt Laws, vol. 1, p. 2, it is laid down that "though the Court can have no more power on a bill than on a petition, yet it is equally, if not more, proper that questions of importance should be brought before the Court by way of bill." The cases which support this proposition are numerous: *Hawkins* v. *King* (Rep. Temp. Finch, 264), *Lord Craven* v. *Widdows* (2 Ch. Ca. 139), *Harding* v. *Marsh* (2 Ch. Ca. 153), *Vanaker* v. *Nash* (Rep. Temp. Finch. 60), *Treeves* v. *Townshend* (1 Bro. C. C. 384), *Hankey* v. *Garrett* (1 Ves. jun. 236). And if this Court has jurisdiction, it is no objection to say that another Court also has jurisdiction. The jurisdiction in the Insolvent Debtors' Court does not take away that of the Court of Chancery: *Barton* v. *Tattersall* (1 Russ. & M. 237). It is clear, both from the case of *Benfield* v. *Solomons* (9 Ves. 77) and that of *Saxton* v. *Davis* (18 Ves. 72), that Lord Eldon was of opinion that such a bill as the present would lie. In the **[180]** latter case there was not a sufficient averment of a surplus, though Leach, arguendo, says that there was; but at all events there was no averment that the debts had been paid. Lord Eldon adverted, not to the general jurisdiction, but to the jurisdiction in a case circumstanced as that was. A point similar to the present arose in the case of *Barton* v. *Jane* (not reported), decided in the Court of Chancery. The testator in that case had been lessee of an inn. Barton was one of his residuary legatees. Barton, after the testator's death, was discharged under the Insolvent Act. The executors got a renewed lease of the inn, and the assignees, in consideration of a sum of money, confirmed the lease. Barton filed his bill against the executors, praying accounts, and that it might be declared that the executors were trustees of the lease for him. To this bill they pleaded Barton's insolvency. Barton then amended his bill and made the assignees parties, and charged collusion between them and the executors, and the assignees demurred. The charges of collusion were not very strong; namely, that the debts amounted to 300l. or 400l. only, and that the share to which the plaintiff was entitled under the will was sufficient to pay the whole, and leave a surplus for the plaintiff; but that the defendants, the assignees, acting in collusion with the

other defendants, declined to take proceedings for enforcing the amount and payment of the plaintiff's share. The demurrer was overruled on the ground that it admitted that the assignees refused to take the steps required of them; that they colluded with the executors; and that there was a surplus. That case, therefore, is a clear authority to shew that a bill like the present is sustainable in any Court of equity. What is reported to have been said by Sir John Leach in *Kirkpatrick* v. *Dennett* (1 S. & S. 411) is absurd. A Court of equity, whether it be the Court of Chancery or the Court of Ex-**[181]**-chequer, has a jurisdiction distinct from the Court of Bankruptcy. [The Lord Chief Baron. The Chancellor, sitting in bankruptcy, sometimes feels a difficulty in deciding a question brought before him, unless there are more parties before the Court; therefore, by the same authority as he directs an issue at common law, he may direct a bill to be filed in the Court of Chancery. He might also direct a bill to be filed in the Court of Exchequer; only it would not inform him. He would direct it to come before him for satisfying his own conscience. That was the reason of bankruptcy not being administered here.] Then, on a bill filed like the present, is it or not imperative on a Court of equity to say you must go to the Court of Bankruptcy? Most clearly it is not imperative. It is said that bankruptcy is a festinum remedium, and that it is only under very special circumstances that a bill may be filed. But going into bankruptcy is a mere question of convenience; and it was so laid down by Lord Lyndhurst, when the present cause was argued on the question of the plea. While the commission is in operation, convenience requires that all the proceedings should be had under it; but, after those proceedings are at an end, the reason for going in under the commission no longer exists. In *Saxton* v. *Davis* (18 Ves. 79) Lord Eldon was clearly of that opinion, for he speaks of the commission in that case as being "now in full force." Suppose then a case where every proceeding in the bankruptcy is concluded; the debts paid—interest paid—costs paid. Can the assignees then elect in what Court proceedings shall be had against them? In this case the jurisdiction in bankruptcy is completely discharged; every creditor is paid. The bill stops no proceedings in bankruptcy affecting the creditors; and the only parties between whom the proceedings could take place are the parties in this case. There is no allegation **[182]** on the other side that, on the grounds of convenience, the accounts should be taken in the bankruptcy rather than in this Court.

The second part of the case puts the jurisdiction of this Court out of all doubt, namely, that which relates to the sale of the Collingwood estate to John Collingwood Tarleton. It is admitted that the purchase was obtained by fraud and collusion. Then the question is whether a Court of equity has not jurisdiction to set aside the proceedings of another Court which have been obtained by fraud and collusion? [The Lord Chief Baron. As a general proposition that cannot be doubted. But are there any cases where a bill has been filed by an uncertificated bankrupt to set aside a fraudulent sale by the assignees?] There are analogous cases: *Sheldon* v. *Mr. Justice Fortescue Aland* (3 P. W. 104), in which the committee of a lunatic, being called upon by bill to account, pleaded the jurisdiction in lunacy, and the plea was overruled: *Barnsley* v. *Powell* (1 Ves. sen. 119, 284), *Manarton* v. *Molesworth* (1 Eden, 18), *Sneyd* v. *Sneyd* (1 Atk. 442), *Hill* v. *Reardon* (2 Russ. 608). Besides, admitting that we were bound to submit ourselves to the commission, still the only part of the Court of Bankruptcy which could be contended to have jurisdiction would be the Court of Review; certainly not the commissioners. Now the Court of Review cannot compel the attendance of witnesses, or compel an account on oath. It could not annul the sale, but only permit a bill to be filed in the Court of Chancery or Exchequer. [The Lord Chief Baron. You are bound to argue as if the Court of Review did not exist. You delayed filing your bill till after the Court of Review was established. The bankrupt states general reasons for his remaining abroad, but not facts sufficient to found any **[183]** judicial decision justifying his nonsurrender. There was, therefore, delay on your part, and you cannot make use of that argument.] At all events John Collingwood Tarleton is not within the jurisdiction in bankruptcy. A party purchasing from the assignees does not thereby bring himself within that jurisdiction: *Ex parte Bennett* (10 Ves. 381). The assignees, therefore, having colluded with him, may be brought before this Court. It is alleged by the bill that he and the assignees combined to keep the bankrupt away from this country, so that the bankrupt was prevented from surrendering by the very fraud of which he complains. If a solicitor

is fraudulent, you make him a party, without praying any relief against him but that he may pay the costs. On this ground the assignees are proper parties, even if no relief be prayed against them; but here relief is prayed against them, namely, that they may make good any loss which the plaintiff may have sustained by reason of an improper sale. Besides, the demurrer is to the whole bill; and being bad as to part, namely, as regards J. C. Tarleton, it is bad as to the whole.

With respect to the objection for want of parties, the mortgage was made to the executors of Backhouse, to secure a debt due from the bankrupt; but the bill alleging that all the debts are paid, they are not necessary parties. If the younger children had been made parties, the bill would have been objected to as multifarious.

Mr. Rolfe, in reply. The counsel for the plaintiff say that their equity rests on two grounds: first, on that head of relief whereby they seek a general account against the assignees; and, secondly, on that whereby they seek to set aside the alleged fraudulent sale. Neither on principle nor authority can they shew themselves entitled to bring such a bill as this for relief. The assignees, they say, are **[184]** trustees, and that the Court can call on them, on the ground of their liability as trustees. There may be no difficulty in admitting this in certain cases, and it may also be admitted that if there is no original jurisdiction, the leave of the Court cannot make a difference. Of course, if there is no original right, no permission will give it. But the proposition we contend for is this; that, from the moment of the bankruptcy, the jurisdiction under the commission is established. It was argued that though public convenience required that no bill should be filed without previously shewing that injustice would be done without such a proceeding, yet that in many cases such a bill might be filed; and for this several authorities were cited. Those authorities were almost all old cases, occurring before the nature of the jurisdiction in bankruptcy was at all understood. *Vanaker* v. *Nash* (Rep. Temp. Finch, 60) was a mere abstract of the pleadings; the assignees there mentioned were not assignees as now understood, but assignees under a deed of assignment; the bill was by a creditor praying to be let in under the commission; a bill which could not now be sustained. *Hawkins* v. *King* (Rep. Temp. Finch, 264) was a bill to establish a set-off, but at that time the statutes of set-off did not exist. In *Lord Craven* v. *Widdows* (2 Ch. C. 139), and *Harding* v. *Marsh* (2 Ch. C. 153), the object was merely to effect an arrangement between two classes of creditors. The bill in *Harding* v. *Marsh* could not now be sustained. The decree in *Hitchcock* v. *Sedgewick* (2 Vern. 156) is admitted on the other side to have been reversed in the House of Lords; and it is clear that a bill to redeem the mortgage, as in that case, could not be brought by creditors at the present day. From 1683 they proceed at once to a case before Lord Hardwicke, which contains a doctrine to which we accede. **[185]** In *Treeves* v. *Townshend* (1 Bro. C. C. 384) there were two assignees, one of whom died, and his executor got the money into his hands. A bill was filed, calling on the representative of the assignee and the surviving assignee to account. There is no jurisdiction in bankruptcy to make the representative of a deceased assignee account; the commission, therefore, could not reach the justice of the case, and consequently a bill was filed. *Hankey* v. *Garrett* (1 Ves. jun. 236) was a case of the same description, and pointedly illustrates the present case. The fund was mixed up of what could and what could not be administered in the bankruptcy. The bill was by creditors: the administratrix of the deceased partner, who was also his creditor by bond, was made a defendant. The Solicitor-General, arguendo, said, "The principle of bringing the bill admits that the fund was not to be distributed under the bankruptcy;" and the Lord Chancellor observed that the bill ought to have been on behalf of the creditors generally; not those only who had sought relief under the commission. This was, therefore, not a bill on behalf of the creditors who had proved. It is clear, therefore, primâ facie, that what is administered in bankruptcy must be administered, not by bill, but by petition. But, supposing all these cases to be of authority, the present bill is filed by the bankrupt; not by the party who filed the bill in those cases. The right of creditors exists independently of the bankrupt statutes; but the bankrupt was treated originally as a criminal—all his property and all the benefit of his contracts concentrating in his assignees. The bankrupt's right is what is restored to him by a particular clause in the statutes of Elizabeth and James, which directs the commissioners to make payment of the overplus. That, therefore, is a particular remedy given to the bankrupt to get that which justice requires he shall

get when the creditors are satisfied. This **[186]** Court has no jurisdiction to alter that rule. So long as justice remains in that channel, so long has this Court a security that the bankrupt shall do what is right; and this Court cannot vary or contradict what is done under the jurisdiction in bankruptcy. *Clarke* v. *Capron* (2 Ves. jun. 66). Then it is an inflexible rule that the bankrupt cannot be heard until he do justice by surrendering. Here there is not only no surrender, but the nonsurrender is put forward as a prominent fact in the case. On the ground of convenience only, that the party must do equity before he asks equity, your Lordship will say that it never was the intention of the legislature to give a right to the bankrupt to file such a bill as this.

With respect to the second point, as to the fraudulent sale, it has been argued that if in an inferior Court an order has been obtained by fraud, this Court has jurisdiction to set aside the proceedings. There is no doubt about this: the Court has jurisdiction over all fraudulent contrivances, in whatever Court they may have arisen. But the question here is whether the plaintiff has taken the proper course—whether his course ought not to have been in the bankruptcy. The sale was effected by an order in the bankruptcy, obtained, as is alleged, by a fraudulent contrivance. It does not appear by whom the petition for the sale was presented; but it is clear that, if done as stated, it was by J. C. Tarleton's collusion. Now if a party submit himself to any of the proceedings in bankruptcy, he submits to the whole. In *Ex parte Gould* (*b*) the petitioner was the mortgagee of the bankrupt's estate. That estate was sold under Lord Loughborough's order, and Fry was declared the purchaser. Fry not having completed his purchase, he was, upon the petition of the mortgagee, ordered to do so, although he **[187]** did not appear upon the hearing of the petition. That case went much further than is contended for here, though not further than justice required. Besides, the bankrupt not only may, but must, proceed in the bankruptcy. The relief sought by annulling the sale is only ancillary to compelling payment of the surplus; and we contend that the surplus can only be obtained in the bankruptcy.

Another point appears to be conclusive. We appear for Barnes only. Nothing is asked against us, supposing we have got over the question of account. It must be admitted that when three or four parties are implicated in a fraud you make all co-defendants, though one only gets the fund. But the rule must be taken with the reservation that you must pray costs against them. Here no relief is prayed against the defendant, arising out of the circumstance of his being particeps criminis.

If this were res integra, the case might rest here; but it is not so. Your Lordship is called upon to undo the deliberate solemn decision of Lord Eldon, in *Saxton* v. *Davis* (18 Ves. 72). That case is as nearly as possible the same as the present. It has been doubted whether there was an allegation of a surplus in that case. At all events, there was no allegation from which it would appear that the debts were not all paid in full. Besides, has a bankrupt no interest in the surplus, even if the debts are not all paid? Has he no interest in shewing that he has paid 15s. in the pound? All the grounds of convenience are with the defendants in this case, and the demurrer must be allowed. [The Lord Chief Baron. The observation of Lord Eldon in that case is certainly very striking—that he was apprehensive of making a precedent, an instance of which the bar could not furnish.]

With respect to the objection for want of parties it has been said that the mortgage debt to the executor of **[188]** Backhouse was, in fact, a debt under the commission; and that there being an allegation that all the debts under the commission are paid, the executors are not necessary parties. Supposing, however, that they are paid, the estate has not been reconveyed, and the parties having the legal estate must be before the Court.

The Lord Chief Baron. This question has been very ably argued on both sides. It is a question of importance, and I have considered it with some anxiety. When I first heard it, I own my impression was, from the combination charged between Tarleton the younger and the assignees, that there was sufficient ground to maintain this bill, at least against the demurrer; but I must say that, on very serious reflection, on hearing the arguments and looking at the cases, I have come to a contrary conclusion.

(*b*) 1 Gl. & Jam. 231. See *Ex parte Lucas*, 1 Mont. & Ayrt. 93.

If would be very satisfactory to me if I could find any precise case to govern me on the subject. I should think it my duty at all times to treat such a case with the greatest respect, and in this particular instance to adhere to it. I asked if any case could be found where any bill had been permitted to be filed against assignees by an uncertificated bankrupt, to bring them to an account of his estate; and the bar has candidly answered that no such case can be found; and I am brought to that conclusion by Lord Eldon's judgment in the case of *Saxton* v. *Davis*. Upon examining that case I find that Lord Eldon, who had as much experience as any man who ever sat in a Court of equity, himself stated that the bar could furnish no such precedent; and, on looking at the matter on principle, I own it appears to me that nothing could be more dangerous than to set an example of a case that might be acted on as a precedent for such a proceeding.

There is a bankrupt who does not, at present, by any **[189]** suggestion on his bill, place himself in a situation to dispute his bankruptcy. He has never surrendered to his commission; he is, in fact, by the statute not entitled to the protection of the law; and he seeks by a bill to call his assignees to an account of all their transactions from the first origin of his bankruptcy up to the present moment. He does not ask for any decree or order touching the commission, but only prays for them to account, on the suggestion (which upon this case is supposed to be satisfactorily proved) that all the debts have been paid, and the object of the commission consequently satisfied. It is perfectly obvious, if that be so, that he has, as a matter of course, the easiest remedy in the world to supersede his commission, by appearing in the Court of Chancery. But the answer to that is that he is a gentleman of a peculiar temper, and that he has made a vow that he will never surrender to his commission. That would be a very dangerous ground for a Judge in a Court of equity to act upon, and one which I apprehend would not apply to the case of other men. I must assume that he is governed by the ordinary prudence, and possessed of the same feelings that govern other individuals, and, therefore, he ought to go to the Lord Chancellor, and state by petition that he is ready to submit to his commission; that the debts are all paid; and that he desires a supersedeas. There is nothing, therefore, I deny him by allowing this demurrer, that he could not obtain by that proceeding, with much more effect, at much less cost, and by a much shorter course than is open to him by this bill.

But let us look at the grounds on which, as I conceive, such a proceeding cannot be taken against assignees. The first statute in bankruptcy, as we all agree, was in the time of Hen. 8 (34 & 35 Hen. 8, c. 4). That gave to the Lord Chancellor and to the Privy Council power to dispose of bankrupts' estates. There is not a word about assignees, **[190]** nor is there any defined mode of proceeding to settle what the form should be. It was left very much at the discretion of the members of the Privy Council to make such orders as they should think fit.

Then comes the statute of Eliz. (13 Eliz. c. 7, sect. 2), which gave power to the Lord Chancellor, if he thought fit, to name commissioners, that is to say, to exercise the authority the Privy Council had before exercised in a general way, by means of commissioners appointed by him, and accountable of course to him or the Privy Council for their transactions; and then comes a clause in the statute that, if the bankrupt's estate should pay and satisfy all the demands against him, the commissioners should account to him and pay him the surplus.

The next statute in point of order is the statute of James, which carries the obligation of the commissioners a step further; for the bankrupt is entitled to demand of the commissioners an account of his estate, and to demand from them payment of the surplus of his estate; and also to proceed against those who withheld the estate; to recover it in his own person—in his own name—if the debts should all be paid. That might afford an answer to the argument drawn from the case before Sir W. Grant, who decided that, where all a bankrupt's debts were paid and a portion of his real estate remained unappropriated for that purpose, it was not divested from him; and that, therefore, it would not, because the commission of bankruptcy intervened, go to his heir, and disappoint his devisee (*Charman* v. *Charman*, 14 Ves. 580). Sir William Grant, in effect, says that if his debts be all paid the bankrupt is not absolutely divested, so as to be deprived of all interest whatsoever in his estate; that in truth he, by that very statute, has a right to recover the unappropriated part of his estate. But in the statute of James (1 Jac. 1, c. 15, ss. 13, 15), which authorizes the commissioners **[191]** to assign (not to constitute assignees, as at present constituted)

for the purpose of disposing of the estate more effectually, it is quite clear that the proceedings must be under the statute to call on the commissioners to account. I will not say whether the proceedings should be by bill in equity or not, because the statute says that, on application to the commissioners, they shall account; and the Lord Chancellor may make an order on them, the commissioners, so to do.

The subsequent statutes in some degree modify the powers of assignees in bankruptcy, till we come to the time of Geo. 1, when the first statute was made, which was afterwards the foundation of the 5th Geo. 2. The 5th Geo. 2 is the first which exactly defines the duties of assignees, and imposes obligations on them. Among those obligations is to be found this, that they are to make dividends by order of the commissioners once, twice, and as often as there may be occasion; they are also to account upon oath to the commissioners for their receipts and expenditure, and shew to them what they have in hand when the commissioners make a dividend (5 Geo. 2, c. 30, s. 33). The commissioners, therefore, are the proper persons to ascertain, under any circumstances, the state of the bankrupt's estate: it is their duty, on application of the bankrupt, to call the assignees to account on oath for the administration of the bankrupt's estate. There is, therefore, no occasion to give the bankrupt any other remedy. That is the remedy given by statute, and it is not necessary for the furtherance of justice to entitle him to come to a Court of equity.

But I will not say that an extreme case may not be put where a bankrupt might come into a court of equity. I do not wish to lay down any such principle; because the imagination can suggest a case where it would be very **[192]** hard indeed to deny him a remedy, and where no inconvenience could result; and let me suppose this case: —A man is an officer in the army, and has a real estate, and while serving abroad some creditors, together with some other persons, enter into a conspiracy to defraud him of his real estate, and they set him up falsely as a trader, and take out a commission of bankruptcy against him, and then obtain the ordinary means of disposing of his real estate. He returns to his own country, having heard nothing of this, and finds these proceedings. That would be a very proper case to apply to a Court of equity to set aside the fraud, and to compel these persons to give an account of what they had done. I only put that as an imaginary case, because I mean to protect myself from any conclusion that a case might not arise in which a Court of equity would have jurisdiction. I do not deny the jurisdiction. But consider what the consequences would be of allowing a bankrupt generally to call his assignees to account. If you once establish the principle that the thing may be done in a case where there is no complaint, and no attempt to set aside the commission, I should be glad to know why the ingredient of paying all the debts, and a surplus remaining over, is essential to the jurisdiction? It appears to me to make no difference at all; because the bankrupt would have a right, much short of that of discharging all his debts under the commission, to call on his assignees to account in order to ascertain whether he had paid 15s. in the pound or not; whether enough had been paid to entitle him to his allowance of 200l. or 300l. All these are interests which would entitle him to an account from his assignees. If you once, therefore, say that the bankrupt is entitled, from any interest that he has, to seek that account, he has that interest from the very beginning.

But supposing you were even, for the sake of argument, to admit the right of the bankrupt in the case where he has surrendered to his commission, what shall we say to a **[193]** Court of equity tolerating a bankrupt who never has surrendered to his commission at all; who on the face of his own bill appears to have entered into very suspicious transactions, to have gone abroad, and to have made a merit of resisting his commission from first to last; who says that, though he is by the statutes in effect an outlaw, because the first statutes declare that if a bankrupt goes abroad and will not submit to a commission he shall be out of the protection of the law, yet he shall come in a subsequent stage of this proceeding and, under the suggestion that all the debts have been paid, demand of the assignees a full account? If there were any occasion for him to do so for the purpose of obtaining relief, I admit that a Court of equity would be the proper place to resort to for that relief; but as there is no occasion for it, and the precedent would lead to inconceivably ruinous consequences to assignees (and I do not see how any man would become an assignee under such a risk and peril), I conceive he has no right, under the circumstances of this case, to demand such an

account—and undoubtedly no reason—because he may get it elsewhere; and I cannot allow for a moment any argument to be raised on the mere reluctance which he has to submit to his commission. There is no disgrace in it. If a man complains that he is the victim of a fraud practised in his absence, which he could not control, by the infidelity and dishonesty of his own son, or any other person whom he has appointed his agent, there is no disgrace in his coming before the Lord Chancellor or before the Court of Bankruptcy, and saying, I have been injured by this fraud, and I now submit to you for the purpose of superseding this commission.

But there is in this particular case another reason why the assignees should not be held liable. I cannot shut my eyes to the apparent object of this bill. This gentleman has tried by every expedient to dispute his commission. He has tried in various ways and has been foiled in every **[194]** attempt. He first of all tried the question of the debt due from him to the executors; and he states in his bill that the verdict was found against him. Why was there not a new trial? He says the reason why a new trial was not granted was that the assignees made an objection that his son had no authority from him and that his son was not his agent. He states that fact as a reason why the Court of Chancery would not grant a new trial. Then if that was so, and he is apprized of the fact, why did he not employ another agent and send a power of attorney to a respectable person for the purpose of making that application? He gives no reason. Tracing him step by step, from the first period of his bankruptcy, from the first period of his dispute with the executors up to the moment of making this application, it appears that he has thrown every obstacle he could in the way of his assignees. Then he makes it a matter of fraud that they made a sort of compromise with the son, by which his son was put in possession of the real estate. It is not merely stating his inference that makes it the fact. It is not calling certain transactions by the name of fraud that compels me to say the fraud is so clear as to overrule the demurrer. If the facts are of such a nature that no fraud can be inferred, it is not the mere imputation of it that will make it fraudulent. Now running through this bill, which I have done with considerable care, I think you will find that observation applies to a considerable portion of the facts of this case, though perhaps that belongs more especially to the argument which relates to the son.

Under these circumstances, if ever there was a case in which a bankrupt had no right to force his assignees at the last stage into a Court of equity, to give an account of all their transactions, this is the case. In the year 1831 he makes his last attempts against the assignees by an action of ejectment. There was then no case whatever of fraud or treachery. He does not allege on that occa-**[195]**-sion that he was deceived by any agent. He appears to have made then a case of a different nature; and what was the consequence? An order from the Court of Chancery restraining him from any proceedings whatsoever touching the validity of his commission. Then he comes here and desires an answer from the assignees, which answer, if they are bound to give, must necessarily bring before me the question of the propriety of issuing the commission; so that indirectly he seeks to obtain by this bill what in his efforts in the Court of Chancery he could not obtain. It appears to me that I must take it to have been properly decided by the Lord Chancellor that he should be restrained from taking any proceedings to dispute the commission. Under these circumstances I think, therefore, as far as regards the assignee Barnes who demurs, supposing the case stood only on the question of filing the bill against the assignees, the demurrer must be allowed.

The point on which I had the greatest difficulty was this—whether, independently of any question of account, the assignees might not still be made to answer; whether the combination charged between Tarleton the younger and the assignees did not raise a question which I could not dispose of on demurrer. I own I hesitated very much about that; but it appears to me that it was my duty to observe great caution that a man should not, by means of setting up a connexion between another party and his assignees, compel the assignees to do that which he could not otherwise compel them to do. I must say that I go along with the defendant's counsel in their argument that the relief prayed against Tarleton, jun., does not require that the assignees should be made parties to the bill. I have looked at the bill with great anxiety in order to see how the fact was. It is clear they had no interest at all—no personal interest—in giving him this estate for a less value than it was worth. But

supposing **[196]** that what they did might amount to fraud and collusion, it is by no means a necessary part of his case to ask that relief against them; and there is no object in joining them, supposing the object is not to get a general account from them as assignees, except to make them pay the costs as co-conspirators. Now, if that were the only object, I should think it a very improper object, and that these were very improper means to introduce assignees as parties: because the whole mass of this bill relates to their transactions, and an account of them is asked; and with that particular part of it which relates to Tarleton, jun., his treachery and conspiracy, they have nothing to do. He may take measures against his son and compel him to give him some redress for his treachery, without touching the assignees. Well, then, the relief prayed against the son is that he may hold the estates for him as trustee. If the son has no case to shew for himself on that subject, of course the plaintiff will be allowed the relief he asks against the son; but I do not see how the assignees are necessary parties on that account.

I hope I am right in this decision. My anxiety has been not to furnish a precedent so fatal to the interests of all persons who are engaged in bankrupt's estates, as that assignees may, by indirect means, be defendants in a bill for a general account of all their transactions at the suit of an uncertificated bankrupt. Upon the ground, therefore, that a bankrupt uncertificated cannot be allowed in this particular case, or any case like it, to call on his assignees for a general account of all their transactions, which he might have by applying to the Court of Bankruptcy; and on the ground that the relief sought against the other defendant does not in the least, of necessity, or in any respect of convenience, require the assignees to be joined in this suit, I must allow this demurrer.

[197] DEARE *v.* THE ATTORNEY GENERAL. Jan. 23, 24, 29, Feb. 10, 1835.—A demurrer to the relief will not extend to the discovery sought by the bill, although the specific relief prayed may be improper, if the bill states a clear case for equitable relief to which the discovery sought may be ancillary, and likewise concludes with a prayer for general relief.—An information having been filed by the Attorney-General against A. for an account of his dealings and transactions with the government as an army agent, A. pleaded in bar of the information a settled account, by means of certain clearing warrants. This plea having been overruled, A. filed his cross bill against the Attorney-General and the Secretary at War, alleging that the clearing warrants had been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that the defendants had divers papers, &c., by which the truth of the several matters alleged would appear, prayed for a discovery—for a declaration that the clearing warrants amounted to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled.

[Referred to, *Dyson* v. *Attorney-General*, [1911] 1 K. B. 424. For former proceedings see 2 Dow. & Cl. 377.]

The plaintiff's father, and afterwards the plaintiff himself and his father, as partners, were, many years previously to 1797, agents to his Majesty's regiments or troops, called the Dunbarton Fencible Cavalry, and the Lanark Fencible Cavalry; and in such character received various large sums of money from the government for the pay of those troops.

In the year 1824 an information was filed by the Attorney-General against the plaintiff, under the provisions of the 45 Geo. 3, c. 58, charging that parts of such sums of money, to a considerable amount, had not been paid or accounted for by the plaintiff or his father to the officers of the above-mentioned troops, and that the plaintiff was a debtor to his Majesty for the balance due in respect thereof; that no settlement had ever been come to between the plaintiff and his father, and the persons duly authorized in that behalf by his Majesty, and that the plaintiff had in his custody divers books of account, papers, writings, and documents, relative to the said agencies, by which it would appear what sums of money had been so received,

and what remained unaccounted for, &c., and praying for a full discovery of the matters aforesaid, to enable his Majesty to sue for and recover the several sums of money and balances remaining in the plaintiff's hands, as the surviving partner and personal representative of his late father.

To this information the plaintiff pleaded in bar that **[198]** all the said accounts were finally settled by virtue of certain clearing warrants, which were made out and signed by the Secretary at War, and countersigned by the Lords of the Treasury for the time being, and issued by the proper authorities to the plaintiff. But this plea was overruled.

The plaintiff then filed the present bill, which was in the nature of a cross bill to the information against the Attorney-General and Mr. Ellice, then Secretary at War, stating the usage of the War Office as to the issuing of clearing warrants, which, as he alleged, depended on a strict investigation of the accounts, testified by vouchers, &c., delivered to the War Office; stating also nine different accounts which had been settled between the plaintiff's father and himself and the government, on the footing of this usage; and insisting that, previous to the year 1811, a clearing warrant had always been considered by all Secretaries at War, and other government officers employed on military accounts, army agents, colonels of regiments, and all other persons, as a complete quietus to the agent; and that no other settlement was ever asked for or considered to be necessary.

The bill then alleged that though the plaintiff always knew that a clearing warrant, after the same had been adjusted and fully carried into execution, was, with reference to all transactions of a date prior to 1811, a final and settled account, and invariably treated as such; yet the plaintiff did not until very recently become acquainted with the whole of the proceedings at the War Office, Pay Office, and elsewhere, whereby such clearing warrant, when fully carried into execution, became a full and settled account for the regiments and corps, and for the period and service to which the same referred; and not till long after it was in the power of the plaintiff in any manner effectually to avail himself of his knowledge of such proceedings in his defence to the information afore-**[199]**-said. That the Right Honourable Edward Ellice is now his Majesty's Secretary at War, and as such Secretary at War hath in his custody or power the whole of the general states or accounts, vouchers or writings, so delivered into the War Office by the plaintiff, or by the plaintiff and his father as aforesaid; and also the several clearing and other warrants and papers and writings relating thereto respectively, by which, and by other books and documents now or lately in the custody or power of the said Secretary at War, when produced, the truth of the several matters aforesaid would appear; and which the said defendants ought to produce, but which they refuse to produce. That the plaintiff cannot safely proceed in his defence to the said information of his Majesty's Attorney-General without such production, and a discovery of the whole of the matters and things connected therewith herein respectively set forth and inquired after.

The bill prayed that the defendants may set forth a proper list or schedule of all such accounts, &c., delivered by the plaintiff and his late father, or either of them, into the War Office as such agents, from May 1794 to December 1797. And also a list or schedule of all such clearing and other warrants, books or book accounts, memorandums and writings, which now are, or ever were, in the custody, possession, or power of the defendants, or of the Secretary at War for the time being, relating to the accounts of the said two regiments and corps, and for the period aforesaid, and otherwise relating to any of the matters aforesaid; and also a list of all writings and papers which were prepared at the War Office or elsewhere, under the power or control of the Secretary at War for the time being, or other officer of the government, relating to the matters aforesaid, or some and which of them, distinguishing which of the same are now in the possession, custody, or power of the said defendants, or either of them, and may leave the same in the hands of their clerk in court **[200]** for the usual purposes, and may set forth what hath become of such of them as are not now in the possession, custody, or power of the said defendants or either of them. And that the said defendants may respectively make a full and true disclosure and discovery of the several matters and things hereinbefore stated and charged. And that it may be declared by this Court that the said clearing warrants for the service and period to which the same extend, after having been carried into execution in manner herein mentioned, amount to such full and final settled account as herein is mentioned;

and that neither the same accounts, nor any of them, ought now to be disturbed or opened. And, in order that the plaintiff may be for ever quieted respecting the said agency accounts, for the period and service herein mentioned, that Sir John Campbell, his Majesty's Attorney-General, and the said Secretary at War, and their successors respectively, may be perpetually injoined by the order and injunction of this Court, from prosecuting the said information, or from instituting or prosecuting, or causing to be instituted, any other legal proceedings in this Court or otherwise, against the plaintiff, touching the same; and for general relief.

To this bill the defendants put in their joint and several demurrer, assigning for cause that it appears by the said bill that these defendants, and each of them, are sued as public officers of his Majesty's government, acting for and on behalf of his Majesty; and of and concerning matters and transactions arising out of and within their duty and employment as such public officers, and not in any manner in their or either of their private character as individuals; submitting, that this Court ought not to entertain jurisdiction of all or any of the matters in the said bill mentioned against these defendants or either of them: and assigning for further cause, that the said complainant has not by his said bill shewn any matter of equity against these defendants or either of them, or made such a case **[201]** as entitles him in a Court of equity to the relief or discovery thereby sought against them, or any relief or discovery whatever as to the matters contained in the said bill, or any of such matters.

Mr. Rolfe and Mr. Wray, for the demurrer. If this bill were filed against private individuals, no doubt a demurrer would hold. The plaintiff might be entitled to the discovery, but he would not be entitled to the relief; and therefore failing as to the relief, he would fail as to the discovery also. Here the plaintiff seeks both discovery and relief. He prays the discovery of the clearing warrants; and that, when discovered, they may be declared to amount to a settled account. That is in effect asking the Court to declare the documents in question to be a good defence to the plaintiff in any suit or action which may be brought against him, without trying the merits of such a suit or action. Such a bill is totally inadmissible. In *Enfield* v. *Jolliffe* (not reported) it appeared that Jolliffe and Banks were contractors for building London Bridge. They employed Henfray as their surveyor, and he was to be paid by receiving a portion of the profits. Henfray died, and upon his death a question arose whether he was to receive one-eighth of the entire profits, or only one-eighth of the profits during the time he superintended the concern. His representatives, conceiving that he was entitled to one-eighth of the whole profits, filed their bill against Jolliffe and Banks for an account and payment accordingly. Jolliffe and Banks, having reason to believe that certain transactions between them and Henfray amounted to a settled account, filed a cross bill against the executors of Henfray for a discovery of their transactions, and that they might be declared to amount to a settled account. To this bill the executors filed a general demurrer, which **[202]** was allowed by Lord Lyndhurst. In that case the counsel who supported the cross bill cited the dictum of Lord Redesdale, that a demurrer to a cross bill will not hold (Mitf. 203); but it was answered that the meaning of that dictum was only this—that a demurrer would not lie for want of jurisdiction in the Court; not that the defendant to the cross bill might not demur in respect of the relief sought by such bill. That case, therefore, is decisive of the present as regards the relief. Here the discovery sought is likewise improper. It is clear that you cannot file a bill against public officers for the discovery of papers affecting the public service.

Mr. Simpkinson and Mr. Miller, for the bill. The bill is not filed in this Court as a Court of equity merely, but as a Court of revenue, a Court indirectly concerned in taking and settling the public accounts. In *The Attorney-General* v. *Deare* the House of Lords decided that clearing warrants did not amount to a settlement of accounts. There is no doubt of that. But we contend on the present occasion that the warrants, coupled with other circumstances, amount to such a settlement. The bill alleges that some important fresh information was not obtained till after the filing of the answer to the information. It also appears from the bill that the accounts between the army agent and the War Office and Deare were settled. The bill alleges that no error exists therein, and that no sum is due to the public by reason of such accounts. It is admitted, therefore, by the demurrer, that there is no error in that respect; nevertheless, an information under the 45 Geo. 3 has been filed against the plaintiff, calling on

him to deliver up his books to the War Office, upon a mere allegation that the accounts have not been settled. The Court has jurisdiction to control the acts of all per-**[203]**-sons, either concerned in collecting the revenues or in auditing the accounts of persons amenable to the Crown. In *Ex parte Durrand* (3 Anstr. 743), Macdonald, C. B., assumed that the Court had jurisdiction; and the only question was, whether it should be exercised by petition or bill. *Laragoity* v. *Attorney-General* (2 Price, 172), *Crawford* v. *Attorney-General* (7 Price, 1), and the luminous judgment of Graham, B., in *Ex parte Colebrooke* (7 Price, 87), are authorities on this subject; and they entirely remove the objection urged against us, that though we might be entitled to the discovery, we are not entitled to the relief sought for by this bill.

But then it is said that the defendants are sued in their official characters, and that the Court has no jurisdiction in that case. But, in all the cases cited, the Attorney-General was sued in his official character. Even the Court of Chancery has entertained suits against persons in their official character. In *Rankin* v. *Huskisson* (4 Sim. 13) one point which was urged was, that the Court had no jurisdiction against the Commissioners of Woods and Forests; but the Vice-Chancellor granted the injunction. In a similar case of *Codrington* v. *Lord Lowther* (not reported) the bill was filed against the Commissioners of Woods and Forests and the Attorney-General, and the object of the bill was to restrain proceedings at law by the Attorney-General. To this bill the commissioners, although public officers, put in a full answer, and inserted in a schedule all the papers inquired after. This cause was afterwards compromised; but it serves to disprove the proposition that papers, the moment they get into the hands of a public officer, are not to be delivered up. In *Attorney-General* v. *Brooksbank* (1 Y. & J. 439) the defendant's plea having been overruled, he moved to amend his plea; and, for that purpose, that the Attorney-**[204]**-General might be directed to produce and leave certain documents in the hands of one of the clerks in Court. The application was granted; the Court only doubting whether the defendant should not have filed a cross bill. That case seems to be decisive of the present.

Lastly, notwithstanding the case before Lord Lyndhurst, no demurrer lies to a cross bill. Mitford, Eq. Pl. 203; Coop. Eq. Pl. 215; Wy. Prac. Reg. 85.

Mr. Rolfe, in reply. Let it be assumed, for the sake of argument, that there is nothing in the character of the Attorney-General to prevent him from making a full discovery. The bill prays for a declaration that the clearing warrants amount to a full and final settled account, and for a perpetual injunction to restrain the defendants from proceeding against the plaintiff. The records do not afford an approach to a precedent of such a bill. The case of *Codrington* v. *Lord Lowther*, cited on the other side, confirms this observation. The Commissioners of Woods and Forests, having a very extensive power of granting leases, had some communication upon the subject of a lease with Sir Bethell Codrington. A dispute arose as to how far they had entered into a contract to grant him a lease; and, in order to bring the matter to a test, they filed an information of intrusion against him. Sir Bethell Codrington took to his counter remedy, and filed a bill in equity against them, not for discovery, but for ordinary relief—for a specific performance of the contract to grant a lease; that the agreement so made might be declared binding on the new commissioners, and carried into execution; that the defendants might execute a proper lease to the plaintiff, the plaintiff being willing to execute a counterpart; and that the defendants might be restrained from commencing or prosecuting any proceedings at law to recover possession. That injunction was ancillary to granting the relief. Upon filing such a bill the party was **[205]** entitled, as of course, to an injunction till the hearing. What is here asked is not only the benefit of discovery, but a declaration that the matter so discovered may afford a defence in this or some other Court. The case before Lord Lyndhurst decides the present question.

Jan. 29th.—THE LORD CHIEF BARON. The demurrer being to the whole bill, if there be no ground for relief stated in the bill, and improper relief is prayed, the demurrer will be good as to the discovery as well as to the relief; because, in such case, the discovery would be absurd. Granted: but, if there is sufficient ground in the bill for some relief, surely I am not bound by the specific prayer of the bill; but, under the prayer for general relief, may give the plaintiff the proper relief. The general prayer gives the Court jurisdiction. I must take for granted all the facts stated in the bill to be true, namely, that these documents amount to a defence—that

they are in the possession of Mr. Ellice—and that the plaintiff has discovered them since the period when he could have used them as a defence to the information.

Mr. Rolfe suggested that there was no necessity for the plaintiff proceeding by cross bill. If, since his former answer, he had discovered new matter for his defence, he might have filed a supplemental answer in the nature of a plea puis darrein continuance. He might, in any term, after filing his former answer, have asked for leave to file such a supplemental answer.

THE LORD CHIEF BARON. That might not help him. If he filed a supplemental answer, he might also file a cross bill in aid of the supplemental answer.

Mr. Simpkinson referred to *Hoare* v. *Parker* (1 Cox, 224).

[206] Feb. 10th.—THE LORD CHIEF BARON. The facts that are admitted by the demurrer are these—that certain documents exist in the possession of one of the defendants which, if produced, would amount to a clear defence and exoneration of the plaintiff as against the information which has been filed against him, and that they have not been discovered by him until after the period when it became too late to urge them in his defence. These are the facts stated upon the bill, and the demurrer admits those facts. The plaintiff then goes on to pray not only a discovery, but for what has been argued to be impossible to grant, namely, a general and perpetual acquittance, so as to bar the Attorney-General for ever from proceeding against him. Now, undoubtedly, it may be true that the specific relief, which forms part of the prayer of the bill, he may not be able to obtain. But then it is argued that, where a party asks for a discovery, but unites that discovery with a prayer for relief, which it is impossible for him to obtain, then, according to decided cases, and according to principle, the bill ought to be dismissed; inasmuch as it shews that the object of discovery is one which could be of no avail—which he cannot make use of or rely upon in a Court of equity. I am very well aware that it has been decided in a series of cases since the time of Lord Thurlow that a general demurrer may be put in to a bill of that nature; that there is no occasion to demur both to the inquiry and to the relief, but that a general demurrer will answer the purpose of disposing of the bill. I concede that; but it appears to me that this must be taken with the qualification that there is no matter of equity disclosed in the bill itself, which shews the party entitled to some species of relief; because if any such matter be disclosed, then, although the specific prayer may not be consistent with that, or may ask something beyond what is attainable in a Court of equity, yet the general prayer of the bill may be brought in aid, and he is entitled, under that general **[207]** prayer, to such relief as the nature of the case will justify. But then it was argued for the defendant, and I was very much struck at first by the argument, that what the plaintiff has stated here he might have urged in his defence—that he might have done it in the shape of an amended answer. Now, though that may be true, still it appears to me that I am asked to assume that what the plaintiff has stated in his bill is false: how, then, is that consistent with the general rule that all the statements in the bill are admitted by the demurrer to be true? I am bound to presume that the plaintiff is placed in such a position by the proceedings that have taken place in this Court, but which are not detailed in the bill, that he could not sufficiently avail himself of the defence which he seeks to make by this discovery if, he attempted it in any other way than by bringing it before the Court by a cross bill. A cross bill is very often filed for the purpose of bringing matters before the Court which the defendant cannot so conveniently set forth in his answer. He may require a discovery, in order to assist him in bringing those matters sufficiently before the Court. Surely, then, it is a sufficient ground for that discovery if, upon the face of his bill, he discloses such matter as, if true, would amount to a clear defence on the information, but which from circumstances he could not use in the defence which he has already made. It is very true that this Court cannot pronounce any decree that shall exonerate him, under all circumstances and at all times, from any claim of the Crown; because any suggestion of fraud, though the decree was actually made, would of course entitle the Crown to proceed de novo against him, and to bring forward that new matter. But, assuming the facts to be true, as stated in this bill, I cannot hesitate to say that they amount to a clear defence to the particular suit instituted by the Attorney-General against him; and, if that be so, surely he is entitled to this sort of relief, namely, that he may have the **[208]** benefit of the discovery for the purpose of adducing those facts before the Court in a specific and distinct form, when both the bills come on together.

A great deal of learning has been gone into for the purpose of shewing that such a bill may be filed against the Attorney-General. I make some remarks upon it, that I may not be supposed to have overlooked any part of the argument. I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned. I am not prepared to say that a bill of discovery has ever been filed, or could upon principle be sustained against the Attorney-General for a discovery of matters that can be neither in his personal nor official knowledge; or that the Crown would be bound, through the medium of the Attorney-General, to make that discovery. At the same time it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred. Hence there are a great variety of cases where bills of this sort have been filed, in which the Attorney-General has been a party; and one case has been referred to, where it appears that the Attorney-General did set forth a full answer.(*a*) There the Treasury desired that the question might be brought before the judicial consideration of some Court of justice; and it was very clear, when once the Court thought that it ought to have jurisdiction over the subject-matter, that it did not become the Attorney-General to urge any form in opposition to **[209]** it: otherwise, I think it would be a difficult thing to say that a mere bill of discovery might be filed against the Attorney-General, instead of putting the party to his petition of right, which is the proper remedy against the Crown, where he claims a specific relief against the Crown.

But that case of *Crawford* v. *The Attorney-General*, as well as *Ex parte Colebrooke*, appear to me to have no distinct relation, except for that point, to the present case. Those were cases only in which the Court of Exchequer thought, upon argument (at first not the majority of the Court, but only Mr. Baron Graham, though afterwards, upon the production of many authorities, all the Court), that this Court had, by virtue of its original constitution, a jurisdiction over public auditors appointed for the purpose of auditing public accounts, unless that jurisdiction was expressly taken away by statute. Now, as it appears by the statute appointing the auditors of public accounts, that there was no express denial of the jurisdiction of the Court, but, on the contrary, a recognition of it in one or two cases, the Court resolved, and I think justly, that they had the same jurisdiction on behalf and for the benefit of the subject over the auditors of public accounts, when the case was properly brought before them, as they would have had over the auditors of the imprest, or auditors appointed by the Court of Exchequer for the purpose of auditing public accounts. I do not, however, think the consequence that was in argument deduced from that position was justly deduced from it, namely, that therefore a bill might be filed against the Attorney-General on such a subject. On the contrary, if they were to be considered in effect officers of the Court, it should rather appear that matters complained of might be brought before the Court on motion. I believe it would be a new proceeding to file a bill against any of the officers of this Court, to whom a matter of account was referred, in order to make him a party to a discovery, or to **[210]** afford any relief to a party who seeks relief. Those cases, however, certainly shew that the Attorney-General may be made a party to such a bill. I never doubted that position; it has been so long established, that there was no occasion to go into a great deal of learning for the purpose of supporting that proposition.

We come back, therefore, to the short ground on which I decide this case; that there does appear to me to be on the face of this bill a ground of relief on which the party is entitled, which he alleges he could not obtain by the pleadings in the original cause, and therefore he asks for a discovery. What the effect may be of an answer I do not pretend to say; but, in case of any doubt whether a demurrer can be sustained or not, the safest course is to overrule the demurrer; because the party will have the same benefit upon the answer that he could have had upon the bill and the demurrer. Therefore, however much shaken I have been—which I confess I was—by the argument for the defendants; nevertheless I come back to the original impression which

(*a*) *Crawford* v. *Attorney-General*, 7 Price, 1.

I had formed in the outset, that there was sufficient in this case to call upon me to overrule the demurrer. I am the more inclined to act upon that opinion, though I do not pretend to entertain a very great confidence in it, from the conviction that it will be no prejudice to the parties if I adopt that course; whereas it might be very much otherwise if I were to allow the demurrer. Upon these grounds, therefore, I think it right to overrule the demurrer.

[211] BELLWOOD *v.* WETHERELL. Jan. 15th, 28th, March 2nd, 1835.—The defendant in a tithe suit, who denies the rector's title, cannot, by a cross bill, compel the rector to discover the evidence of his title; therefore, where the rector, by his answer to such a cross bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled.

[S. C. 4 L. J. Ex. Eq. 23. See 4 Y. & C. Ex. 563.]

The defendant in this suit, as lay impropriator of the rectory of Osmotherley, in the county of York, in Trinity Term 1833, filed his bill against the present plaintiffs and others, for an account of tithes for lands in their respective occupations within the said parish.

The present was a cross bill filed for the purpose of obtaining a discovery of the defendant's title. It alleged that the defendant was only a portionist of some tithes arising upon certain lands within the parish of Osmotherley, and not the impropriate rector of such parish. It likewise alleged that the first conveyance under which the defendant claimed title, and which the bill charged to be in his possession, and which bore date, &c., did not contain certain lands for which he claimed tithes, although in subsequent conveyances, which were likewise in his possession, those lands had been preserved with a view to give the persons claiming under the same an apparent or valuable title to the said rectory.

The bill contained charges on which the following inquiry was founded:—"Whether the said Benjamin John Wetherell is in any and what manner, or under any and what deeds or deed, entitled to the tithes which he is seeking to recover by his said bill against the plaintiffs. And that the said Benjamin John Wetherell may discover and set forth what tithes within the said parish of Osmotherley he is seised of or entitled to, and how and in what manner and in what capacity he is seised of or entitled to the same, and under what deeds or deed, and the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed, under which he alleges the said rectory was conveyed to the person or persons under whom he claims such rectory."

The defendant by his answer denied that he was only a **[212]** portionist. He said that one John Weighill had formerly the said rectory duly conveyed to him, or by other good and lawful means became the lay impropriator thereof. That he, the defendant, claimed to be entitled to all the tithes, both great and small, within the township of Osmotherley, excepting from such lands the tithes whereof had been sold off, but which lands were not in the occupation of any of the plaintiffs. That he, the defendant, was the impropriate rector of the said parish, and that he derived title to the tithes aforesaid under the said John Weighill. With respect to the foregoing inquiry, his answer was as follows:—"That he is in manner hereinbefore, and in his said former answer mentioned, entitled to the tithes which he is seeking to recover by his said bills. And he insists and submits that said plaintiffs are not entitled to be informed under what deeds or deed, or the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed under which he alleges the said rectory was conveyed to the person or persons under whom this defendant claims the said rectory."

The plaintiff took exceptions to the answer for insufficiency.

Mr. Barber and Mr. Bayley, for the exceptions. This is a cross bill filed for the discovery of deeds, in order to prove the allegation that the plaintiff in the original suit is only a portionist. A similar course was taken in *Bowman* v. *Lygon* (1 Anstr. 1), where the demurrer to the cross bill was overruled. *Metcalfe* v. *Harvey* (1 Ves. sen. 249), and *Moodalay* v. *The East India Company* (1 Bro. C. C. 468), are authorities in favour of the plaintiff. The former of these cases is very strong. There Lord

Hardwicke laid it down that a person in possession of an estate might file a bill to discover the **[213]** title of a person bringing ejectment against him. No doubt the general rule is, that where a man as plaintiff files an original bill to establish his title, he may call for deeds which shew his own title, but not those which would discover the title of the defendant. That position is not disputed. But where a man is defendant, the case is different. If a person is brought into a Court of equity, he has a right to call on the person who brings him there to discover his title, because it is by way of defence. You may, by a bill of discovery, make a plaintiff a witness against himself. In aid of a defence, a discovery will be enforced, even though the party compelled to make it may be made liable to penalties in consequence: *Bishop of London* v. *Fytche* (1 Bro. C. C. 96), *Macaulay* v. *Shackell* (1 Bligh, N. S. 96). It is the constant practice of underwriters, when sued on a policy which they believe to be affected with fraud, to file a bill for discovery against the plaintiffs at law, although the discovery might subject the parties to an indictment or penalties.

Mr. G. Richards, contrà. The plaintiff is not entitled to the production of these deeds, and the principle is the same either on a cross bill or an original bill. Where the defendant admits that he has deeds which make out the plaintiff's title, the Court will order them to be produced. But the Court will not order their production in this case, for the defendant has admitted deeds which relate to the rector's title only. In *Bowman* v. *Lygon* (1 Anstr. 1) the demurrer was overruled; because, as Thompson, B., observed, it covered too much. In the same case Eyre, B., said that the rule as laid down by Lord Hardwicke went much too far: but that in the case before him the demurrer was overruled on other grounds. It is impossible to deny that **[214]** Lord Hardwicke's is a dangerous decision. In the case of underwriters, the admission of fraud on the part of the defendant makes out the case of the plaintiff. [The Lord Chief Baron. The defendant puts your title in issue. Suppose that, upon the hearing, you, having shewn no previous title in answer to the bill, should succeed, you would be entitled to a decree; but that would be no answer to the real rector who afterwards filed his bill. You say that defendants who are underwriters may file a bill of discovery, whatever be the consequence to the plaintiff. Does not that apply here? Is it not essential that the defendants should know whether the plaintiff is really rector, in order to be guarded against a suit by another person?] In *Glegg* v. *Legh* (4 Madd. 193) the same point was agitated as in the present case, and the discovery was refused. *Parker* v. *Legh* (4 Madd. 207) was a decision to the same effect. *Sampson* v. *Swettenham* (5 Madd. 16), *Collins* v. *Gresly* (2 Y. & J. 490), *Bligh* v. *Berson* (7 Price, 205).

Mr. Barber, in reply. Except the case in Maddock, the cases cited have no application. The parties were plaintiffs, and filed their bills for the recovery of tithes. But here you bring the defendant into equity against his will. He then referred to Mitford on Pleading, 53, 54.

Mr. Simpkinson, amicus curiæ, said that since *Glegg* v. *Legh* was decided, Sir John Leach had in a similar case decided otherwise, and had overruled the demurrer.

Jan. 28th.—On a subsequent day Mr. Simpkinson said that his remark on a former occasion was corroborated by the decisions in *Glegg* v. *Legh* (1 Bligh, N. S. 302), and *Cherry* v. *Legh* (id. 306), in **[215]** the House of Lords, in which cases answers were put in. He also referred to *Attorney-General* v. *Davison* (1 M'Clel. & Y. 160).

Mr. G. Richards, for the defendant, referred to *Bolton* v. *Corporation of Liverpool* (3 Sim. 467; 1 Myl. & K. 88).

March 2nd.—THE LORD CHIEF BARON. These are exceptions to the answer to a cross bill filed against a lay rector, the rector having filed his original bill for an account of tithes. The defendant in the original suit puts the plaintiff's title in issue in his answer, and then files his cross bill against the plaintiff for a discovery of his title, disputing his title as rector, alleging that he is only a portionist, and not the rector generally; he does not, however, suggest that any body else is rector, or that any body else is entitled. These exceptions are taken to the answer, because the rector does not set forth his title in manner required by the bill. The question, therefore, is this, whether the rector under the circumstances is bound to disclose the evidence of his title? Upon looking at the cases, some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them. The case which appears at first to be most in point is that of *Bowman* v. *Lygon* (1 Anstr. 1), but it does not furnish a precise decision on the subject. That was a bill filed by a

rector for tithes; the rector's title was put in issue, and a cross bill was filed, seeking a discovery of the rector's title, and whether he had received any agistment tithe. The demurrer was to both these points. The principle was there recognised that, as a general proposition, a man should not be obliged to discover his title; but the same distinction was attempted to be established in that case as in the present; one of the counsel arguing that, where a person **[216]** is defendant to an original bill, he is entitled in all cases to a discovery of the plaintiff's title. I cannot accede to that. The judgment in that case was no doubt correct, because the demurrer covered too much. Mr. Baron Thompson, a most consummate Judge both in law and in equity, proceeded with his usual caution on that occasion, and avoided coming to any decision on a point not in question. He held the demurrer bad, for the reason I have stated, but gave no opinion upon the other point; a reserve which would have been wholly unnecessary if he had thought it perfectly clear and indisputable. Then Lord Chief Baron Eyre, a person of great accuracy, though not always so cautious in delivering his opinions as Mr. Baron Thompson, throws out an observation which qualifies the general proposition. He seems to consider that nothing but some pressing matter arising in the particular suit would justify the discovery. He says it is difficult to draw a line in what cases discovery ought to be granted, as where the tenant is fearful of being harassed by different claimants of the impropriation. Now the obvious line to be drawn is this—that though in general the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party files a bill as rector, the defendant may file a cross bill, to see whether the plaintiff in the original suit is entitled to have that which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he does not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defen-**[217]**-dant shall not be harassed a second time. That would apply to several cases: as, for instance, if the defendant to an original suit had established a modus, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by that decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment.

The distinction to be taken in cases of this nature was recognised in those cases of *Glegg* v. *Legh* (1 Bligh, N. S. 302), and *Cherry* v. *Legh* (id. 307), in the House of Lords. In the former case the plaintiff filed his bill as rector for the recovery of tithes. The answer denied the plaintiff's title as rector, and then a cross bill was filed; and the cross bill must have been suggested by that which appeared in the answer. At that time the rectory was vested in two trustees of a term for securing certain annuities, and also in a mortgagee. Now this bill was filed in 1817, and the cross bill was filed the following year; and I find by the report in *Cherry* v. *Legh* that the bill against Cherry was not filed till 1820, which was after the answer was put in to the bill filed by Glegg and the other parties; and in this last bill, Egerton and Tatton, the trustees of the term, were made plaintiffs. That was not so in the original bill filed by Glegg. When this last case came to be tried in the Exchequer, two defences were set up, one of which was a denial of the plaintiff's title as rector; and this Court decreed, notwithstanding the trustees were in possession of the term for securing the incumbrancers, and notwithstanding the mortgagee had the legal title; yet, as all the annuities had been paid up to the time when the bill was filed; and as the mortgagee had been paid all his interest; **[218]** that was a sufficient protection to the defendant, because he could not be called on again by the trustees or mortgagees, and, therefore, he was bound to account. That decree was confirmed by the House of Lords, and the very opinion of Lord Eldon on the hearing of the appeal shews what was the object of the discovery claimed by the cross bill; and it appears clear that he thought there was a distinction to be drawn in these cases, and that it does not follow that if a plaintiff files a bill claiming tithes, that gives the defendant the right to file a bill to obtain from the plaintiff the evidence of his title.

It was said, indeed, by the counsel who supported the exceptions, that where a party is brought into equity as a defendant, he is in a different situation from a party seeking discovery as a plaintiff, and that he has a right to file a cross bill to obtain the discovery necessary for his defence; and in support of that position, the case is adduced where a defendant attacked by an ejectment files a bill of discovery. But the observation to be made as to that is simply this—where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir at law—whether he claims under a devise—or whether he alleges any imperfection in the defendant's title deeds. There the defendant is taken by surprise, and therefore I can easily understand in such a case why not the evidence, but the nature of the title, should be disclosed. But in cases of recent possession, where parties well know the nature of each other's titles, there is no ground to compel any such discovery as that which is here required. That appears to me to be an answer to the argument derived from the cases of ejectment.

There is another case which it is necessary to notice; **[219]** *Moodalay* v. *East India Company* (1 Bro. C. C. 468). That was a case where a party in the East Indies held under the company, by what is called a cowl. He had been dispossessed by order of the company and he was desirous of bringing an action to vindicate his right, and he filed his bill against the company for a discovery of the circumstances under which they had granted another cowl and to know by what authority they had dismissed him. The Master of the Rolls in his judgment says the company are bound to answer; but the question in that case was whether the case were within the given limits within which suits will be entertained by courts of equity against the company; that was the main point decided, and upon that the Master of the Rolls was against the company. As to the other point, he said they should not be prejudiced by discovering their title; so that in fact that point was not decided; and therefore the case, as regards the present question, is not an authority.

There is, undoubtedly, a recent case of *Bolton* v. *The Corporation of Liverpool* (3 Sim. 467; 1 Myl. & K. 88), where, upon a bill filed for the discovery of documents affecting the right of the corporation to demand toll, the Court of Chancery ordered the defendants to produce certain cases which had been laid before counsel relating to the subject in dispute, those cases not having been prepared with reference to the existing proceedings. I confess I do not think that decision was warranted by the cases which were made the foundation of it. I should have decided it differently, and should not have allowed the production of those documents; at the same time, where a corporation claims a toll to be due from the inhabitants of a town, then I think it would be both expedient and just, not that the evidence of their title, but that the nature of their claim, should be discovered.

[220] The plaintiff in this suit does not suggest upon his bill any doubt whether he may not be put to additional expense and be harassed again by some person claiming a paramount title to the rectory. He simply says that the defendant is not rector; and that brings it to the naked question, shall he be allowed to call on the defendant to produce a deed, not because it makes out his own case—not to defend himself—but to expose the plaintiff to all the dangers of a discovery? The possession of the rector, without any adverse claimant, is primâ facie evidence of his title; and if in any document to be so produced a flaw should happen to be found, it would be a summary means to deprive the rector of his right, if that deed were exposed in a Court of equity, where other persons might take advantage of the defect. At law, the rector must prove his title, as in any other case, and the defendant might take advantage of any imperfection; but to allow such an application as the present would be to enable the defendant in a tithe suit in every case, to call on the plaintiff to produce the particulars of his title. The case by which the general rule is entrenched upon, and which forms an exception to the rule, is where it is expedient that the defendant should be protected from any adverse right set up by a paramount claimant, and from agitating the matter over again.

Exceptions overruled.

[221] BOND *v.* NORTHOVER. Jan. 23rd, 1835.—A charge in the bill that papers and documents are in the possession or power of the defendant or his solicitor, is not answered by a denial that they are in the possession or power of the defendant.

[S. C. 4 L. J. Ex. Eq. 60.]

This was a bill to set aside certain conveyances alleged to have been obtained by the defendant from his uncle by fraud and misrepresentation. It contained a charge that certain papers and documents were in the possession or power of the defendant or his solicitor, whereby the truth of the several matters alleged in the bill would appear, but which the defendant refused to produce. The answer denied that the defendant had the possession or power of the papers and documents in question, but said nothing as to whether they were or had been in the possession or power of the solicitor. An exception was taken to the answer for insufficiency in this respect.

Sir Charles Wetherell and Mr. G. Richards, in support of the exception, contended that a charge of this nature always applied to the physical or personal possession of the solicitor, not to his constructive possession.

Mr. Simpkinson, contrà. The possession of the solicitor is the possession of the party. The party denies that they are in his possession, and that is equivalent to saying that they are not in the possession of the solicitor.

THE LORD CHIEF BARON. If the solicitor got them aliunde, or if he has them with a lien upon them, they are not in the possession or power of the party, though in the hands of his solicitor. The answer therefore is not sufficient as regards the solicitor. It may be important for the plaintiff to know whether the solicitor has the documents; for he may amend his bill and make the solicitor a party.

Exception allowed.

[222] LORD *v.* STEPHENS. Jan. 29th, 1835.—In an agreement for the purchase of an estate, one of the stipulations was that the vendor should be tenant from year to year to the purchaser: Held that the inability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have had some notice was no bar to the specific performance of the contract.—A stipulation to give such a title as shall be satisfactory to the purchaser, does not authorize the purchaser to make any other than the usual objections to the title.—Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser.

Richard Lord, the father of the plaintiff, being seised in fee of various freehold estates, by indentures of lease and release, dated the 28th and 29th days of May, 1822, conveyed a farm of 98 acres to the defendant by way of mortgage, for securing the sum of 4000l. and interest. By indentures of lease and release, dated the 16th and 17th days of May, 1827, he conveyed another farm containing 120 acres to Booth Hodgetts, by way of mortgage for securing the sum of 8500l. and interest.

Upon the death of Richard Lord the father in December, 1831, the equity of redemption in all the mortgaged premises became vested in the plaintiff Richard Lord the son.

In February, 1832, the defendant being desirous of purchasing of the plaintiff the farm comprising the 120 acres, and of deducting from the purchase money what was already due to him on mortgage, entered into an agreement with the plaintiff for the purchase, and paid 100l. as a deposit. The agreement was as follows:—

"Memorandum of an agreement made this 14th day of February, 1832, between Richard Lord, of Barly, in the county of Leicester, farmer, of the one part, and the Rev. Richard Stephens, of Belgrave, in the county of Leicester, clerk, of the other part. The said Richard Lord doth hereby agree to sell to the said Richard Stephens, and the said Richard Stephens doth hereby agree to purchase at the rate and price of 60l. per acre, all &c., containing 120 acres or thereabouts, now in the occupation of the said Richard Lord, free from all tithes and quit rents, but subject &c. And it is hereby declared and agreed that the said Richard Lord shall at his own expense make out a good and marketable title to the said premises: and the said Richard Stephens

shall be at the expense of his **[223]** own conveyances. That the purchase shall be completed on the first day of July next, when the said Richard Stephens shall pay the remainder of his purchase money, and the said Richard Lord shall execute a proper conveyance, &c. That nothing herein shall prejudice the mortgage between the said Richard Stephens and Richard Lord, the late father of the said Richard Lord, or the principal and interest and monies thereby secured, except that the said Richard Stephens shall be at liberty to deduct the amount thereof from the said purchase money. That the said Richard Lord, party hereto, shall after the completion of this purchase take and be permitted to rent and occupy the said premises, at a sum or amount equal to 4l. per cent. per annum and interest, on the purchase money to be paid for the said premises, as tenant from year to year; and a proper lease or agreement be granted and accepted thereof, with the usual covenants in farming leases or occupations accordingly. And lastly, that the costs of this agreement shall be paid equally between the said parties; and that in case the title shall not be satisfactory to the said Richard Stephens, his heirs or assigns, or his or their counsel, these presents shall be void to all intents and purposes."

In August, 1832, a fiat in bankruptcy issued against the plaintiff, but was annulled by an order dated the 9th February, 1833. In January, 1833, the defendant caused a formal notice to be served on the plaintiff, stating that in consequence of the delay which had taken place in making out the title to the premises contained in the written contract, under which it was agreed that the purchase should be completed on the first day of July then following; and in consequence and by reason of the bankruptcy or reputed bankruptcy of the plaintiff, whereby he was rendered unable and unfit to accept the defendant's lease, or become a tenant of the said farm to the defen-**[224]**-dant, pursuant to the said contract, and for other reasons, he the defendant thereby gave the plaintiff notice that he should abandon and give up, and did thereby abandon and give up, the said purchase and the said contract, except as to the deposit of 100l., which he thereby required to be returned, together with interest, or that he should take legal proceedings to recover the same.

The bill stating the foregoing facts, and charging that the delay had arisen on the part of the defendant, and that the same solicitor acted both for the plaintiff and the defendant until the bankruptcy, prayed a specific performance of the contract, and that the defendant might be restrained from proceeding against the plaintiff by ejectment, or for the deposit.

The defendant by his answer admitted all the material allegations of the bill, but said that shortly after the date of the said contract a bill had been filed against the plaintiff and also against Hodgetts, the mortgagee of the 120 acres, and against two other incumbrancers, praying a foreclosure in respect of a mortgage of the premises which had been executed by the plaintiff's father in July, 1830, for securing 1100l., which suit was still pending in the Court of Chancery; that another foreclosure suit was also pending which had been instituted by Hodgetts; that after the contract was entered into the plaintiff fell into embarrassed circumstances, whereby he became incapable of properly occupying the said lands as tenant thereof, according to the terms of the agreement; and that the plaintiff had since the agreement been in possession of the premises, and had by improper modes of husbandry and farming greatly injured and deteriorated the said lands, and particularly the pasture lands thereof. He submitted that under these circumstances he was justified in refusing to complete the contract, and that it was not his fault that it was not completed at the time agreed upon.

[225] The defendant did not allege by his answer, nor did it appear from the evidence, that he was ignorant of the mortgage of 1830, at the time of the contract with the plaintiff.

On the part of the plaintiff, evidence was read to shew that the lands were not mismanaged after the contract was entered into. It was proved by one of the witnesses, that in September, 1833, there was a meeting of the mortgagees, at which the defendant and his solicitor were present; that on that occasion a discussion arose connected with the contract for the purchase by the defendant; and that the defendant then claimed to have the sum of 700l. deducted out of his purchase money for injury and dilapidations accruing to the premises since the contract, which the deponent on behalf of the plaintiff thought unreasonable, and proposed to have left to arbitration; but that the defendant and his solicitor declined such proposal.

On the part of the defendant, it was given in evidence that, in 1832, the plaintiff mowed about 67 acres of old pasture land; and that, in the following year, he mowed nearly the whole of the lands, it being a grass farm; that he carried off the produce without properly grazing the lands, or manuring them, &c., and that he neglected to repair the outbuildings. It was likewise proved that several distresses had been made upon the premises by the mortgagees, and, amongst them, by the defendant himself, for arrears of interest on the 4000l.

Mr. Treslove and Mr. Koe, for the plaintiff. The same solicitor acted for both parties until the bankruptcy; the delay therefore arose from the defendant's own agent; and, even if it were otherwise, time was not of the essence of the contract; and therefore the defendant could not rescind the contract upon a mere notice to that effect, however formal. The defendant complains of a deterioration of the property. That is not so to the [226] extent complained of, and it arose from the difficulties in which the plaintiff was placed by the delay. Deterioration, however, of the property during the time required for completing the purchase is not a ground for rescinding the contract, though it may be the subject of an allowance to the purchaser: *Ferguson* v. *Tadman* (1 Sim. 530). The circumstance of the estate being incumbered with foreclosures is no objection to the title; besides, if the purchaser had paid his money as he ought to have done, the plaintiff would have been enabled to pay off the mortgage. Then it is said that the plaintiff is not in a condition to continue the farm as tenant. But the agreement does not make it obligatory on the defendant to accept the plaintiff as his tenant. That is entirely optional; at all events, the plaintiff waives that right.

Mr. Boteler and Mr. Blunt, for the defendant. First, the agreement must be performed, if at all, in the entirety. It was a substantial part of the agreement that the defendant should look to the plaintiff as his tenant, at a rent fixed by the terms of the agreement. The plaintiff being unable to perform this condition properly, the agreement is at an end. [The Lord Chief Baron. The tenancy was determinable at six months' notice.] Admitting that it is strictly so determinable, yet, if that stipulation was only a lure for larger purchase money, and colourable, the Court will not help the agreement. If the plaintiff entered into such a stipulation, with a view to annul it immediately, it was a breach of faith. Besides, it was agreed that a lease should be entered into with the usual covenants. Secondly, the agreement does not contain the usual stipulation that the plaintiff shall make a good title, but that, in case the title shall not be satisfactory to the defendant, the agreement shall be void. Therefore, if [227] the objections raised by the defendant are fair and reasonable, the Court will not enforce the contract against him. Now the mortgage of 1830, and the foreclosure in consequence, is a circumstance affecting the title. The plaintiff has since been in all kinds of difficulties; writs of execution have been issued against him, and distresses levied upon the premises. Besides, having notice of the bankruptcy, it is difficult to say to whom we ought to pay the money. It is clear that the title cannot be made good without arrangement; it is therefore unsatisfactory. The defendant is not bound to accept it.

Mr. Treslove, in reply. Granting that the embarrassments on this property were double what they are, that would be no objection to the title. To make out a difficulty of title there must be an adverse title: *Esdaile* v. *Stephenson* (6 Madd. 366). Here they are all incumbrances under the plaintiff. If in this suit a reference were made to the Master, he would report that a good title could be made upon the proper parties joining in the conveyance. Then, if those parties did not join, the bill might afterwards be dismissed; but that has nothing to do with the present defence. There are reasons to believe that the bill will not be dismissed. As to the concluding passage in the contract, it clearly does not mean that the defendant shall be at liberty to take an absurd or capricious objection to the title.

The Lord Chief Baron. The two objections which have been raised on the part of the defendant appear to me to amount to nothing. The defendant clearly knew that the plaintiff was not affluent: he himself claimed interest for the 4000l.; he therefore knew that the plaintiff could not pay the interest of that mortgage. If he [228] had made the tenancy of the plaintiff part of the consideration for the contract, by paying a larger sum for the farm on that account, that might have been a cause for rescinding the agreement, if he had found the tenant unable to carry on the farm. But he was cautious and attentive to his own interests, and, by a term in the agree-

ment, he was not bound to keep the plaintiff as his tenant beyond a year. That was a term in it which makes the tenancy of no consideration. If there had been a lease for fourteen or fifteen years, and the tenant had become insolvent, it might have been a reasonable objection; but I cannot imagine that the contract is to be set aside because of the inability of the defendant to take the plaintiff as a tenant for a single year under such circumstances. With respect to what has been said relative to the form of the contract, I cannot construe it to mean that the contract should be binding on one party and not on the other. I think it must mean that the contract should be at an end, in case there was a reasonable difficulty as to the title. There is nothing, therefore, in these two objections.

It then appears that, in September, 1833, the defendant was willing to take the title, provided he could get 700l. allowed him for dilapidations. If at law he had taken his present ground of defence, he would have been answered that, in September, he agreed to the contract, upon being allowed the 700l., and that the parties only differed upon that. According to the ancient practice, unless the plaintiff first proceeded at law and recovered damages, he could not file his bill for specific performance. That is altered now, but still it is a criterion for the decision of a Court of equity. I cannot doubt of this case. At law the plaintiff must have succeeded. The agreement must be performed: the Master to consider to what extent the estate has been deteriorated.

[229] EX PARTE TAYLOR. IN THE MATTER OF THE LONDON AND BIRMINGHAM RAILROAD COMPANY. Jan. 29th, 1835.—Where an act of Parliament, establishing a railway company, directs that the money to be paid for lands to be purchased by the company shall be paid into the bank, until the same shall, upon petition, be applied in the purchase of other lands; and, in the meantime, until such purchase can be made, shall, upon application to the Court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the company: Held, that, under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application.

[S. C. 4 L. J. Ex. Eq. 33.]

This was a petition by a tenant for life of land purchased by the London and Birmingham Railroad Company, praying that the purchase-money might be invested in the 3l. per Cent. Annuities, until a purchase of land could be found, and a reference to the Master to tax the petitioner his costs of the petition, and that the same, when taxed, might be paid by the company.

By the 4th section of the 3 Will. 4, c. xxxvi., incorporating the company, it is enacted that all money to be raised by the act shall be first applied in paying the expenses of obtaining the act, "and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, and making and maintaining the railway, and otherwise in carrying the act into execution."

The 39th section enacts that the money paid by the company for the purchase of any land of any corporation, tenant for life, &c., shall, if it exceed 200l. be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, until the same shall, by order made upon petition in the Court of Exchequer, be applied in the discharge of the several incumbrances mentioned in the act; or until the same shall, by a like order, be laid out in the purchase of other lands, to be settled to the like uses as the lands which shall be so purchased stood settled or limited; "and in the meantime, and until such purchase can be made, the said money may, by order of the said Court, upon application thereto, be invested by the said Accountant-General in his name, in the purchase of 3l. per Cent. Consolidated, or 3l. per Cent. Reduced Bank Annuities, or in government or real securities; and in the mean time, and until such annuities or securities shall be ordered by the **[230]** said Court to be sold for the purposes aforesaid, or shall be called in or cancelled, the dividends, interest, and annual produce thereof, shall, from time to time, by order of the said Court, be paid to the party who would, for the time being, have been entitled to the rents and profits of such lands so to be purchased and settled."

The 42nd section is stated in a former page (p. 166, ante).

Mr. Webster, for the petitioner, contended that, under the 4th section of the act,

the Court has jurisdiction to make the order as prayed, notwithstanding the 42nd section, which, he said, related only to cases where no investment, intermediate between the payment into the bank and the purchase of land, is required. The effect of throwing the costs on the petitioner would be, that for some time he will actually be deprived of all income from the purchase-money.

Mr. Bacon, contrà.

THE LORD CHIEF BARON. The 42nd section does not extend to the costs of investing the money in the funds, and the 4th is only for the purpose of carrying the act into effect, and does not apply to this case. Then, as no mention is made of these costs in the 39th section, they must be borne by the petitioner.

LOVELL *v.* HICKS. Feb. 21st, 1835.—Order to take the bill pro confesso discharged, and answer permitted to be filed, under the circumstances, and upon certain terms.

[S. C. 4 L. J. Ex. Eq. 32. See further, 2 Y. & C. Ex. 58, 472.]

The original bill in this cause was filed on the 28th of May, 1833. The defendant Hicks, together with several other defendants, put in a joint answer, to which exceptions were taken, but which exceptions were waived by the plaintiff soon afterwards amending his bill. Previous to the filing of the amended bill the defendant **[231]** Hicks went to America, and there remained until the month of January, 1835. In the meantime process of contempt to sequestration had issued against him; and, in pursuance of an order, dated the 12th of December, 1834, the amended bill had been taken pro confesso, as against him. The other defendants having answered, and issue being joined, evidence had been gone into on the part of the plaintiff.

Mr. Heathfield, for the defendant Hicks, now moved to discharge the order for taking the bill pro confesso, and for leave to put in an answer to the amended bill upon affidavit, stating the fact of the defendant having been absent in America, as above mentioned.

Mr. Blunt, for the plaintiff, opposed the motion.

It being alleged that Hicks had not returned more than a fortnight since; and it appearing that the cause had abated by the death of a defendant, so that no additional delay would be occasioned, the Lord Chief Baron thought it reasonable that Hicks should be allowed to put in an answer, which was ordered accordingly, on the following terms; namely, that process of contempt should be kept on foot until the sufficiency of the answer should be determined; that Hicks should allow the evidence already gone into on the part of the plaintiff to be read as against him; and that he should pay all the additional costs to be occasioned by the indulgence.(*a*)

[232] MARSHALL *v.* COLLETT. Jan. 30th, Feb. 17th, 1835.—By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock: Held, that she was not entitled.—Semble, that a limitation in a settlement "to the executors and administrators of A., for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take, is void for uncertainty.—A party who, under a misapprehension of his legal rights, parts with his property for a bonâ fide and valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake.

By an indenture dated the 4th September, 1802, and made between George Marshall, since deceased, of the first part, the plaintiff Ann Marshall, the wife of the

(*a*) See *Williams* v. *Thompson*, 2 Bro. C. C. 280, S. C. 1 Cox, 413; *Hearne* v. *Ogilvie*, 11 Ves. 77; *Hughes* v. *Owen*, 1 Fowl. Exch. Pr. 199, contrà.

said George Marshall, of the second part, and John Meysey, Richard Cox, and Joseph Pridham of the third part, it was declared and agreed, that the said John Meysey, Richard Cox, and Joseph Pridham, and the survivors and survivor of them, and the executors and administrators and assigns of such survivor, should stand possessed of the sum of 4000l. 5l. per Cent. Navy Bank Annuities, which had been transferred into their joint names, and the dividends and interest thereof, upon trust to permit and suffer the said George Marshall, or his assigns, to receive for his or their own use and benefit the dividends and interest thereof, during the joint lives of himself and the said plaintiff; and in case he should survive the said plaintiff, then from and immediately after her death, upon trust to transfer the said stock unto the said George Marshall, his executors, administrators, or assigns, to and for his or their own use and benefit; but in case the said plaintiff should survive the said George Marshall, then, upon further trust, that the said trustees, and the survivors, &c. should, from and after the decease of the said George Marshall, receive the dividends and interest of the said sum of 4000l. 5l. per Cent. Navy Bank Annuities, during the life of the said plaintiff, and pay and dispose of the same dividends and interest as the said plaintiff, notwithstanding her coverture, should, in manner therein mentioned, **[233]** appoint, for her sole and separate use; and after the decease of the said plaintiff, surviving the said George Marshall as aforesaid, upon trust to assign and transfer the said sum of 4000l. 5l. per Cent. Bank Annuities, unto the executors or administrators of the said George Marshall, to and for their own use and benefit. And it was thereby provided and agreed, that the said plaintiff should accept, and she did thereby accept, the provision made for her by the present deed, in lieu of a certain annuity which had been secured to her, and in lieu of dower or thirds, and free bench at the common law, &c.

George Marshall died intestate, leaving the plaintiff and four children surviving him, and letters of administration of his personal estate were granted to the plaintiff.

Upon the death of George Marshall it was considered that the plaintiff, under the Statutes of Distribution, was entitled to one-third of the 4000l. stock comprised in the settlement; and, accordingly, the same having in the interim been converted by act of Parliament into a sum of 4200l. New 4l. per Cent. Bank Annuities, the trustees transferred one-third of it to the plaintiff; the remaining 2800l. stock being reserved for the children, in equal shares, subject to the life interest of the plaintiff under the settlement. One of the children afterwards died intestate and unmarried, whereby one-fourth of his share accrued to the plaintiff, and the residue to the surviving children.

In the beginning of the year 1834 the plaintiff and two of the children agreed to sell their interest in the 2800l. stock to the defendant Collett; and accordingly, by an indenture of assignment, dated the 9th April, 1830, to which the plaintiff and the two children and Collett were parties, the life interest and all other the share of the plaintiff, and also the shares, both original and accruing, of the two children, were, for a valuable consideration, assigned to the defendant Collett; and, shortly after the execution of that indenture, the 2800l. stock was transferred **[234]** into the joint names of Richard Cox, the only surviving trustee, and the defendant Collett. Richard Cox afterwards died intestate.

The bill, which was filed against Collett and the plaintiff's three children, having stated the foregoing facts, alleged that, since the plaintiff had executed the said indenture of assignment of the 9th April, 1834, she had been advised that, under and by virtue of the limitations to the executors or administrators of the said George Marshall, to and for their own use and benefit, contained in the said indenture of the 4th September, 1802, she became entitled as administratrix of her said deceased husband, for her own absolute use and benefit, to the whole of the said sum of 4000l. stock, mentioned and comprised in the said indenture; that, upon the decease of her said late husband, and upon the plaintiff becoming his administratrix, the trustees ought to have transferred to her the said sum of 4000l. stock; that she entered into the said contract for the sale to the said John Collett of her supposed life interest in the said sum of 2800l. New 3l. 10s. per Cent. Annuities, in total misapprehension of her right therein and thereto, and in utter ignorance that she was absolutely entitled to the proceeds of the said sum of 2800l. stock, to which, by the ways and means aforesaid, the said trust fund had become reduced.

The bill prayed that the indenture of the 4th of September, 1802, might be

established, and the plaintiff declared absolutely entitled, for her own use and benefit, to the 2800l. stock, part of the proceeds of the 4000l. stock comprised in the said indenture, and that the same might be transferred to her accordingly; that it might be declared that the plaintiff executed the said indenture of the 9th April last under a mistaken apprehension of her rights and interests under the said indenture of the 4th September, 1802; and that the said indenture of the 9th April last might be delivered up to the **[235]** plaintiff upon payment by her to the defendant Collett of what she had received for her supposed life interest. But if the Court should be of opinion that the last-mentioned indenture was valid, then that the 2800l. stock, subject to her life interest, might be secured for such persons as might be entitled thereto at her death. That in the mean time Collett might be restrained by injunction from making any transfer or sale of the said 2800l. stock, &c.

Mr. Simpkinson now moved for an injunction, according to the prayer of the bill:— First, the plaintiff, in the character of administratrix to George Marshall, is beneficially entitled to the corpus of the stock. By the terms of the settlement the corpus of the stock, the wife surviving the husband, is to be transferred by the trustees to the executors, administrators, and assigns of the husband, for their own use and benefit. It will be contended that executors, in cases like the present, are trustees for the next of kin; but in *Evans* v. *Charles*,(*a*) under a bequest to the "personal representatives," an administratrix was held to take beneficially. That case has, to a certain extent, been questioned, but never overruled. In *Sanders* v. *Franks* (2 Madd. 147) the bequest was to the executors or administrators of the testator's wife "for their own use and benefit;" and Sir Thomas Plumer said that those words gave the administrator a beneficial interest. Secondly, the plaintiff having assigned her interest to the defendant Collett, under a misapprehension of her rights, has a right to have that sale set aside, and to be placed in the same situation as if she had not executed the deed.

Mr. Boteler and Mr. G. Richards, contrà. The construction sought to be put upon this instrument would lead to consequences which never could be intended. **[236]** The result might be to give the ordinary the power of disposing of the property. *Evans* v. *Charles* is not law. In *Sanders* v. *Franks* the only point in question was, whether the power of appointment was good or bad. The present point was not agitated, though mentioned by Mr. Heald in his reply. What is stated in *Wellman* v. *Bowring* (1 S. & S. 24) as the ground of decision in *Sanders* v. *Franks* is incorrect; it did not turn upon the limitation to the executors and administrators. *Sanders* v. *Franks* has been called a case of questionable authority (3 Sim. 333). *Collier* v. *Squire* (3 Russ. 467) was decided on the intention of the party, and on the faith that it was to be the property of that person whose executors and administrators are named. As to the second point, there is no allegation of fraud against the defendant Collett, or that he was the means of bringing the plaintiff into her present situation. He paid a valuable consideration for what he has got, and a Court of equity cannot take it from him. The parties to the deed covenant that they are lawfully entitled to their shares.

Mr. Simpkinson, in reply.

THE LORD CHIEF BARON. I should do wrong to suspend my judgment in a case in which I entertain no doubt. The first question arises upon the construction of the settlement; and with reference to that, only two cases have been cited for the plaintiff. Without saying more upon those cases, I must observe that the one is not a sufficient authority to act upon; the other is not a decision on the point now before the Court, but only contains the dictum of a highly respectable Judge. The present question could not have arisen in that case; if it had, it might have been carried to a higher tribunal. The only point for consideration was, whether the power was duly executed; **[237]** there was no question between the administrator and the next of kin. Those cases, therefore, are no authorities on the present occasion: the one because it pushes the construction contended for too far; the other because I can only treat it as a dictum, not as a judicial authority.

Then look at the words of the settlement. The deed is executed inter vivos, and there is no reason why the same words, conveying the same interest, should, in different parts of the deed, receive a different construction. Common sense tells us that we

(*a*) 1 Anstr. 128. See *Baines* v. *Ottey*, 1 Myl. & K. 465.

must be bound by the same construction wherever they occur. Where the words "for their own use and benefit" first occur, who could have contended against the husband, or against his next of kin? And if so, whatever doubts might have existed, if they had been only used in reference to the event which has happened, yet, under the present circumstances, what reason is there to say that they are not to be construed in the same manner in the second case as in the first? Mrs. Marshall's second thoughts were not the best. The arguments of her counsel have been very favourable to her cause, but they have not been sufficient to raise any doubts in my mind.

It is not necessary to go into the other part of the case; though even there Mrs. Marshall has not a better equity than the defendant Collett. She has stood by, and has been a party to various instruments, and has seen him pay herself and her children the full value of their interests. He was a purchaser for a valuable consideration. It is too much to say that he was a witness or a party to a fraud; or that she, having represented her own interest as so and so and her children's as so and so, can now say, I made a mistake in regard to my legal rights, and now call upon you to become a trustee for me. If he had given a much less value for the purchase than it was worth, and she had called upon the Court to rescind the contract on that ground, the result might have been different. But that is not so here.

[238] It is a maxim of equity, that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law, they cannot afterwards be heard to say that the contract shall on that account be set aside. When contracting parties act without fraud, on a bonâ fide apprehension of their interests, it is not because it was discovered some time afterwards that these interests are differently modified, that therefore the purchase is to be considered unavailing. That, I should say, was not a ground of equity for the Court to proceed upon. Therefore, though I am not so peremptory upon this point as on the former, yet, upon both grounds, I think that the injunction must be refused.

Feb. 17.—On this day the cause came on to be heard on demurrer.

Mr. Boteler and Mr. G. Richards, for the demurrer.

Mr. Simpkinson and Mr. Rudall, for the bill. The words used are executors or administrators, which means that they should take by purchase. If it had been intended that they should take through the husband, the word "and" would have been used. It might have been intended to give the wife that chance. In the first clause of the settlement, the representatives take by limitation; in the last, they take absolutely. By this construction effect is given to all the words of the settlement. In this case it so happens that the wife, who has given a valuable consideration for her interest, is the party entitled. She has given up her right to dower and free bench, and an annuity of 200l. per annum. The Court cannot look to the absurdity of the limitation, supposing it to be absurd, but only to the language of the instrument. *Evans* v. *Charles* (1 Anst. 128), *Jennings* v. *Gallimore* (3 Ves. 146), *Sanders* v. *Franks* (2 Madd. 147).

[239] Mr. Boteler, in reply, was stopped by the Court.

THE LORD CHIEF BARON. It is enough to decide this case on the words of the settlement, without going further and resorting to general principles. Here it is clear that the words "for their own use and benefit" are not used in the sense contended for by the plaintiff. It is urged that, under the first clause, the executors and administrators take by limitation, and in the last by purchase; and that otherwise the Court must reject from the last clause the words "own use and benefit." I think that as the same words are used in both the clauses, they must in each case receive the same signification. The words in question may be rejected from the first clause without affecting the sense or altering the construction; and I think that the same words may be rejected from the second also. The two clauses must be construed in the same way.

But I do not stop here. The case of *Evans* v. *Charles* is clearly not law; and *Sanders* v. *Franks* is not an authority for the proposition advanced. Suppose, on a marriage settlement being made, it was intended to give one of the parties the power of appointing beneficially to his executor; might it not be said, "to such person as A. B. shall appoint executor by his will, or if he should fail of appointing, to such persons as shall appear to be his next of kin at his death?" But according to the

words of the present settlement, if the construction contended for be adopted, either a creditor, or such person as the bishop shall appoint, may take. In that view of the case, the very vagueness of the limitation is sufficient to make it void. The demurrer must be allowed.

[240] TOLDERVY *v.* COLT. Jan. 30th, Feb. 18th, 1835.—Testator devised his real estates to trustees, upon trust that his daughter M. should until twenty-one, if sole and unmarried, receive thereout an annuity of 60l., and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40l.; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50l., and the said estates should immediately upon such marriage be in trust for the children of M., under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister S. Provided that if M. should marry with the consent of the trustees, the estates should be in trust for her and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. M. married with the consent of the trustees, and died without issue: Held, that the remainder to S. was not conditional, depending on M.'s marriage without consent; consequently, that notwithstanding M.'s marriage with consent, the remainder to S. took effect.

[See further, p. 621, post.]

James Bowman Clarke, by his will, after directing his just debts and funeral expenses to be paid, devised and bequeathed unto his friends William Toldervy and Thomas Davis, their heirs and assigns, all his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of Hereford, and elsewhere, "upon the trusts, and subject to the powers, provisoes, and limitations hereinafter expressed and declared, of and concerning the same (that is to say); in the first place, to the intent and purpose that my daughter Mallett shall from time to time until she shall have attained the age of twenty-one years, if sole and unmarried, have, receive, and take annually out of the rents and profits of the said premises, one annuity or yearly sum of 60l., to be paid to her by the said William Toldervy and Thomas Davis, their heirs or assigns, by four even and equal portions, at or upon four days in every year (that is to say), &c.; and to the further intent that my said daughter Mallett may from time to time thereafter, and until she shall have attained the age of thirty-one years, if she shall so long remain sole and unmarried, have, receive, and take out of the rents, issues, and profits of the said premises, one further or other annuity or sum of 40l., to be paid and payable to her by the said William Toldervy and Thomas Davis, or the survivor of them, or the heirs or assigns of such survivor, &c. But it is my will, and I do hereby declare, that in case my said daughter Mallett shall, either before she shall have attained the age of thirty-one years, or afterwards, marry without the consent [241] of the said William Toldervy, if living, and after his decease, without the consent of the said Thomas Davis, first had and obtained in writing under the hands and seals of them respectively, then she shall be paid for and during the term of her natural life only one annuity or yearly sum of 50l., and not the other annuities, or either of them. And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise that all the said freehold messuages, lands, tenements, and hereditaments, with their and every their appurtenances, shall be in trust for all and every the child and children of the said Mallett, lawfully to be begotten, in such shares and proportions, manner and form, as they the said William Toldervy and Thomas Davis, and the survivor of them, or the heirs of such survivor, shall from time to time direct and appoint," &c. In default of appointment, the testator directed that the said freehold lands and hereditaments should be in trust for all the children of Mallett, as tenants in common in tail, with cross remainders between them, and if but one child, in trust for such surviving or only child in tail. "And for default of such issue, then in trust as to one moiety or half part of the said freehold messuages, lands, tenements, hereditaments, and premises, for my sister, Lady Frances Burrard, and her assigns, for and during the term of her natural life; and from and immediately after her decease, in trust and for the use of my sister Sarah, the wife of the said William Toldervy, and

her heirs and assigns for ever. And as to the other moiety of the said messuages, lands, tenements, and hereditaments, with the appurtenances, in trust and for the use of the said Sarah Toldervy, her heirs and assigns for ever." The testator then devised certain leasehold hereditaments to his trustees upon the same trusts and under the same limitations as he had declared concerning his freehold estate, or as near thereto as the different natures of the respective **[242]** properties would permit. Then followed this proviso: "Provided always, and it is my will, that in case my said daughter shall in the lifetime of the said William Toldervy marry with his approbation and consent, or after his decease, with the good-liking, approbation, and consent of the said Thomas Davis, or the legal representative of the survivor of them, then and in such case it shall and may be lawful for them, or the survivor of them, or the legal representative of the survivor of them, to convey the said freehold messuages, lands, tenements, and hereditaments, and to assign the said leasehold messuages, lands, tenements, and premises unto such person and persons, use and uses, as they or the survivor of them, or the legal representative of the survivor of them shall think proper; so that the same is conveyed and assigned upon trust only, and for the use of my said daughter Mallett, and such husband as she shall marry with such consent as aforesaid, for and during their joint lives, and the life of the survivor of them (but not without impeachment of waste), with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions, as they my said trustees, or the survivor of them, shall think proper, direct and appoint; and for want of such direction, limitation, or appointment, in such shares and proportions, as are hereinbefore limited respecting the same." The testator then directed an additional allowance to be made to his daughter at the discretion of his trustees until she should attain the age of thirty-one, if she so long remained sole and unmarried. He then provided for the maintenance of his daughter's children, in case she married without consent. And then reciting that he was entitled to the remainder in fee of certain hereditaments in Whitechapel, he gave and devised the same unto his sisters, Lady Frances Burrard and Sarah Toldervy, and to the heirs and assigns of the said Sarah Toldervy.

The testator died without revoking his will, leaving **[243]** his two sisters and his daughter Mallett surviving him. Mallett attained her age of twenty-one, and afterwards, with the consent of William Toldervy, married the Reverend James Colt. Mr. and Mrs. Colt died without ever having had any issue. Sarah Toldervy survived her sister Lady Frances Burrard, and devised all her real estates to James Bayley Toldervy in fee. James Bayley Toldervy died, having made a settlement of the property comprised in the above will in favour of his wife and children.

The present bill was filed by the widow of James Bayley Toldervy against Sir John Colt (who upon the death of his uncle, Mr. Colt, had taken possession of the property), against the heir-at-law of the surviving trustee under the will, and against the children of James Bayley Toldervy. It prayed delivery of possession of the property and title-deeds to the plaintiff; an account of the rents and profits received by the defendant Colt since the death of his uncle; a receiver; injunction, &c.

The defendant, Sir John Colt, having put in his answer, admitting the possession of certain deeds relating to the property in question, Mr. Temple and Mr. Wilcock, for the plaintiff, moved for their production.

Mr. Rolfe and Mr. Cooper resisted the motion on two grounds: first, that supposing the plaintiff had any title under the will, she had no right to call upon the defendant to disclose his title; secondly, that the plaintiff had no title under the will.

Upon the first point, the Court gave judgment in favour of the plaintiff at the close of the argument. Upon the second point, judgment was given on a subsequent day by

Feb. 18th.—THE LORD CHIEF BARON. This, it must be confessed, is an obscure and ill-drawn will; but I formed my opinion **[244]** upon it, and was prepared to deliver that opinion at the time the motion was made: it seemed, however, the wish of one of the parties, that it should be stated as a case for the opinion of the Court of Exchequer. I reserved my judgment, in order to see whether the will appeared sufficiently doubtful for that purpose. With a view, however, to save expense to the parties, I thought it right, in the first instance, to submit the will to the inspection of my brother Parke. His opinion upon it is so much in confirmation of my own that I think it unnecessary that a case should be stated.

The question is whether Sarah Toldervy, the sister of the testator, took any interest

under this will, his daughter Mallett having died without issue, and that turns on the following circumstances:—The testator, by his will, devised the estate to trustees, upon trust to pay an annuity of 60l. a year to his daughter till she attained twenty-one if she remained unmarried, and then to increase it by 40l. a year if she remained unmarried till she was thirty-one. There is no provision for her marriage after thirty-one: but in case she married without the consent of the trustees, then he limits her annuity to 50l. a-year for her sole use and benefit, excluding the husband altogether, and gives estates to her children as tenants in common, with cross remainders between them; and then comes a clause to the effect that, in default of such issue, the property shall be in trust as to one moiety for one of the sisters for her life, and after her death to the other sister; and as to the other moiety, in trust also for that other sister, under whom the plaintiff in this cause claims.

The question then is whether that remainder to the sisters is a conditional remainder depending on the previous condition as to the daughter marrying without the consent of the trustees. I am of opinion, taking the whole will together, that it does not depend on that condition, but is absolute. The doubt arose upon the subsequent proviso, as to what should be done in case she **[245]** married with the consent of the trustees. In that case they were to convey the estate to such persons as they should think fit, upon trust, that she and her husband should have an estate for their joint lives and the life of the survivor, with remainders to the children in the same manner as before, omitting to make any mention of the sisters. Now, it appears to me that the testator did not contemplate that his daughter would marry with the consent of the trustees; and, therefore, he introduces a proviso to let in the daughter and her husband, in case there should be a consent, without intending to alter any other part of the will; and he refers to the former provisions, in order to shew that the children are to have the same interests, whether the marriage should take place with consent or without. He then considered that he had made an ample provision for his sisters by the remainder in fee after the extinction of the issue of his daughter, and that that provision was not affected by the subsequent proviso contained in the will. He consequently took no occasion to alter the provision already made for his sisters.

In my opinion, therefore, the estate limited over to the sisters is not conditional; and therefore, on this motion, the plaintiff is entitled.(*a*)

IN RE BIGG. Feb. 9th, 1835.—To obtain a re-transfer of stock under the provisions of the 56 Geo. 3, c. 60, it is not necessary for the petitioners to shew that they are beneficially entitled to it; it is sufficient if they prove their legal claim.

[S. C. 4 L. J. Ex. Eq. 41.]

This was a petition for the re-transfer of certain stock to the petitioners under the provisions of the 56 Geo. 3, c. 60. That statute authorizes all stock upon which dividends have remained unclaimed for ten years to be transferred to the account of the commissioners for the reduc-**[246]**-tion of the national debt, in the books of the Governor and Company of the Bank of England. By the 5th section of the statute, the Bank of England is authorized to re-transfer the stock to any person who shall shew to the satisfaction of the governor his right or title thereto; but in case the governor shall not be satisfied of the legality of such claim, the Courts of Chancery or Exchequer may, upon the petition of such claimant verified by affidavit, make such order for the re-transfer of the stock, or otherwise, as shall appear to be just.

The petitioners in the present matter had already obtained an order of reference to the Master to ascertain who were the persons legally interested in the stock in question; and the Master had found that the petitioners as the legal personal representatives of one Bigg, who was the survivor of three persons, in whose joint names the stock was originally invested, were the persons legally interested therein. They therefore now prayed a re-transfer to them of the stock.

Mr. Boteler, for the petition.

Mr. Wray, for the Crown. The order of reference omits a very material term. The inquiry should have been as to the persons beneficially interested in the stock.

(*a*) See *Mackinnon* v. *Sewell*, 2 Myl. & K. 202.

If these persons cannot be found, the Crown is entitled to it: *Middleton* v. *Spicer* (1 Bro. C. C. 201). It is clear that the three persons in whose names the stock was originally invested were mere trustees, of whom Bigg was the survivor.

Mr. Boteler, in reply. If before the expiration of the ten years they would have been entitled, they would be equally so now. The act takes away no right which the parties had before it passed; the mere suggestion of a trust cannot vary the case.

[247] THE LORD CHIEF BARON. All that this Court has to do is to see to the legality of the claim. It is not necessary for the Court to pursue all the ramifications of the trust.

Order as prayed. The Attorney-General to have his costs out of the fund.

BENNETT *v.* ATTKINS. Feb. 10th, 1835.—An executor or trustee, who retains a balance in his hands, and against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct. —Where a suit is instituted with unnecessary haste against an executor or trustee who has not grossly misconducted himself, he will be allowed his costs.

[S. C. 4 L. J. Ex. Eq. 35.]

Benjamin Mitchell, by his will, after bequeathing various legacies and weekly payments, devised certain real estates to John Prickett and Samuel Attkins, upon trust for sale, and to invest the produce in the funds, and apply the interest thereof to pay the weekly payments, till his daughter Mary Mitchell should attain twenty-one; and then upon trust to appropriate a sufficient part of the said funds for the weekly payments and for an annuity of 100l. to his wife, and to pay the remainder to his daughter. He bequeathed the residue of his personal estate upon the same trusts, and appointed Prickett and Attkins his executors. The testator died in March, 1816. His widow married the defendant Kimpton. Mary Mitchell attained twenty-one in February, 1833, and married the plaintiff Bennett. Prickett died, and the defendants George Prickett and Francis Prickett were his personal representatives.

The present suit having been instituted by Bennett and his wife, for the administration of the testator's estate, the Master reported that upon his death the executors sold part of the real property, and with the produce purchased 1700l. Consols, which was now standing in the name of the Accountant-General to the credit of this cause. He likewise reported that there was due to the testator's estate 199l. from the defendant Attkins, and 306l. from the **[248]** estate of Prickett, whose representatives declined to admit assets, the estate being in Chancery.

The cause now coming on to be heard on further directions, it was proposed by the plaintiffs that the Master should tax the costs of the plaintiffs and the defendants Kimpton and wife, as between solicitor and client; that the same should be paid by a sale of a sufficient part of the 1750l. Consols; and that the defendant Attkins should repay such costs.

Mr. Jervis and Mr. Wilbraham, for the plaintiffs. The defendant Attkins has had this balance of 199l. in his hands for eighteen years. The executors of the other trustees have denied assets. The object of the bill therefore is to bring the whole fund into Court; and Attkins must pay interest on the money detained, and the costs of the suit. *Seers* v. *Hind* (1 Ves. jun. 294), *Caffrey* v. *Darby* (6 Ves. 488), *Piety* v. *Stace* (4 Ves. 620), *Rocke* v. *Hart* (11 Ves. 58). An executor may be charged, although there is no specific trust for an investment. Here there is a specific trust, which makes this case stronger than that of mere executors, and a breach of trust has been committed. The trustees should have given in their accounts as soon as the infant attained twenty-one, instead of putting her to the expense of coming into a Court of equity. The costs have been rendered necessary by their default. The observation of Sir William Grant in *Ashburnham* v. *Thompson* (13 Ves. 404), that costs are not to be given against executors in all cases, applies to executors only, and not to trustees.

Mr. Tatham, for the defendants Kimpton and wife.

Mr. Wray, for the defendant Attkins. This defen-**[249]**-dant was made trustee and executor jointly with Prickett, who was the principal manager of the testator's property, and conducted the sale of the real estates. The question is whether the fact of Attkins having 199l. in his hands is a foundation for making him pay the costs of the suit, Prickett being insolvent. Nothing has been alleged against him by the

bill or the Master's report, except that the money was not paid, the fact being that this is a balance in his hands, which he is ready to pay. It was a reasonable balance to have in his hands. It was necessary for him to have something to go on with.

Mr. Seton, for the defendants, the executors of Prickett. The case of *Seers* v. *Hind* is overruled by *Ashburnham* v. *Thompson* (13 Ves. 402) and *Tebbs* v. *Carpenter* (1 Madd. 290). The present case must be governed by *Sammes* v. *Rickmans* (2 Ves. 36), which is an authority to shew that there is no ground for claiming either interest or costs against these defendants.

Mr. Jervis, in reply.

THE LORD CHIEF BARON. The good sense of the rule as to costs in cases of this nature is contained in the judgment of Sir William Grant. The costs must depend on the circumstances of each particular case. In this case it is said that the object of filing the bill was to bring the money into Court, one of the trustees being insolvent. That might be so; but as my attention has not been called by the bill to any misconduct alleged against them, I cannot (for the money was not considerable) take it for granted that they had no possible pretence for keeping it, or that they made interest of it. This lady attained her age before the accounts were delivered, and a very short time afterwards the bill was filed. What ground was there for **[250]** filing a bill to compel Attkins to do what he might have done without it? I am asked to do two things: first, to infer impropriety against him; and secondly, to declare, without knowing the truth of the fact, that he was not ready to account. How do I know that if called upon he might not have paid the money? For any thing that appears to the contrary, it might have been in his hand, and he ready to pay it. Shall I then make him pay the costs of a suit which has been so unnecessarily brought against him? If, indeed, the sum retained were so large as to raise any suspicion on the subject, that might form an ingredient in the case for the good judgment of the Court to act upon. But that is not so here.

There is no ground, therefore, for decreeing costs against Attkins. As to the executors of the party who is said to be insolvent, they are in no respect to blame, and must be allowed their costs out of the fund in Court. If they are obliged to pay their own costs, they will have to seek repayment from the insolvent's estate, which they ought not to be compelled to do.

His Lordship, after some further discussion, allowed Attkins his costs out of the money due from him. The costs of the other parties were likewise allowed out of the fund.

BAKER *v.* CARTER. Feb. 11th, 1835.—A trustee who has purchased the trust property and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit.

[S. C. 4 L. J. Ex. Eq. 12.]

Charles Carter, of Eton, boat-builder, by his will gave and devised all and singular his real estates which he might die possessed of, unto his brother James Carter the elder, and another trustee, upon trust to re-**[251]**-ceive the rents of the same, and to pay and apply them unto and to the use and benefit of his wife Charlotte Carter, and his two daughters, until they should attain their respective ages of twenty-one years. And from and after the decease of his said wife, he gave his real estates to his two daughters, as tenants in common, their heirs and assigns for ever. And he gave and bequeathed all and singular his stock in trade, household goods, plate, china, and all other his effects, unto his said wife Charlotte Carter, upon trust to carry on the business for the benefit of herself and his two daughters, and after her decease, to his two daughters share and share alike. By a codicil he appointed James Carter the elder and another person his executors. Carter alone proved the will in December, 1815.

The bill, which was filed by the two daughters and the husband of one of them, against Charlotte Carter, James Carter the elder, and his son James Carter the younger, charged various acts of fraud against all the defendants in relation to the testator's estate, and prayed a general account.

The charge against Mrs. Carter was not substantiated. That against James

Carter the elder and his son was to a certain extent proved, and arose out of the following transactions:—In 1816 eight leasehold houses of the testator being in mortgage to one Sawyer, the mortgagee called in his mortgage money. Carter the elder having no assets of the testator in his hands, advertised these premises for sale in the *Windsor Express*, and offered to sell them to the mortgagee, who refused to buy them. They were then valued by a surveyor at 936l., and, as sworn by Carter in his answer, he again endeavoured to procure a purchaser for them, but without success. Eventually he sold them to his son James Carter the younger, for 936l., the consideration money being, as he admitted, his own money, and not that of his son. Six years after-**[252]**-wards, the corporation of Windsor, requiring the scite of these premises for the purpose of building the new bridge of Windsor, purchased them of James Carter the younger for 1200l., and 50l. expenses.

Upon the hearing of this cause before Lord Lyndhurst, C. B., at the sittings after Trinity Term, 1832, his Lordship was of opinion that the before-mentioned transaction could not be supported in a Court of equity; it was therefore ordered that the defendant James Carter the elder should account for the sums of 1200l. and 50l., with interest at 4l. per cent., from the 6th July, 1822, which was the time of the sale to the corporation of Windsor; and should also account for the rents and profits of the premises from the death of the testator till the 6th July, 1822.

The cause coming on to be heard upon further directions, the main question was whether the defendant James Carter the elder should pay the costs of the suit.

Mr. Jervis and Mr. Dixon, for the plaintiffs. The question as to costs must be governed by the cases of *Tebbs* v. *Carpenter* (1 Madd. 290), *Ashburnham* v. *Thompson* (13 Ves. 402), *Whitchcote* v. *Lawrence* (3 Ves. 740), and *Piety* v. *Stace* (4 Ves. 620). In the two latter cases the decision was against the trustee, not on the ground of direct fraud, but because he had gained an advantage from the trust funds. The present is a clear case of fraud, and accordingly the trustee has been ordered to refund what he has gained with interest; he must therefore pay the costs. If it be said that the son was not a necessary party, the answer is that he was implicated in the fraud. The bill prays an account against all the defendants. It would have been sufficient to have made Carter the younger a defendant, for the mere pur-**[253]**-pose of praying costs against him. [The Lord Chief Baron. I know it is said in one or two cases that you may make a person charged with fraud a party to a bill for the purpose of praying costs against him. I should be better satisfied with those dicta, if a reason was given for them. No doubt if several persons are parties to a fraud, they ought to be made parties for the sake of a discovery, but not merely for costs. It appears to me that Carter the younger was not a necessary party to this suit. If you had intended to set aside the sale made by Carter the younger, you should have made the corporation of Windsor parties. But you do not seek to set aside the sale; therefore all you can get is an account from the father.]

Mr. Simpkinson and Mr. James Watson, for the defendants Carter the father and Carter the son. If these defendants had acted with fraud, the cases cited would have been apposite. But the principle on which those cases depend is entirely in favour of these defendants. Carter the elder was not a specific trustee. He did not take under the first clauses of the will, there being freehold property to answer the description in that clause. He was only by construction of law, in the character of executor, held to be a trustee. It is very doubtful, therefore, whether he is bound by the general rule of equity as regards trustees in these cases. *Naylor* v. *Winch* (1 S. & S. 555). Besides, the object of the bill is to get relief from Charlotte Carter, charging that, instead of fulfilling the trusts reposed in her for the benefit of her children, she has converted the property to her own use. The bill, therefore, relates to other matters than the fraud of the trustee, and on that ground he is not liable for the costs. *Tebbs* v. *Carpenter* (1 Madd. 307). Here, however, there was, morally speaking, no fraud; and Lord Lyndhurst was of that opin-**[254]**-ion at the hearing. His Lordship set aside the transaction solely on technical grounds of equity.

Mr. G. Richards, for the defendant Charlotte Carter.

Mr. Jervis, in reply.

THE LORD CHIEF BARON. These questions of costs, which rest in the discretion of the Court, give rise to much controversy and great difference of opinion, because the cases are so unlike one another in their details, that it is difficult to lay down any general rule respecting them. Here the circumstances are of a peculiar nature. I

agree that where a trustee purchases the trust estate for his own benefit, the simple obvious rule is that the purchase must be set aside; but it does not therefore follow that such a transaction bears the character of fraud in every case. On the contrary, the trustee may do it under circumstances beneficial to the trust estate, and to the principal parties concerned. A trustee, therefore, is not necessarily to be punished in cases of this nature; though, if he violates his trust, and is guilty of fraud, no doubt the Court will oblige him to pay the costs which by his misconduct the cestui que trusts have been put to. In the present case, I think the leasehold estates passed under the general devise, because it is not probable that the testator meant to die intestate as to any part of his estate. He devises all his real estate, all his effects, every thing that he had. Then the case stands thus: Mrs. Carter had these estates, together with other effects, specifically devised to her as trustee; and she insisted originally that Carter the elder had no right to interfere with that property. It afterwards became a question whether he had sufficient assets, or if he had not sufficient assets, whether there must not be a sale to pay off the mortgage debt. The sale took place, and nothing intervened to prevent it. It was not proved that when sold it was not properly sold. **[255]** It was not argued that the executors did wrong in selling it. If they did, Mrs. Carter ought to have prevented it. It is clear, therefore, that what they did in 1816 was acquiesced in by Mrs. Carter, who was an interested party. In that respect, therefore, there was no fraud in the sale.

But then it is said that the defendant bought of himself, and that the purchase by his son was a mere colourable purchase. If there were any evidence that the property was worth much more than it was sold for, that would be a circumstance from which to infer fraud against him, and that he took advantage of his situation as trustee. But this is not proved, nor even suggested. What then is the situation of the parties? Mrs. Carter having a specific devise of the property, with remainder to her daughters, though at first reluctant, afterwards acquiesces in the sale by the executor, and admits his interference for the purpose of paying the debts. It happens that six years afterwards, the property is wanted for the purpose of making the new approaches to Windsor bridge. It is probable that the purchasers are induced to give a larger price for it, from being almost forced to buy it. It comes then to the question whether, if an executor should purchase the testator's property and give the estate the full benefit of the purchase, and at any time afterwards under extraordinary circumstances which no one ever contemplated, the property should be sold at a greater value than that for which it was bought, then not only by an inexorable rule of equity is the money to be paid back to the testator's estate, but the executor is to be accused of fraud and made to pay all the costs. If he had made no profit by the purchase, the parties interested would have been satisfied. Subsequent events cannot vary the moral conduct of the defendant, though they may alter his legal responsibility. There is no ground, therefore, for charging him with fraud, or visiting him with the costs of this suit.

[256] But there is a part of the case as to which the defendant is not altogether exonerated from some blame. He put in three answers. If the first answer had been full and specific, it would have been unnecessary to put the plaintiffs to the expense of proceeding further, and procuring further evidence to bring the facts before the Court. He never did admit that he received the rents and profits of the premises; and by his first answers there was either no denial of that fact or no denial sufficient to prevent the necessity of entering into evidence. Where a defendant does not answer distinctly, but thinks fit to conceal certain facts, or answers in such a manner as to oblige the plaintiff to proceed further in the suit, the plaintiff is of necessity compelled to pay additional costs. The defendant, therefore, ought to pay those costs which have resulted from the period of his first answer, and which have been occasioned by the insufficiency of that answer, so far as it relates to the sale of these estates. So far as his answers relate to his conduct as executor, he must have his costs out of the fund.

His son's is not a case which calls for any costs against him. There was no fraud whatever in the son. I do not see clearly why he was a necessary party, the bill not seeking to set aside the release. Except, perhaps, for the purposes of discovery, he was clearly not a necessary party. He is, therefore, entitled to his costs.

[257] PIERCE *v.* SCOTT. Feb. 17th, 1835.—Where lands are devised in trust for the payment of the testator's debts generally, with a direction that his estate at A. shall first be sold for that purpose, and if that be not sufficient, then his estate at B.; a good title cannot be made to the estate at B., unless the vendor shews clearly that the trust remains unsatisfied, and that the produce arising from the sale of the A. property would, beyond all doubt, be insufficient for the purposes of the trust.

[S. C. 4 L. J. Ex. Eq. 36.]

John Harvey Pierce, by his will dated the 28th March, 1818, after specifically bequeathing his furniture and other personal estate except his leasehold property, gave, devised, and bequeathed to four trustees, whom he appointed his executors, their heirs and assigns, all his real estate, and also his leasehold estates and all his interest therein, upon certain trusts mentioned in his will, for the benefit of his children. The will then contained the following clause:—"And my will is that if, at my decease, any mortgage or other debts remain unpaid, then my trustees aforesaid shall sell my interest in my said leasehold estates, and so much of my freehold estates as may be sufficient to pay off all such said debts and mortgages, provided the majority of the said trustees deem it best so to do; in which case my will is that the three houses in Hermitage Street be first sold, after the leasehold estates are disposed of; then the house and land at Upchurch, in the county of Kent; and if these are not sufficient, then the public-house premises at Union Stairs, reserving, if possible, the ground rent of four houses on the north side of the said Hermitage Street, and the public-house, the Edinburgh Castle, with the wharf, warehouses, stable, and dwelling-house adjoining, situate in Wapping, near the Hermitage aforesaid, in the county of Middlesex."

The testator died soon after the date of his will. Three of the trustees disclaimed, in consequence of which the execution of the trusts devolved on the remaining trustee, who was the eldest son of the testator, and plaintiff in this suit.

In December, 1832, the plaintiff caused the Edinburgh Castle and the other premises at Wapping, which were freehold, to be put up to sale by public auction. The **[258]** defendant was declared the purchaser, and paid his deposit. Upon his afterwards objecting to the title, and refusing to complete the purchase, the present bill was filed against him for a specific performance of the contract. It contained an allegation that the other property mentioned in the will, and thereby directed to be sold before the property sold to the defendant, is subject to mortgages and other charges to the value or more than the value thereof. That the said premises sold to the said defendant as aforesaid are also subject to a mortgage debt and arrears of an annuity to a considerable amount, although the same will be discharged out of the said defendant's said purchase-money; and that there are also various other debts of the testator to a large amount still owing and unpaid; and that there are no other funds available for the payment thereof than the defendant's aforesaid purchase-money.

The cause having been heard, and the Master in pursuance of the usual reference having reported that a good title could not be made to the premises in question, the plaintiff excepted to the Master's report.

Mr. Rogers, in support of the exception. Whenever a trust for sale under a will depends on facts which involve the administration of the testator's estate, or any other facts which would involve the purchaser in great trouble, the purchaser is protected from seeing to the propriety or necessity of the sale. This rule is not merely for the purchaser's protection, but for that of every one who leaves his property to be administered by trustees. It will be admitted that executors are justified in selling leaseholds which are specifically devised; and that if they are improperly sold and there are other assets, the remedy is not against the purchaser, but amongst the legatees. Co. Litt. 290 b., note (1), sect. 14. These general prin-**[259]**-ciples would apply to freehold property situated as this is, and would be quite sufficient to dispose of this case. The bill, however, expressly alleges that there are debts, and that the only fund available for their payment is the defendant's purchase-money. It may be contended that the length of time since the testator's death, which took place fifteen years ago, raises a presumption that the debts have been paid, and consequently that the sale is improper. It is, however, clearly established that when property is bequeathed upon trust for the payment of debts, a creditor, though only by simple contract, may at any time within twenty years from the testator's death file a bill to

enforce that trust: *Jones* v. *Scott* (1 Russ. & Mylne, 255). No purchaser, therefore, within a period less than twenty years, has a right to set up any presumption of this nature against the propriety of the sale.

Mr. Treslove and Mr. Kenyon Parker, contrà. No doubt, where real property is devised for the payment of the testator's debts generally, or even for raising so much money as the personal estate shall be deficient for that purpose, the purchaser will not be bound to see to the propriety of the sale; but it is otherwise where the debts are specified. Here the mortgage debts are specified debts, which the purchaser is bound to see paid. It is not even clear that the testator did not mean to exonerate his personalty. Besides, there is no authority for saying that where a testator directs his estates to be sold in succession, the executors may sell the last first, and come into a Court of equity to compel the purchase. The Court will not compel a purchaser to take a doubtful title. *Shapland* v. *Smith* (1 Bro. C. C. 74). The lapse of fifteen years is strong evidence that the debts are paid.

[260] Mr. Rogers, in reply. If the allegation in the bill is sufficient, the plaintiff must have a decree. It is not necessary for him to prove by evidence that there are debts; and the lapse of fifteen years is not notice that there are no debts. There may be bond debts. At law, twenty years are allowed for claiming a bond debt.

The Lord Chief Baron. I feel considerable doubt upon the point. I will not say that it is clear that the purchaser is not liable to be compelled to complete his purchase; at the same time, there is a suspicion in regard to the payment of the debts. Suppose the circumstances are such as raise a suspicion that the plaintiff is not complying with the terms of the trust, the question is, whether that is not notice? Now it is not likely the creditors went so long as is suggested without enforcing their demands. I do not like to lay down general propositions unnecessarily, but if I were a purchaser, I should say that this was not a safe or prudent purchase.

Exception overruled; bill dismissed with costs.

Leigh *v.* Macaulay and Another. Feb. 20th, 1835.—The foreign agent of a mercantile house in London, dealing in African produce, was appointed executor of A., a merchant at Sierra Leone, with directions to sell the testator's property and invest the proceeds in the Bank of England. The agent accordingly wrote to his principals in London, advising them of consignments which he should make to them of some of A.'s property, and directing them to place the proceeds to his credit as executor of A. The consignments were made, and the merchants placed the proceeds to a separate account, namely, that of A.'s estate: Held, that the goods were specifically and not generally consigned, and that the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of A. for an account, they were bound to pay into Court.—When a Court of equity traces out trust money in the hands of a person who has not primâ facie a right to hold it, that money must be paid into Court.

[S. C. 4 L. J. Ex. Eq. 37.]

The defendants in this suit, from the year 1818 to the end of the year 1829, carried on business in copartner-**[261]**-ship, under the firm of Z. Macaulay & Babington. A great part of their business consisted in exporting and consigning goods for sale to Sierra Leone, and importing into Europe African produce, consigned to them for sale. They also carried on a similar business at Sierra Leone, and from the year 1819 till 1829 (with some interruptions arising from absence and other causes) Kenneth Macaulay acted as their agent at Sierra Leone, and as such agent procured and made to them various consignments of goods. He did not, however, confine his dealings to the business of the defendants, but from time to time acted as the agent of other persons.

In 1818 William Henry Leigh, a merchant of Sierra Leone, made his will, whereby, after appointing Kenneth Macaulay his executor and requesting him to sell the whole of his property, he directed that the proceeds of the sale, after the payment of certain legacies mentioned in his will, should be placed by his executor in the Bank of England for the benefit of his children. The testator died soon after making his will, which was proved at Sierra Leone, but not in England, by Kenneth Macaulay, who thereupon took possession of the testator's property and effects.

In the latter part of the year 1818, the defendants received letters from Kenneth Macaulay, announcing his intention of consigning to them a quantity of ivory, palm oil, and other goods, which he described as belonging to the late Mr. Leigh's estate. In one of these letters he directed the defendants to sell the goods, and to "put the net proceeds to my credit, as executor of Leigh's estate, and not to the credit of my account with you." In the following year the defendants again received letters from Kenneth Macaulay, informing them that he had sent other goods belonging to the estate of the late W. H. Leigh, in one of which he spoke of "the estate having credit in our books for every article as it is received."

[262] In pursuance of these letters the defendants opened in their books in England an account, headed, "Dr. the estate of the late W. H. Leigh, in account with Z. Macaulay & Babington, Cr.," and such account was entered in a ledger, journal, and other books. Kenneth Macaulay, from time to time, consigned to the defendants the goods mentioned in the letters, and also a great variety of other goods belonging to the testator's estate. These the defendants accordingly sold, and, on the occasion of each sale, they rendered to Kenneth Macaulay an account headed in the following manner:—"Account sales of (*article*) received per (*ship*) from Sierra Leone, and sold by order of Mr. K. Macaulay, on account of the estate of the late W. H. Leigh." In these accounts the defendants charged the estate of W. H. Leigh with freight, brokerage, and other usual charges. The sales were entered in the ledger and journal as made "on account of W. H. Leigh, by order of K. Macaulay."

In the month of September, 1826, an account was rendered by the defendants to Kenneth Macaulay, which was headed, "Dr. the estate of the late W. H. Leigh, in account with Z. Macaulay & Babington, Cr." In this account they gave credit to the estate of Leigh for 3033l., as for the net proceeds of the several consignments; and they debited that estate with various disbursements and losses. In April, 1828, and July, 1828, similar accounts were rendered, and the balance due to Leigh's estate on the last of these accounts amounted to the sum of 1965l.

In June, 1829, Kenneth Macaulay died, having by his will appointed the defendant, Z. Macaulay, his executor. In August, 1833, letters of administration of the goods and effects of W. H. Leigh were granted by the Prerogative Court of Canterbury to James Leigh, the son of W. H. Leigh, who in the same year filed his bill against the defendants, stating the foregoing facts; that Kenneth Macaulay had died greatly indebted to the estate of W. **[263]** H. Leigh; that the monies received by the defendants on account of W. H. Leigh's estate had not been invested by them for the benefit of that estate, but had been mixed with their own monies, and applied to their own uses; charging that Kenneth Macaulay and the defendants were partners, and that they were liable for his deficiencies as well as their own in regard to W. H. Leigh's estate, and praying a general account of the personal estate of W. H. Leigh, which had come to the hands of the defendants, or any person for their use.

The defendants, by their answer, stated that they considered themselves accountable for the proceeds of the consignments to Kenneth Macaulay alone. They denied that they were in any manner agents for the estate of W. H. Leigh, and they submitted that they were not accountable to that estate. They alleged that the opening a separate account in their books for W. H. Leigh's estate, and the heading of the various accounts in the manner mentioned in the bill, was done solely for the convenience of Kenneth Macaulay, and in order to enable him to keep a distinct account of Leigh's estate. They admitted the balance of 1965l. to be due from them on the account mentioned in the bill; but they stated that account to be a special, and not a general account. They alleged that, in a general account, Kenneth Macaulay was their debtor to a very large amount, and that he, in fact, died insolvent, though not, as they believed (and for which belief they stated reasons), indebted to the estate of W. H. Leigh. They denied the existence of any partnership between themselves and Kenneth Macaulay.

The bill was filed on the 19th of December, 1833. The defendants, before filing their answer, applied for further time, upon affidavits stating that they had sent to Sierra Leone, but that the accounts which they expected from thence had not yet been received. This application was granted by the Court upon terms. The defendants, **[264]** however, omitted to comply with those terms, and filed their answer on the 12th of July, 1834.

Mr. Simpkinson, for the plaintiff, now moved that the sum of 1965l., with certain

deductions, might be paid into Court. Kenneth Macaulay consigned these goods to the defendants, not on a general account—not on his own account—but ear-marked as portions of the testator's estate, and for the benefit of that estate. The transactions were placed to a separate account in the books of the defendants, both in England and at Sierra Leone. The accounts rendered by the defendants to Kenneth Macaulay related specifically to the testator's estate; and upon those accounts, the sum in question is the admitted balance due to that estate. The plaintiff contends that, in fact, a much larger sum is due. That the defendants deny; but there is a sufficient admission in the answer that this sum in particular is due. They admit that they never have accounted with Kenneth Macaulay for any part of this balance, but that they paid it to their own bankers on their own account, and mixed it with their own money. Being consignors of produce specifically consigned to them, which they were to carry to a particular account, they had no right to apply the produce in this manner. They dispute the plaintiff's title to call them to account. The plaintiff, however, has a clear right to do so, as the legal personal representative of Leigh. Even legatees may call consignees to account under such circumstances as these. *Wilson* v. *Moore* (1 Mylne & Keen, 126). They say they are only answerable to Kenneth Macaulay as his representatives. Now one of the defendants is himself the representative of Kenneth Macaulay. [He was then stopped by the Court.]

Mr. G. Richards, and Mr. James Parker, for the defendants. The case of *Wilson* v. *Moore* is inapplicable. **[265]** There the parties acted fraudulently towards the persons interested in the testator's estate. Here the transactions in question took place in the usual course of business: there was no fraud or breach of trust. The property came into the hands of the consignees not upon trust, but as of absolute necessity. Without the assistance of the defendants, or some other person resident in this country, it could not have been converted into money. The defendants, no doubt, were generally liable to Kenneth Macaulay, as between consignees and consignor; but they were not further or in any other character liable. That being so, they had a right to apply the proceeds of these consignments in discharge of the debt due from Kenneth Macaulay to themselves. The separate heading of the accounts, which was done entirely for the convenience of Kenneth Macaulay, can make no difference in this respect. But, even supposing the defendants to be liable to account with the plaintiff, your Lordship will not order the money to be brought into Court immediately, but will direct the usual decree to be taken. This is not a real but an apparent balance. Upon a general account a large sum will be found due to the defendants. They ought not, therefore, upon an interlocutory application, to be compelled to pay into Court a mere isolated sum due upon a special account.

The Lord Chief Baron. The money must be paid into Court. I remember, when I was young in the profession, a stronger case than this, which occurred in the House of Lords (*Bogle* v. *Stewart*, Dom. Proc. 1801). A family resident in Scotland had a relation who died in the West Indies. A friend of theirs, who was in the West Indies at the time this event happened, took out administration of the estate of the deceased and collected several sums of money then due to the estate. He had several debts to pay for the intestate,**[266]** but he handed over the money to certain persons who were merchants and bankers in Scotland, stating that it belonged to the intestate's estate. He did not direct them to place the remittances to a separate account, but he sent the very bills belonging to the intestate indorsed to them; therefore they had notice to whom the property belonged. He afterwards sent to Scotland to inform the bankers that the estate would literally realize a considerable sum of money, but that there were debts which he would have to pay; and he begged they would lend him 2000*l.* or 3000*l.*, being part of the money which he had remitted to them. The bankers paid over the money to the administrator, and afterwards the relations of the intestate instituted proceedings in Scotland against the bankers; and the Court of Session made a decree in their favour. Upon appeal from this decision to the House of Lords, I urged in favour of the bankers that the administrator was alive, and ought to have been made a party to the suit, inasmuch as he had an interest in the money for the purpose of paying the debts; but Lords Eldon and Thurlow, who heard the appeal, observed that it was the rule in equity to follow trust money wherever it was to be found and bring it into Court; and that, in the case before them, the very circumstance of the administrator writing for the money was an additional reason for supposing that it was not safe in his hands. I thought at the

time that this was strange doctrine. In that suit, however, which was simply between the legatees and bankers, the House of Lords ordered that the money should be paid over to the plaintiffs. Now here the money sent over by Kenneth Macaulay is appropriated. You cannot apply it to discharge the debts due from him to the defendants. Even at law you cannot set off A.'s money against B.'s debt. The defendants received these letters in the capacity of trustees; they knew when they received them that Kenneth Macaulay was executor for W. H. Leigh. It is **[267]** said that he was not, in fact, a debtor to that estate; but this at least is doubtful, and I cannot omit altogether from my consideration the circumstance of the length of time which they have taken for their defence. The motion, however, must be granted, on the principle that when a Court of equity traces out trust money in the hands of a person who has not primâ facie a right to hold it, that money must be brought into Court.(*a*)

M'LACHLAN *v.* ROB. Feb. 20th, Mar. 2nd, 1835.—The common order for rehearing, obtained upon an application made after the expiration of six months from the time the decree was pronounced, will be discharged for irregularity; but upon a special case stated by petition and verified by affidavit, the Court will grant a rehearing, though the ordinary time for making the application has expired.

[S. C. 4 L. J. Ex. Eq. 40.]

Andrew Rob and Ralph Rob carried on business in co-partnership, as cattle dealers; the former living in the county of Stirling, the latter in the county of York. In August, 1808, Andrew died intestate, and his widow, who afterwards married the plaintiff M'Lachlan, took out letters of administration of his personal estate and effects. In 1817, proceedings were instituted in the Court of Session by Mrs. M'Lachlan and others against Ralph Rob, for the purpose of obtaining an adjustment of the partnership accounts, and payment of what was due to herself and her daughter from the estate of Andrew Rob. A report was made in the Court of Session, by which a considerable balance was found due to the plaintiff; but before any final decree was had in the suit, Ralph Rob died, having appointed his widow, Mary Rob, his executrix. The suit was then revived in the Court of Session against Mary Rob, who for some time joined in the accounts which had been directed to be taken, but ultimately pleaded that she lived in England, and was not amenable to the jurisdiction of the Court, and that plea was allowed.

In consequence of this decision, the present suit was instituted by Mrs. M'Lachlan and her husband, against **[268]** Mary Rob, praying for the same relief as had been sought from the Court of Session; and a decree was pronounced on the 13th of July, 1833, by which it was referred to the Master to take an account of the dealings and transactions of the late partnership, and also of the personal estate of Ralph Rob; and the Master was to be at liberty, if he thought fit, to adopt the proceedings of the Court of Session, and he was to make to all parties all just allowances.

Although this decree was pronounced on the day above mentioned, it was not finally settled until February, 1834. A state of facts was, in April following, taken into the Master's office by the plaintiffs, who contended that the proceedings and accounts taken in Scotland should be adopted by the Master. The defendant, on the other hand, objected to this for various reasons; and especially because in those accounts compound interest had been charged against her. The plaintiffs then submitted that the Master might adopt those proceedings and accounts in part only. The Master, however, was of opinion that, having regard to the wording of the decree, he was not at liberty to adopt the accounts and proceedings partially, but that he must either adopt them wholly or not at all.

Under these circumstances, the plaintiffs having obtained the common order for rehearing the cause, for the purpose of varying the decree, so as to allow the parties to adopt any part of the proceedings of the Court of Session—

Mr. Jervis moved to discharge that order for irregularity, contending that, according to the rule of Court stated in 2 Fowler, 199, no application for rehearing a cause can be made after six months have expired from the time of pronouncing the

(*a*) See *Bowsher* v. *Watkins*, 1 Russ. & Myl. 277.

decree. He also cited *Drake* v. *Hopkins* (Bunb. 309), *Bowyer* v. *Bright* (M'Clel. 483), and *Milford* v. *Milford* (1 M'Clel. & Y. 150).

[269] Mr. G. Richards, contrà, was proceeding to contend that there were circumstances which took this case out of the general rule; but per

THE LORD CHIEF BARON. There ought to have been a special application in this case: I cannot in this form hear the special circumstances. The plaintiffs must give notice of a petition upon affidavit to amend the decree or for a rehearing. I cannot treat the order of the Court as a nullity. The meaning of it is that a rehearing shall not take place, as a matter of course, after six months. The order for rehearing must be discharged with costs, with liberty to the plaintiffs to commence de novo.

Mar. 2nd.—On a subsequent day the plaintiffs presented their petition verified by affidavit, stating the material facts of the case, and praying for a rehearing notwithstanding the expiration of the six months. It was likewise stated upon affidavit that the accounts which had been taken in Scotland were very voluminous, and that the proceedings before the Master were conducted as expeditiously as the rules and regulations of the Master's office would permit.

THE LORD CHIEF BARON was of opinion that a sufficient ground had been made out for deviating from the general rule, and made the order as prayed.(*a*)[1]

[270] HALFORD *v.* HALFORD. March 2nd, 1835.—Upon a proper case stated by petition and verified by affidavit, the Court will relax the general order of 13th November, 1731, which requires that all applications for a rehearing shall be made within six months after the decree is pronounced.(*a*)[2]

Judgment in this cause having been pronounced on the 1st July, 1834, various discussions took place between the parties as to the form of the minutes of the decree to be founded on that judgment, and the decree was not finally settled until the 20th February, 1835. On the 23rd of that month the minutes of the decree as settled were delivered by the defendant's solicitor to the plaintiffs' solicitor, who, on the same day, delivered them to his clerk in Court with instructions to draw up and enter the decree without a moment's delay. It was accordingly drawn up and delivered over to the defendant's clerk in Court on the 24th February, and it was entered and passed on the 27th.

The plaintiffs now presented their petition for a rehearing, verified by affidavit, stating the foregoing facts; and also that the petitioners had been theretofore prevented from applying for a rehearing, because the decree had not been passed and entered in due time; it being the practice of this Court not to permit any application for a rehearing until the minutes of the decree are settled, and the decree is passed and entered.

On the part of the defendant, the affidavit of his solicitor was read, stating his belief that the original intention of the plaintiffs was to appeal from the decree, and not to have the cause reheard; and that the discussion which had taken place arose from the plaintiffs wishing to insert in the minutes additional matter for the purpose of improving their case upon appeal. The deponent had never been acquainted with the intention of the plaintiffs to petition for a rehearing until the 27th February.

[271] Mr. Kindersley, for the petition.

Mr. Barlow, contrà, contended that under the circumstances the fault of the delay rested with the plaintiffs, and that they were not entitled to the indulgence of the Court; that the rule of Court as to the time of presenting a petition of rehearing was peremptory, and had never been relaxed unless, perhaps, in very extreme cases. He cited *Cutten* v. *Sanger* (3 Y. & J. 374) and *Milford* v. *Milford* (1 M'Clel. & Y. 150).

THE LORD CHIEF BARON observed that it was by a mere accident that the plaintiffs were prevented from making an application for a rehearing till six months had elapsed; and he granted the prayer of the petition.

TAYLOR *v.* SHEPPARD. Feb. 23rd, 1835.—The creditors of A. having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others,

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(*a*)[1] See the next case. (*a*)[2] See the last case.

that A. was only the agent of B. & Co., proceeded nevertheless to sign A.'s certificate: Held, that this was not an election by the creditors to treat A. as their sole debtor.—A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination.—Where a document is in the custody of an officer of a Court of equity, the Court will, on grounds of public policy, order the production of that document at the trial of an indictment against any individual, whether he be a party to the suit in which the document is in evidence or not.—Where there are several actions against the same party grounded on the same document, and the document is in the custody of an officer of a Court of equity, in a suit instituted by the defendant at law to restrain proceedings in one of the actions, the Court, upon the application of the defendant at law, will order the production of that document at the trial of another of the actions, though the plaintiff in the latter action is not a party to the suit in equity.

[S. C. (on point as to production of documents), 4 L. J. Ex. Eq. 20.]

The plaintiffs in this suit carried on trade at Manchester as woollen-cloth manufacturers, under the firm of Taylor, Son & Gibson. The defendants carried on the like trade at Uley, under the firm of Edward Sheppard & Sons.

In April, 1830, the defendants received an order from a person of the name of Hulme, to supply him with woollen manufactured goods, on behalf of the house of William Hulme & Co., Manchester; and the defendants answered that order by the requisite supply. Further orders were afterwards made, and the dealings between Hulme **[272]** and the defendants, with some interruptions which will be noticed presently, continued till September, 1832, when the balance due from Hulme to the defendants amounted to 564l. On the 26th of that month Hulme committed an act of bankruptcy. On the 11th of the following month a fiat in bankruptcy issued against him on the petition of the defendants; and soon afterwards he was declared a bankrupt. In November the defendants proved part of their debt, and on the 10th of December they signed the bankrupt's certificate.

During the investigations which took place under Hulme's bankruptcy, several of his creditors, amongst whom were the defendants, having heard that the plaintiffs were liable for the debts of Hulme & Co. entered into the following agreement:—"We, the undersigned, having credited William Hulme & Co. of Manchester with woollen cloth or other goods to a considerable amount, and having proved or being entitled to prove our several debts under a fiat in bankruptcy issued against the said William Hulme, and having reason to believe that the said William Hulme was not carrying on business on his own account, but merely as the agent of Messrs. Taylor, Son & Gibson, of Manchester aforesaid, do hereby for ourselves and our respective partners severally agree to and with each other to bear, pay, and contribute our proportion of the expense in the prosecution of any action or proceeding that Messrs. Edward Sheppard & Sons of Uley may be advised to take against the said Taylor, Son & Gibson, to be calculated at an equal pound rate upon the amount of our respective debts. And we do hereby also severally agree to leave in the hands of the assignees of the said William Hulme, the dividends to become payable to us and each of us under the said fiat. And we do hereby authorize the said assignees to apply the same dividends, so far as they will extend, in discharge of our several proportions **[273]** of the expense to which the said Messrs. Sheppard & Sons may become liable to pay as aforesaid."

In Michaelmas Term, 1833, the defendants commenced an action against the plaintiffs in the Common Pleas, to recover the balance due to them; and ultimately obtained a verdict for the amount, with interest on such part as consisted of bills bearing interest. In Michaelmas Term last, the plaintiffs moved for a new trial, but the Court refused to grant a rule.

The plaintiffs then filed their bill, praying that it may be declared that the defendants are not entitled to proceed in their said action against the plaintiffs, or to sue out execution upon the judgment obtained by them against the plaintiffs; and that the defendants may be restrained by injunction from proceeding in the said action, and from commencing and prosecuting any other action in respect of the said debt

alleged to be due to them from the plaintiffs; and that all necessary directions may be given for effectuating the said several purposes, and for general relief.

The case made by the bill, in reference to the connexion between Hulme and the plaintiffs, was this: That Hulme was originally the shopman of one Rowlands; that Rowlands having become bankrupt, the plaintiffs took the premises which had been occupied by him, and continued the trade there, and employed Hulme upon the premises as their agent, with a salary of 120l. a year; that it was agreed in writing that Hulme should have the option at any future period of taking that business upon himself, provided he relinquished his salary and paid the plaintiffs for the fixtures, &c.; that in January, 1830, Hulme took the business on his sole account, and that some time afterwards a written agreement was entered into between him and the plaintiffs, by which he agreed to relinquish all claim to salary from July, 1829, and to pay for fixtures, &c.; that the fact of Hulme being the sole owner of the **[274]** business was universally known, as well as the circumstances under which he took it.

The bill charged that if the plaintiffs were at any time liable at law for any debts contracted by the said William Hulme, under the said firm of William Hulme & Company, which the plaintiffs by no means admitted or acknowledged, but on the contrary utterly denied, the defendants must be considered to have elected to proceed against the said William Hulme for the balance alleged to be due to them in respect of the dealings and transactions between them and the said William Hulme, they having after full knowledge or notice of such alleged liability on the part of the plaintiffs issued the aforesaid fiat, and acted thereunder as before mentioned; and that they had thereby released the plaintiffs from their liability (in case they ever were liable to them). And as evidence thereof, the plaintiffs charged that, since the trial of the said action, the plaintiffs had discovered, as the fact was, that pending the prosecution of the said fiat, and before the defendants had proved their said debt thereunder, or had received their dividend, or had signed the certificate of conformity of the said William Hulme, the said William Hulme, in the presence and hearing of the said defendants or one of them, deposed or stated, though contrary to the fact, that the said business so carried on by him under the firm of William Hulme & Co. belonged to the plaintiffs, or that the plaintiffs had some interest therein up to the month of October, 1832.

The bill also charged that, notwithstanding such notice of the plaintiffs' alleged liability, the defendants continued to work the said fiat, and proved their debt against the estate of the said William Hulme, and received a dividend from the said William Hulme's estate, and also signed his certificate of conformity, before they commenced the said action against the plaintiffs.

[275] The defendants, by their answer, stated various difficulties which they had met with, in obtaining payment from Hulme in the course of these transactions; that Hulme however had on one occasion represented to them that he was backed by a great Manchester house; and that on another occasion, the defendants having arrested Hulme for the amount of a dishonoured bill, he introduced to one of the defendants the plaintiff Gibson, who said that the plaintiffs would guarantee Hulme to any firm to any reasonable amount; that under these circumstances the defendants continued their dealings with Hulme.

The defendants then stated that it appeared by the examination of Hulme, and the proceedings under the fiat, and they believed the fact to be, that the said firm of Messrs. Hulme & Co. was established some time in the year 1829 by the said plaintiffs; and that the same, and all the fixtures, stock in trade, and every thing in the said house for carrying on the same, belonged to the said plaintiffs; and that the said William Hulme was then only agent or manager of the said plaintiffs, at a salary of 120l. per annum or thereabouts, under a certain agreement, bearing date on or about the 28th July, 1829, and which was reduced into writing, and signed by the said plaintiffs and the said William Hulme, and which is set forth in the said bill of complaint; and that they supplied the said William Hulme with woollen manufactured goods for the purposes of sale; and that the said William Hulme was to exercise his discretion in making a profit thereof, and was to account for the same regularly to the said plaintiffs; and that the same so continued down to the 2nd October, 1832, and subsequent to the date of the said act of bankruptcy.

The defendants further stated that they first became acquainted with the connexion between the plaintiffs and Hulme, and of their employment of Hulme as their agent,

by the examinations of the plaintiffs, the bankrupt, and **[276]** others, under the proceedings in the bankruptcy; and not till the conclusion of those proceedings. They denied having received any dividend on their debt, and stated that the proof had been expunged from the proceedings. They also stated that they were unable to set forth as to their knowledge or information, but they said they did not believe it to be true that since the trial of the said action the plaintiffs or any of them had made the discovery alleged by the bill.

An injunction having issued to stay proceedings at law, and an order nisi having been obtained to dissolve it—

Mr. Simpkinson and Mr. Kenyon Parker now shewed cause against dissolving the injunction. The defendants have elected to make Hulme their sole debtor. It is immaterial whether they knew of his agency or not at the time of issuing the fiat. If they pursued their proceedings against Hulme and signed his certificate, with the knowledge of his dealing with the plaintiffs, they by that act abandoned their claims as against the plaintiffs: *Ex parte Husband* (5 Madd. 418). [Alderson, B. If they prove under the fiat against one partner, what is there to prevent them from going against the solvent partners? The case you set up makes Hulme liable; but you also are liable. Their discovering that Hulme is only a name, and that there are real persons behind, does not of course relieve Hulme of his responsibility, if he previously held himself out to the world as a partner: but you may be equally liable.] Hulme was a mere agent, and not a partner; and they elected to treat him as the debtor, and not the principals. That is shewn by the agreement to prosecute the plaintiffs. Under that there was a distinct appropriation of the dividends, which is equivalent to receiving them. They say **[277]** that the proof was expunged, which is not the case. They say also that they waive their right to dividends, which they cannot do behind the back of third persons. [Alderson, B. The agreement to prosecute seems only to be a sort of guarantie to the attorney. The question is whether the defendants knew Hulme to be the agent of the plaintiffs at the time they gave credit to him. Then another question is whether, after a trial has been had, that is a proper subject for the interference of a Court of equity? There is a class of cases where a party recovers at law, and afterwards the party losing finds a receipt which he might have used at the trial. It is universal at law to give no new trial in such a case.] The refusal of a new trial at law entitles the plaintiffs to apply to a Court of equity for relief. The introduction of a new trial at law is comparatively of modern origin. It was introduced about the year 1700. There are many authorities to shew that a Court of equity may interfere in such a case: *Sewell* v. *Freeston* (1 Ch. Ca. 65), *Kent* v. *Bridgman* (Prec. Ch. 233), *Blackhall* v. *Combs* (2 P. W. 70), *Countess of Gainsborough* v. *Gifford* (2 P. W. 424), in which the Master of the Rolls refers to the case of finding a receipt after the trial; *Robinson* v. *Bell* (2 Vern. 146), *Hankey* v. *Vernon* (2 Cox, 12), *Farquharson* v. *Pitcher* (2 Russ. 81). [Alderson, B. In *Farquharson* v. *Pitcher* it appears that the Court of law having jurisdiction refused to exercise it. They determined nothing at all. Here the matter is res judicata. In *Hankey* v. *Vernon* the Court refused a new trial: but there the fact was admitted by the answer.] We say the discovery was made after verdict, and they do not displace this statement by their answer. To say the least of it, they leave it in doubt by their answer whether we made the discovery before or since the trial.

[278] Mr. Temple and Mr. John Romilly, contrà. The plaintiffs could make no affidavit to enable them to obtain a new trial. They therefore come here, where they are not called upon to make an affidavit. Under the circumstances the defendants had a right to proceed against Hulme. Is the proceeding against Hulme in ignorance that other parties were concerned a bar to proceeding against the other parties when discovered? The debt was proved on the 6th of November, and the proceedings under the bankruptcy continued till the 30th; and the defendants swear they were not until the close of those proceedings acquainted with the fact of Hulme's agency. Is the mere proof of the debt to be sufficient to raise the question of election? In *Ex parte Husband* (5 Madd. 418) it is said that the receipt of dividends is the criterion. In all other respects that case is no authority for the present; the question there being merely between two different sets of creditors.

Then as to the question of jurisdiction, no doubt there are cases where this Court will interfere after verdict; but the Court looks to those cases with great anxiety. In *Sewell* v. *Freeston* (1 Ch. Ca. 65) the Court refused to interfere. *Gainsborough* v.

Gifford (2 P. W. 424) does not meet the present question, and the doctrine of the Master of the Rolls in that case is commented upon by Lord Eldon in *Protheroe* v. *Forman* (2 Swanst. 227). *Hankey* v. *Vernon* (2 Cox, 12) turns on this—that there must be an express discovery. [Alderson, B. A discovery which the plaintiff could not obtain except in equity. Here the plaintiffs might have obtained the discovery by the examination of witnesses at law. Hulme was examined as a witness at the trial.] Admitting all that the plaintiffs say to be true, it amounts only **[279]** to this —that they have discovered evidence which they might have produced at law; and which, if they had so produced, might have obtained for them a different verdict. The principle is very clearly laid down by Lord Redesdale in *Bateman* v. *Willoe* (1 Sch. & Lef. 201): "It is said," he observes, "that great injustice has been done to the plaintiffs. Supposing that to be the case, it is not sufficient to shew that injustice has been done, but that it has been done under circumstances which authorize the Court to interfere; because, if a matter has already been investigated in a Court of justice according to the common and ordinary rules of investigation, a Court of equity cannot take on itself to enter into it again." *Whitmore* v. *Thornton* (3 Price, 241) and *Field* v. *Beaumont* (1 Swanst. 209) are also authorities in point.

Another circumstance is, that the bill prays no specific relief. It prays, without stating why, a declaration that the defendants are not entitled to proceed against the plaintiffs, and for an injunction to restrain them from so doing. But it asks for no relief consequent on the injunction.

ALDERSON, B. The injunction must be dissolved. I do not see my way clearly to the proposition that the party, under the circumstances, is to be taken to have made his election. It seems clear to me that if, at the time of issuing the fiat, the defendants in equity had known the facts, they might have brought actions against Hulme and the present plaintiffs; possibly a joint action against both. All they knew, however, was that Hulme was the ostensible person: who were the real persons they did not know. It turned out upon the inquiry under the fiat that they had reason to believe that Hulme was only an agent, and that the plaintiffs were the real persons concerned in the transaction and liable to the debts of the concern. At the conclusion of the transac-**[280]**-tions in the bankruptcy they came to the opinion that they had a substantial case against the plaintiffs in equity. The only fact which can be urged as a ground of election is their afterwards signing the certificate; but at that time they did not know the manner in which all the circumstances might strike a judge or jury. It is obvious, for instance, that they could not tell what effect the agreement by the plaintiffs for the disposal of the property to Hulme might have on the minds of the jury. Therefore, at all events, these circumstances, which the plaintiffs attempt to set up in order to raise a case of election, tend clearly to exonerate the defendants. Then the question is, whether it is a reasonable conclusion from the facts—considering too that Hulme and his agents were examined at the trial, and that the plaintiffs gave notice to produce the agreement entered into by the defendants, and that no question was ever put to Hulme or the other persons on the point in question—whether it is a reasonable conclusion that Hulme told the state of these transactions to the defendants in the manner charged in the bill? I cannot think the parties have placed themselves in a situation which entitles them to keep up this injunction. *Hankey* v. *Vernon* is a strong case; but there the plaintiff could not prove the fact by any witness which he could have examined at law. Here the fact might have been proved by examination of the witness at law.

Injunction dissolved.

Feb. 9th.—In this cause the plaintiffs having indicted William Hulme for perjury, committed on the trial of the action **[281]** before mentioned, and alleging also that they were about to prefer bills of indictment against the defendants (though for what offence did not appear), a motion was made on behalf of the plaintiffs that certain books, papers, and documents, which had been left by the defendants in the custody of Mr. Bowyer, their clerk in court, under an order in this cause, might be produced by him at the trial of William Hulme, and also before the grand jury before whom the bills of indictment against the defendants might be laid, and also upon the trial of those indictments, should true bills be found.

The affidavit of the plaintiffs' solicitor stated his belief of the materiality of those documents at such impending trial or trials.

Mr. Simpkinson, for the motion.

Mr. John Romilly, contrà. First, the plaintiffs are not entitled to this motion as against Hulme. In *Ex parte Jones* (Buck, 337), where papers had been deposited with the solicitor of the bankrupt, the Vice-Chancellor would not permit them to be delivered to the assignees for the purpose of founding criminal proceedings against the bankrupt. In the present case there is no proof how the papers got into the hands of the defendants, and Hulme might object that they got them from his solicitor. [The Lord Chief Baron. There is no such protection in criminal cases.] A third party will surely be protected. Hulme is not a party to this suit. If this motion be granted, the consequence will be, that a bill of discovery may be filed in this Court for the purpose of obtaining evidence to charge a person criminally who is not a party to the proceedings in this Court. It would be monstrous to hold that a Court of equity could be used for such purposes. The plaintiffs are entitled to the books and papers for every thing relating **[282]** to this suit, but not as against a third party: *Rex* v. *Dixon* (3 Burr. 1687). Secondly, it is clear that the motion must be dismissed as to the defendants. The Court will not compel parties to produce evidence to support an indictment against them. Besides, the notice of motion does not state for what offence they are to be indicted, and is in other respects loose and unintelligible.

THE LORD CHIEF BARON. I go along with you on the last point: as to that, the motion must be refused. But upon the first point, I think the plaintiffs are entitled. The cases which have been cited have no application. They depend on the question whether an attorney can be compelled to deliver up papers of his client which are in his custody; and it has always been held that he cannot. The late Lord Tenterden departed from the old rule on this subject to a very considerable degree.(*b*) I do not say, however, whether my opinion would agree with his to the extent to which he carried it. That case in Burrow is, no doubt, sound law; but I have also heard Lord Tenterden say that, in criminal cases, the rule does not apply. The principle of that case is, that where a person is acting as an attorney bonâ fide, the Court considers the attorney and the party himself as the same party. The case in Buck is to the same effect. There the documents were held by the attorney of the bankrupt, the attorney having received them for the purpose of defending several actions which had been brought against the bankrupt by certain underwriters; and the question was not, whether the Court would order the documents in its own possession to be produced, but whether it would compel the production of those which were in the posses-**[283]**-sion of the bankrupt. The Court said, we have no jurisdiction to do this; we cannot violate the confidence between the bankrupt and his solicitor. That is not so here. It appears that there was a letter in the possession of the defendants, which was supposed to be essential as evidence to convict this man of perjury. What benefit is it to the defendants to retain it? They have no interest in protecting a man who is guilty of perjury. What Court will lend itself either to conceal or withdraw evidence which is to convict a man of so great a crime? If the original of this letter is not forthcoming at the trial, a copy of it cannot be given in evidence; and is it equitable to give the party a chance of escape by keeping back the original document? A document gets into the possession of the Court in a thousand cases; and the discovery of the document leads to the discovery of the offender. These are not documents created by the cause: they existed before the suit commenced. They have found their way into this Court; and the defendants do not in fact possess them. It is asked that they may be returned to the defendants; but if they were so returned, might not the defendants withdraw them from the hands of justice? If they might be subpœnaed to produce them, why may not also their clerk in court? Suppose some great felony or murder had been committed, would there be any difficulty in such a case?

It is said that to grant this motion would tend to the abuse of Courts of equity. Certainly there are cases in which it would be an abuse. But suppose a bill of discovery to be filed, and it turns out that, amongst the documents produced, there

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(*b*) See *Williams* v. *Mundie*, Ry. & Mood. 34. But the old rule is restored. *Doe d. Shellard* v. *Harris*, 5 C. & P. 592; *Moore* v. *Terrell*, 4 B. & Ad. 870; 1 Nev. & Man. 559. The cases on the subject are reviewed by Lord Brougham in *Greenough* v. *Gaskell*, 1 Mylne & K. 100.

is one—a forged will, for instance—in which the defendants have no interest, but by which the interest of third persons is deeply affected, and this document gets into the possession of a clerk in court—on what foundation could the defendants say that such a document ought not to be produced, but that it ought to be returned to them, in order that they might put it in the fire? Upon a trial at common law, if a forged document **[284]** appears in evidence, the Court will impound it; (*a*) why, then, if the same principle be acted upon, should a Court of equity suppress these proceedings? (*b*)

Feb. 19th.—On this day it was moved that the before-mentioned books, papers, and documents (which included the agreement stated ante, p. 272) might be produced by Mr. Bowyer at the trial of an action, which had been commenced **[285]** by Rawson & Co., against the plaintiffs, to recover the sum of 290l. 11s. 6d. Rawson & Co. were amongst the creditors of Hulme, who, in common with Messrs. Sheppard, the present defendants, had signed the above-mentioned agreement. Their action, therefore, and that of the present defendants, had been brought under precisely similar circumstances.

Mr. Simpkinson, for the motion.

Mr. John Romilly, contrà. This is not a case where public justice is concerned. The papers not being required for any indictment, the plaintiffs are not entitled. They seek evidence in this suit against persons who are not parties to this suit, who do not appear to this motion, and who cannot make their defence. You can only move against a party upon his answer; not in his absence: *Marsh* v. *Sibbald* (2 Ves. & B. 375). If this motion be granted, it will be a stronger step than allowing the answer of one defendant to be read against another. [The Lord Chief Baron. This is a distinct collateral motion. They have found a certain document in the possession of the defendants' clerk in court, and they desire that it may be produced by that officer. Suppose that by a bill of discovery a party was bound to produce a book, which, when in the hands of an officer of the Court, is found to affect various of his Majesty's subjects: do you mean to say, that when it is in the possession of this Court, all access to it is locked up? The production of this paper will not alone make it evidence: they must prove it by witnesses. If your client had a book relating to a public company, he might be ordered to produce the book as part of his answer; and then any person having an interest in it might move to have it produced at law; proving it sufficiently.] Not unless he was **[286]** a party to the suit. The papers are only left with the clerk in court for the purposes of a particular suit. The plaintiffs must be left to their remedy by a subpœna duces tecum. Your Lordship cannot order the production of these papers without shaking that case before Lord Eldon, and opening a new branch of equity; which may have a very serious effect.

Mr. Simpkinson, in reply. In *Marsh* v. *Sibbald* it was sought to compel the defen-

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(*a*) *Fitch* v. *Wells*, 1 Salk. 215; Holt. 213; Co. Litt. 231 b. note (1); *Rex* v. *Clifford*, 1 Car. & P. 521. And in equity, see *Frankland* v. *Hampden*, 1 Vern. 66.

(*b*) On the day on which the next motion was argued his Lordship said that he had inquired as to the practice of the Court of Chancery in cases where the plaintiff in a suit applies for the use of documents admitted by the defendant, in order to furnish evidence for the indictment of a third person, not a party to the suit; and that the opinion of the registrars was unanimous that an order for the production of papers in such a case might be made, though they could find no express authority in point. The reporters have been furnished by one of the officers of the Court of Exchequer with the following cases, which were sent by the registrars of the Court of Chancery to the Lord Chief Baron as bearing upon the point in question—

Vaux v. *Mackenzie*. 11th December, 1806, B. 48. On the application of the plaintiffs, the defendants' answer to be produced at the trial of action brought by P. C. Bruce (no party) against the defendants.

Robson v. *Moore*. 5th June, 1813, B. 782. On the application of a third person, the clerk in court to attend with the record of the bill and answer of the defendant, indicted for perjury alleged in the answer of the defendant.

Lloyd v. *Sandilands*. 27th November, 1822, B. 7. On the application of a person no party, a person to be appointed by the Master to attend the grand jury on an indictment preferred against the plaintiff for perjury, with affidavits sworn by the plaintiff; and if bill found, to attend the trial.

dant to produce a document. Here it is in the possession of the Court. The Court will not impound the document to the hindrance of all justice.

THE LORD CHIEF BARON. I should be sorry to be so rash and presumptuous as to seek to overturn any decision of Lord Eldon. No one has a greater respect than I have for that learned Lord—a respect not formed on any recent acquaintance, but on that of a whole life. As far as I understand that case the decision is this: that he could not order the answer, or that which constituted part of the answer, of one defendant to be read against another, upon a trial at law brought by that other defendant. I may take the precaution of stating thus much, in order that the present case may not be drawn into a precedent upon all occasions.

I think it will be seen that the public inconvenience which is expected to arise from one way of deciding this question, would result equally from the other. It is said that, if the motion be granted, it will give rise to a new species of equity, in order to get at evidence in certain cases. It may be so; but I do not know that a Court of equity is bound by any decision to limit its power as to enforcing the production of documents. Look at the state of the case. Several traders enter into an agreement, which is signed by them in common, and which states that, having prosecuted a commission against a certain in-[287]-dividual, and having made a discovery from that individual as to other persons, they agree to make use of the dividends as a common fund, to enable them to render the other parties liable. This agreement is known amongst themselves only, and they put it in force by bringing an action in the name of one of themselves against the present plaintiffs, and a verdict is found against them. It is supposed that that verdict is incapable of being disturbed; but the present plaintiffs file their bill in equity, and they find this agreement signed by twenty or thirty persons, all having the same interest in it as the person who by chance has it in his possession. Assume that it is a good defence at law; it is now in this Court; the other parties have brought their actions; and the plaintiffs in equity now seek the benefit of that agreement, which was accidentally discovered upon a bill filed against the party who brought the first action. It is said that this Court has no jurisdiction to order the production of the agreement as against the other plaintiffs at law, and that each of those nineteen plaintiffs may go on and recover the same verdict, and that the defendants at law have no remedy. Would not that be calling on this Court to shut out important evidence, and to dispose of the rights of individuals contrary to law? But it is said, you may return it, and then compel its production by a subpœna duces tecum. Now we know that when a document is in the possession of the plaintiff, it is in his discretion whether he shall produce it or not, upon notice, and the defendant may resort to other evidence if it be not produced; but if the party who has it is only a witness, and refuses to produce it, you cannot give a copy in evidence. The counsel for Sheppard who has produced the document presses me not to part with it; which consequently leads me to believe that he would not produce it on a subpœna duces tecum. Sheppard would not hand it over to any of the parties; on the contrary, he would be careful not to do [288] so; and yet I am asked to lend myself to suppress a document which might never have come to light at all, but for a bill of discovery.

In this case the plaintiffs in the different suits have a common interest. The document derives no authority in consequence of coming from this Court. It must be proved by a witness at law; and the party who objects to its production may object before the judge at law. But suppose it were the case of a public company, and the clerk objected to producing it in Court, on the ground that it contained the titles of different persons—I confess, I should not think that, while impounded here, it would be so inaccessible that no man living should be allowed to produce it. Agreeing, therefore, entirely with the rule, that you cannot read the answer of one defendant against another in the same cause, I do not see that I should do justice, if I refused the party the benefit of this paper in evidence.

Motion granted.

D'ALMAINE AND ANOTHER *v.* BOOSEY. March 3rd, 1835.—To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright is an act of piracy.—The English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright.

Semble, that a foreigner who resides and publishes in England, is within the like protection.

[S. C. 4 L. J. Ex. Eq. 21. Distinguished, *Boucicault* v. *Chatterton*, 1876, 4 Ch. D. 276. See *Jefferys* v. *Boosey*, 1854, 4 H. L. Cas. 815.]

Denis Ferdinand Esprit Auber, of Paris, in the early part of the year 1834, wrote and composed a certain book comprising the music of an opera called Lestocq, which was first represented at Paris on or about the 24th of May in the same year.

By an indenture, dated in June in the same year, stamped according to the laws of England, and made between Auber of the one part and the plaintiffs of the other part: Auber, in consideration of 80l. paid to him **[289]** by the plaintiffs, assigned to the plaintiffs, their executors, administrators, and assigns, all his copyright in the before-mentioned book, and the several airs, pieces, or compositions comprising the music thereof, and the sole and exclusive right of printing, re-printing, and publishing the same and every part thereof; saving and reserving to Auber and his assigns the right and privilege of printing, publishing, and vending, after the first publication thereof by the plaintiffs (such first publication not being delayed beyond the 15th of July then next), copies of the said book, and the airs or compositions comprising the same, in France and Germany, or elsewhere, not being any part or parts of the united kingdom of Great Britain and Ireland, or any of the colonies or dominions thereof.

About the 12th of June, 1834, the plaintiffs, who carry on business in co-partnership as music sellers, gave notice in writing to persons connected with that trade, and, amongst others, to the defendant, that they had purchased the copyright in the music of Lestocq. On the 16th of June they caused the book, comprising the music of the whole opera, to be entered at Stationers' Hall. On the 30th of June a like entry was made of the overture; and on the 23rd of July a like entry was made of the airs. The overture was published by the plaintiffs at their shop on the 30th of June, and the airs on or about the 23rd of July. In August the plaintiffs published two sets of quadrilles, arranged by Wheippert, from the same opera.

In the early part of the year 1835, the plaintiffs discovered that the defendant had published several of the airs of Lestocq, with some alterations, in the shape of quadrilles and waltzes. These publications were respectively called Musard's 57th Set of Quadrilles (New Series): Musard's 58th Set of Quadrilles (New Series), and Musard's 42nd Set of Waltzes. They were all described on the title page as having been taken from Auber's opera of Lestocq, though arranged by Musard.

[290] The plaintiffs having filed their bill against the defendant, praying for an account of these several publications and of the profits arising from the sale thereof, and for an injunction to restrain the further sale, a motion was now made for the injunction.

In support of the plaintiffs' case, the affidavit of Mr. Rodwell, an experienced musician, was read. With reference to the 57th set of quadrilles published by the defendant, he deposed that the second quadrille was so completely similar to an air of the opera called "Gentille Muscovite," that it was nearly note for note the same, even to the accompaniments; that the melody of the fourth quadrille was like another air of the opera, with some variations in certain bars, which he specified; and that the melody of the fifth quadrille was contained in certain bars of the overture, which he specified. With reference to the 58th set, he said that the first quadrille was founded on, though much varied from, an air of the opera called "Le pauvre Ivan." He mentioned the several bars in which alterations had been made, and stated that in one instance there had been a change of key. He made similar statements with respect to the other quadrilles and the waltzes; observing, however, that in one of the waltzes there were sixteen bars which were not in the original air. He concluded his affidavit by saying, that although in several instances the music of the quadrilles in question was slightly varied from the airs of the opera, yet such variation was not more than is always found to be necessary when the music of an opera is arranged in the form of quadrilles.

The defendant, by his affidavit, stated that in December, 1833, an agreement was entered into between him and Philippe Musard, a French subject residing at Paris, that the latter should supply the defendant annually with a stated number of quadrilles, waltzes and galoppes, composed or arranged by him for the piano and orchestra, so **[291]** as to suit the London season. That the defendant had no control over

Musard as to the subjects to be chosen, or the authors upon whose compositions such quadrilles &c. should be founded; and that he did not know on what the same were founded until they were received by him from Musard; that the quadrilles and waltzes in question were received by the defendant from Musard in pursuance of the foregoing agreement; and that the former were published by the defendant in November, 1834.

The defendant further stated that the overture to the opera of Lestocq, as entered by the plaintiffs at Stationers' Hall on the 30th of June, is an abridgment, arrangement, or adaptation of the overture as composed by Auber; and that it is so altered, abridged, arranged, and adapted as to be performed on the piano forte by one person; and that it is an entirely distinct work from the overture of Auber; which last-mentioned composition can only be performed by the united efforts of a number of persons performing on different instruments. That the defendant's belief is, that the overture so entered was not composed or arranged by Auber in the mode or form in which it was so published and entered by the plaintiffs, but that it was so composed and arranged by some other person. That the airs which were entered by the plaintiffs on the 23rd of July were in like manner adapted for the piano forte only. That the defendant's reason for believing that the overture and airs had been arranged by other persons was, that the plaintiffs had entered and published several other airs from Lestocq which had been arranged by Adam, Kalkbrenner, and others.

The defendant further stated that Auber composed only the music of the said opera in the form usually called and known as the score, which contains the whole of the music to be used by all the performers collectively with their several instruments. That it is universally known in the musical profession, and the fact is, that the **[292]** opera Lestocq, as entered on the 16th of June, is the only one of the compositions before mentioned which was composed by Auber himself; and that the several other compositions are only arrangements or adaptations, and were composed by other persons. That it is in the usual course of trade to call such compositions by the name of arrangements or adaptations; and that the persons who make or compose them possess an inferior degree of talent to the original composer of the opera, who, from his superior talent, would not occupy his time or attention upon such a subject. That the value of such arrangements or adaptations depends entirely upon the talent or ability of the arranger or adapter. That the arrangements and adaptations published by the plaintiffs were not intended to be used for dancing; while, on the contrary, the defendant's publications were expressly intended for that purpose.

Upon this last point the defendant also relied on affidavits of two other musicians, who stated that the music of the plaintiffs' publications was adapted for the piano forte only, in which form it was not intended to be danced to; and that, in fact, it had not those necessary breaks and portions of melody which are absolutely necessary to form a quadrille or waltz, whereas the object of the defendant's publications was the arrangement or adaptation of the music of Lestocq, so as to admit of the same being danced to; and that in such arrangement or adaptation a very considerable degree of musical skill and talent is necessary; and that the sale of the quadrilles and waltzes so formed is very much increased or diminished according to the talent and ability of the composer or arranger of the same.

With respect to the time of the publication of the opera in France, the evidence was contradictory. The plaintiff stated his belief that no part of the opera was published by Auber before the 2nd of July, 1834, about which time it was likewise registered at the proper office at Paris. The de-**[293]**-fendant, on the contrary, asserted that, from letters which he had received to that effect, he believed the publication in Paris had been a month earlier than the 2nd of July.

Mr. Twiss, for the plaintiffs. The defendant states that under a previous agreement for that purpose he received the music in question from Musard, and that he had no control over Musard as to the selection which the latter might make. The fact is, however, that he has waited to see what would be most popular and attractive in the opera of Lestocq, and has pirated all the choicest airs accordingly. It will be said that a foreign author cannot convey his copyright to an English subject, so as to place the Englishman under the protection of the acts of Parliament. In *Clementi* v. *Walker* (2 B. & C. 861; 3 Dowl. & Ryl. 602) it was held that a foreign author, not using due diligence for that purpose, cannot stop the publication of his works in England; but the Court declined to decide the question whether the act of publishing

abroad alone makes the work publici juris. It is apprehended, however, that it will not; and that the assignment to the plaintiffs is valid at common law, if not under the act of Parliament. Copyright exists at the common law, and the power to transfer such a right is recognised by the statute of Anne (8 Anne, c. 19), which speaks of authors "who have not transferred to any other the copy or copies of their books." Nothing has occurred in this case to narrow the author's privilege at common law. But then it will be said that the 7th section of the statute provides that nothing contained in the act shall extend to prohibit the importation of any books in Greek, Latin, or any other foreign language printed beyond the seas. Now it can scarcely be argued that music is language within that clause of the statute; but even if it be so, it is clear that where an Englishman possesses himself of the right **[294]** which is saved to a foreigner, the saving is at an end. The act was passed for the protection of British authors. [The Lord Chief Baron. The clause in question was intended to protect those who had imported certain works.] But though so intended, a reasonable time is to be allowed to the author or his assignee for publication in England in the first instance. In *Edgeberry* v. *Stephens* (2 Salk. 447; Holt, 475) the Court held that the purchaser of a foreign invention was within the protection of 21 Jac. 1, c. 3, s. 35. [The Lord Chief Baron. The Court considers the importation from abroad an original merit entitled to protection. The contract having been entered into abroad makes no difference.] The plaintiffs have used due diligence in the importation. The registration of the work at Stationers' Hall took place before any publication either at Paris or London, and the publication of the first part was within a fortnight after the assignment to the plaintiff. It was impossible to be more prompt; and, in fact, the registration itself is an inchoate publication.

Mr. Beames and Mr. Wood, for the defendant. The first question is whether a foreigner living abroad, publishing abroad, and reserving to himself a right of publishing abroad, can nevertheless have a copyright in this country, entitled to the same protection as the copyrights of British subjects. If he cannot, it follows that his assignee cannot; for the assignee can only take what the assignor is able to give him. Now, in *Miller* v. *Taylor* (4 Burr. 2310), Mr. Justice Willes points out the materiality of the wording of the special verdict in that case. "It is found," says his Lordship, "that the work is an original composition, first printed and published in London; the author a natural born subject, resident in England. Therefore this case has nothing to do with foreign books, which stand on **[295]** a very different footing." Now these observations are strong to shew that no copyright exists, except in a British subject. [The Lord Chief Baron. Those observations were only made in answer to the arguments at the bar. Mr. Justice Willes avoids deciding the point.] At all events, it is not to be inferred that his opinion was in favour of any protection to foreigners. In *Clementi* v. *Walker* (2 B. & C. 870; 3 Dowl. & Ryl. 602) Mr. Justice Bayley expresses himself with great caution on the subject, declining to give any opinion as to whether an author publishing abroad is entitled to any privilege here. It was unnecessary to decide the point in that case, but in *Delondre* v. *Shaw* (2 Sim. 237) there is an express decision on the subject. In that case one of the grounds of the Vice-Chancellor's judgment was, that a foreigner can have no copyright which a Court of equity will protect. [The Lord Chief Baron. What has that case to do with copyright? The substantial ground for relief was, that the property of the plaintiff was injured by the sale of a spurious article by another party. Am I to understand that, if a foreigner residing here were to invent and publish a work and enter it at Stationers' Hall, he would have no property in that work?] The present is not that case; but it is difficult to say that a foreigner so circumstanced would have any such property, for the object of the act was solely to encourage British skill and industry. In *Page* v. *Townsend* (5 Sim. 395) it was held that prints engraved and struck off abroad, but published in England, are not entitled to protection from piracy. [The Lord Chief Baron. That case depended upon the wording of a particular statute.] There is no case in which a Court of equity has ever interfered in favour of the copyright of a foreigner, and the assignment of such a right to an Englishman can make no difference.

But, secondly, supposing the plaintiffs to have a copyright in the work which they have purchased, there has **[296]** been no piracy of it by the defendant. By an express provision in the deed of assignment, Auber was to have the right of publishing the opera abroad, after the first publication of it by the plaintiffs, upon condition that they published it in England before the 15th of July. They omitted to publish it within

the prescribed period, and then the defendant purchased his work of Musard as adapted from the opera published by Auber at Paris. It is true that within the given time the plaintiffs entered the original opera as published by them at Stationers' Hall; but they have not in fact published it. The compositions which they have published are not Auber's, but those of various other persons. The overture which they have published is not the overture which was entered at Stationers' Hall, and the like observation applies to the other parts of the opera. Besides, even if they had published the genuine opera, the defendant's work is merely an adaptation of the original, and such an adaptation is not a piracy: *Gyles* v. *Wilcox* (2 Atk. 143). [The Lord Chief Baron. I think that if the original air is published, though with adaptations and harmonies, or for different instruments, it is a piracy, and an action will lie. This is not like the case of an abridgment of a book. The purpose of abridgments is very distinct from that of the works from which they are taken. No one can doubt that Viner's Abridgment and Comyn's Digest are original works.] According to the affidavits of disinterested witnesses of known talents, there is considerable exercise of mind in these adaptations, independently of what is derived from the original composition. Besides, the defendant's work does not pretend to compete with the elaborate work of the plaintiffs. Their publication is intended for the higher purposes of music, while that of the defendant is adapted entirely and exclusively for dancing.

Lastly, the plaintiffs must be left to their remedy at **[297]** law. The defendant has done no more than persons in his situation have usually done in the course of their trade; and in cases of this nature the custom of trade is to be regarded: *Dodsley* v. *Kinnersley* (Ambler, 403). At all events, a Court of equity will not interfere unless it is clearly and decidedly of opinion that the legal right is with the party complaining; if there be the least doubt on the subject, it will send the parties to law.

Mr. Twiss, in reply. Admitting what is by no means true, that a foreigner cannot sue in England for a breach of copyright, it does not follow that his assignee cannot do so. The assignee could sue, even though the assignor were an alien enemy. Suppose Auber, having drawn a bill upon the defendant, had indorsed it to the plaintiff, and before it had become due a war had broken out between France and England; Auber, being an alien enemy, could not have sued the acceptor, but would it follow that the plaintiff could not have done so? yet his right would have been derived from an alien enemy. [The Lord Chief Baron. One of the points raised by the defendant is this, that his work was purchased abroad, and, therefore, in effect taken from the publication abroad, and not from the publication here.] In order to bring himself within the saving clause of the statute the defendant must shew that the work was first printed abroad. The 7th section of the statute of Anne must be read as if the word "first" were inserted before the words "printed beyond the seas."

THE LORD CHIEF BARON. Several nice points of law have been raised in the course of the argument; but, when we refer to the facts of the case, it will be found to present no difficulty. I have been struck with the authorities **[298]** produced on behalf of the defendant, and if the Vice Chancellor had decided expressly that a foreigner, quà foreigner, had no protection in England in regard to copyright, I confess I should have doubted the correctness of that decision; though, certainly, I should not have decided in opposition to him, but should have put this case in the course of further investigation, out of respect to his authority. But the case which has been cited upon the subject does not go that length; it is in principle not quite intelligible, but there was clear ground for an injunction independently of the question of copyright. Besides, that was a case where one of the parties resided abroad. Now the acts give no protection to foreigners resident abroad in respect of works published abroad; and all the Vice Chancellor said was, that the publisher of a work at Paris could not protect himself in a Court of justice in England, either by action or injunction.

But the question, whether a foreigner publishing in England can sue in this country for a breach of his copyright, was in fact determined in the case of *Bach* v. *Longman* (Cowp. 623). Bach was a musical composer, who had come into this country from Germany. He sued Longman for pirating a sonata, which the latter had published in England, and was successful in his suit. The argument, however, in that case turned chiefly on a question which may properly be considered here; namely, whether music is within the statute of Anne. From the expressions of Lord Mansfield it is clear that he considered printed music to be nothing more than a short-hand mode of

representing what might be written in another manner at great length. In *Hime* v. *Dale* (2 Camp. 27, n.) this doctrine was doubted. I was for the plaintiff in that action, which was brought for an infraction of copyright, and I remember that Lord Ellenborough doubted, not only whether music [299] was within the provisions of the statute, but also whether music printed on a single sheet was a book. Having to investigate the subject for the purpose of moving for a new trial, I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the act of Parliament, and I found, not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered, in reference to proceedings of this nature, as a book.

Then how stands the case in relation to the acts of Parliament? The statute of Anne was one of the most laboriously considered acts that ever passed the legislature. It was the result of petitions of various booksellers, and afforded work to several committees, of which Addison, Steele, Wortley, and other literary men, were members. Now, the act provides, and they certainly intended, that Latin, Greek, and other works in a foreign language, printed abroad, might be imported for the purpose of sale in England. It might therefore be said that a Latin book published in England might be republished abroad, and then imported into England. That, however, was a casus omissus in that statute, and was accordingly remedied by the 12 Geo. 2, c. 36, which prevents the importation into this kingdom of books printed in this kingdom, and reprinted in any other country.

To apply these principles, if they may be called principles, to the facts of the present case. Early in 1834 the plaintiffs purchased the manuscript of the opera in question from Auber. At that time it was not published by any other person. The opera was indeed soon afterwards represented at Paris; but that was no publication. No work was at that time published abroad from which any other work of this nature might have been produced; and Auber, being abroad, sells his very work to the plain-[300]-tiffs. The plaintiffs, therefore, acquired a copyright in it before publication. They publish the work. After they have published it, comes out the publication of the defendant; the whole or part of which is alleged to have been copied from that of the plaintiffs. The defendant's case is that he produced only what he had before purchased at Paris. But as the admitted fact is that the plaintiffs made the first publication of the work in this country, the circumstance of its being republished at Paris afterwards does not justify the importation of it, because the 12 Geo. 2, c. 36, exactly meets that case. If, under such circumstances, the music be in fact republished in this country, the publication of it at Paris affords no protection to the defendant, and his argument drawn from that source falls entirely to the ground. The case, therefore, is that of a copyright vested in the plaintiffs of a work protected by the statute as well as the common law, and of a piracy committed in the publication of it afterwards by the defendant. The point whether the copyright of a foreigner is protected at all in this country does not arise in the present case, because the plaintiff D'Almaine is not a foreigner. He could acquire the copyright of a publication as well from a foreigner as an Englishman. If he is the owner of the work it makes no difference whether he composed it himself or bought it from a foreigner.

The other point raised by the defendant is this—whether his work, from its particular nature, is to be deemed a piracy. With reference to this question, the facts of the case are as follows:—The plaintiffs published first the overture, and then a number of airs, and all the melodies. It is admitted that the defendant has published portions of the opera containing the melodious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, [301] although he adds fifteen other bars which are not to be found in it. Now it is said that this is not a piracy, first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera; and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, à fortiori they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the

merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a bonâ fide abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject **[302]** of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

I remember in a case of copyright, at nisi prius, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle.

I see no reason to direct the plaintiffs to go before a jury in a case in which there is no doubt. Certainly, if I had any doubt upon the subject, I should not think myself justified in disposing of this matter without sending it to a jury. It has been said that the case is too unimportant to be so dealt with; but the same principles must be acted upon, whether the piracy consists merely in the **[303]** adaptation of opera music to quadrilles, or in extracting original airs from the finest operas of Rossini or Mozart.

Injunction granted.

WILLIAM HENRY WHITBREAD AND OTHERS *v.* THOMAS JORDAN AND WILLIAM BOULNOIS the Younger; and by Supplemental Bill, WILLIAM HENRY WHITBREAD AND OTHERS *v.* EDWARD EDWARDS, STEPHEN PONTIN AND ROBERT COLLINS. Dec. 19, 20, 1833; Feb. 17, 1834; Feb. 12, 28, 1835.—An equitable mortgage may be created of copyholds by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises; and if the latter document is not forthcoming, its non-production must be reasonably accounted for.—Where the creditor of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and at the time of taking this security knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage: Held, that the creditor had such notice of the transactions between his debtor and the brewers as would have put a

prudent man on further inquiry; and that, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security.

[S. C. 4 L. J. Ex. Eq. 38. Discussed, *Jones* v. *Smith*, 1843, 1 Ph. 244; 1 Hare, 43. Explained, *In re Mount Morgan (West) Gold Mine; Ex parte West*, 1887, 56 L. T. 625. See 4 Y. & C. Ex. 563.]

The original bill stated that the plaintiffs had for many years carried on the business of brewers in co-partnership, under the style or firm of Whitbread & Co. That in November 1827 the defendant Jordan, being or pretending to be seised to him and his heirs, or well entitled, according to the custom of the manor of Tottenham in the county of Middlesex, to a certain messuage and premises used by him as a public-house, called the "Valiant Trooper," and situate in Goodge Street, Tottenham Court Road, applied to the plaintiffs, and requested them to lend him the sum of 2000l. on the security of those premises. That it was thereupon agreed by the plaintiffs and Jordan that the repayment of the said sum of 2000l. with interest should be secured by a deposit, to be made by Jordan with the plaintiffs, of all the title-deeds, copies of court roll, or muniments of title, relating to the said copyhold premises. That accordingly, on the 17th of November, the plaintiffs lent and advanced to Jordan the sum of 2000l.; and thereupon, in order to secure the re-**[304]**-payment of the same with interest, Jordan deposited in the hands of the plaintiffs divers deeds and copies of admissions, being the title-deeds of the said copyhold hereditaments; and the same were accordingly retained by the plaintiffs as such security as aforesaid. That some time after such deposit had been made it was discovered that the copy of the admission of Jordan himself to the premises had not been deposited by him with the other documents; and that thereupon Jordan, at the request of the plaintiffs, applied to the steward of the manor, and obtained from him a copy of his admission; which copy, Jordan, on or about the 28th April, 1828, delivered to the plaintiffs to be retained by them together with the other deeds and documents before mentioned, as such security as aforesaid. That 1750l. remained due to the plaintiffs on the aforesaid security.

The bill charged that the defendant Boulnois claimed to be an incumbrancer upon the said premises by virtue of certain conditional surrenders made to him by Jordan in December 1832 and September 1833; and that he combined with the defendant Jordan to defeat the plaintiffs' security and to deprive them of their lien; and that for that purpose the defendants had, without communicating with the plaintiffs, advertised the premises for sale by auction. That the plaintiffs immediately, upon being informed of this circumstance, gave notice to the defendant Boulnois and his solicitors of the priority of their claims; but that the premises had nevertheless been put up to auction and sold. That previously to the year 1832 the defendant Boulnois had notice that Jordan was in embarrassed circumstances, and had parted with his title-deeds, &c. That upon the occasion of the said conditional surrenders the defendant Boulnois did not use due caution or diligence in inquiring into Jordan's title; and that no title-deed, copy of surrender, or admission, or other document relating to the premises, was in fact ever pro-**[305]**-duced or shewn by Jordan to the defendant Boulnois or his solicitors. That it is the usual and ordinary practice for the proposed purchaser or mortgagee of copyhold premises to require from the vendor or mortgagor the production and inspection of the several copies of the surrenders or admissions to the said premises. That without this precaution the proposed purchase or mortgage cannot safely be completed; and that the party who does not take such precaution is guilty of gross negligence and want of caution, and abstains from doing so at his own risk, &c.

The bill prayed that an account might be taken of what was due from the defendant Jordan to the plaintiffs for principal and interest, by virtue of their security. That it might be declared that they were entitled to a prior charge on the said messuage and premises, and to be paid what should be found due to them, together with their costs of this suit, in the first instance and prior to the defendant Boulnois. That they might be paid out of the monies produced by the sale of the said premises. And that the defendants might be restrained from demanding or receiving the purchase-money or disposing thereof, and from conveying away the premises, &c.

After the filing of the bill a fiat in bankruptcy was duly awarded and issued against Jordan, under which he was declared a bankrupt. He had, however, filed

his answer, which was in substance the same as his evidence given in the cause; contradicting all the material allegations of the bill, as to the circumstances under which the security was given to the plaintiffs.

The defendant Boulnois, by his answer stated that previously to December, 1832, there had been various dealings in trade between him and Jordan; and that about the beginning of that month Jordan was indebted to him in the sum of 2000l. That Jordan at that time proposed to give a mortgage to the defendant of the premises in **[306]** question, which he stated to be copyhold; and that upon the defendant's expressing his ignorance of the nature of copyholds, Jordan explained it to him, and stated that, it being copyhold property, he had power to mortgage it; and he referred the defendant to the steward of the manor for a confirmation of his statement. That the defendant thereupon asked Jordan whether he had not mortgaged the premises to his brewers; to which Jordan replied that not a penny was due upon the property; and that for the money he had borrowed of the plaintiffs, who were his brewers, they had taken only his note of hand. That the defendant, being anxious to use due care in taking the security, went with Jordan to the steward's office; when the steward's clerk inspected the court rolls of the manor, and after such inspection, informed the defendant that the premises were perfectly unincumbered, and that Jordan was at perfect liberty to mortgage them. That, from what the steward's clerk stated of the nature of copyholds, the impression on the defendant's mind was that no title-deeds of copyholds were at all necessary, but that the court rolls were sufficient. That in December, 1832, the defendant spoke to his solicitors on the subject, when they said it would be necessary that they should have an abstract of Jordan's title to the premises. That, on learning from Jordan that he had no abstract of title, but that he could obtain one from the steward, he called with Jordan on his solicitors, and told them that though he wished them to be satisfied on the subject, still, if an abstract of title was not essentially required, he did not wish Jordan to be put to that expense. That he made the last observation not with any desire that a due investigation of the title should be avoided, but solely from a wish to save Jordan any unnecessary expense; more especially as it appeared to the defendant, who was not versed in legal matters, that the title must depend on the entries in the court rolls. That at a meeting, at which were present **[307]** the defendant, his solicitors, and Jordan, the solicitors asked Jordan for his copies of the court roll, and documents of title; and that Jordan said he had mislaid or lost them. The defendant then insisted that freehold and copyhold property do not stand on the same footing in regard to the furnishing of abstracts of title and to the production of title-deeds and copies of court rolls; that the production of the copies of court rolls does not make out evidence of title to copyhold property, but that the court rolls themselves must be examined; and therefore, that the loss of such copies does not in any degree affect the title; and that stewards are always willing to make out fresh copies. He admitted that, prior to the surrender of 1832, he had reason to believe that Jordan was indebted to the plaintiffs; but he denied that he was aware, before the filing of the bill, that Jordan had given them the security therein mentioned, or had parted with his title-deeds. He admitted that, except as stated in his answer, he had not compelled the production of the title-deeds of the premises.

Dec. 19, 20, 1833.—An injunction having been obtained ex parte according to the prayer of the bill, a motion was now made on the part of the defendant Boulnois to dissolve the injunction.

Mr. Simpkinson and Mr. Chandless, for the motion. The question is whether, under the circumstances, the plaintiffs are entitled to the extraordinary relief which they seek. The plaintiffs do not pretend that the defendant Boulnois had any notice of their alleged lien, and they must therefore support their case by evidence of crassa negligentia. The defendant Boulnois searched the court rolls, and no incumbrance was entered upon them; and the only case the plaintiffs make against him is, that he ought to have insisted on Jordan's producing copies of the court rolls, documents which might be seen by examining the court rolls. The proposition the plaintiffs **[308]** must make out is, that they have a good equitable mortgage; and, having done so, that the omission to require the delivery of the copies of the court rolls from Jordan was such crassa negligentia as will justify the Court in postponing the defendant to the plaintiffs.

The first question is, whether an equitable mortgage can be created by a deposit

of copies of court rolls. It was certainly held in *Ex parte Warner* (19 Ves. 202) that a deposit of copies of court rolls was sufficient to give a lien on a copyhold estate; and this doctrine seems to have been approved in *Winter* v. *Lord Anson* (3 Rus. 488): but, in a recent case before the Master of the Rolls, his Honour expressed a different opinion. A copyholder being in fact only a tenant at will to the lord of the manor, he has no right to make an equitable mortgage of his estate, nor has he any estate capable of being mortgaged. If he were able to do so, he would be enabled to commit a fraud on the lord. But supposing the rule to be the same with regard to copyholds as it is with respect to freeholds, it is necessary that the more important documents should be deposited. Now, in this case, the most important document—the admission of Jordan himself—was not deposited with the other title-deeds or until some months afterwards. In *Plumb* v. *Fluitt* (2 Anstr. 432) title-deeds had been deposited as a security for money: a creditor of the mortgagor, fearing his insolvency, took a conveyance of the estate without notice of the incumbrance; and that conveyance was not only held good, but a bill by the mortgagee to obtain payment of the money due to him on the deposit, and to restrain the purchaser from proceeding at law to recover possession of the premises, was discharged with costs. In that case Chief Baron Eyre distinctly states that the circumstance that the deeds are not forthcoming is not of itself notice of a deposit, but is only a circumstance of evidence to shew that there was reason for fur-**[309]**-ther inquiry; and that, unsupported by any other circumstances, it proves nothing. In the present case no such circumstances occur. *Plumb* v. *Fluitt* was cited in *Evans* v. *Bicknell* (6 Ves. 174), and was not only not questioned by Sir Samuel Romilly, but spoken of with approbation by Lord Eldon. That was a much stronger case than the present; for there the property was freehold, and it was impossible to examine the title without the deeds; but, in copyhold property, as many copies of the court rolls may be obtained as the party chooses to pay for. In *Bozon* v. *Williams* (3 Y. & J. 150) it was decided that though a mere deposit of deeds constituted an equitable mortgage, yet it could only occur as against strangers in cases where the possession of the title-deeds could be accounted for in no other manner except from their having been deposited by way of equitable mortgage. In the present case no necessity existed for inquiring who had the possession of the title-deeds, the rolls of the manor being the fullest evidence of the title.

Mr. Wigram and Sir George Grey, contrà. It is clear, from its being the only case on the subject, that the authority of *Ex parte Warner* has never been disputed. *Bicknell* v. *Evans* was a suit to charge a trustee personally, and appears to have been cited on the other side only to give weight to the case in Anstruther. The case in Anstruther is distinguishable from the present. That was a claim on the hearing of the cause upon evidence, and not on an interlocutory application. There was nothing further to be investigated, no inquiry was necessary. There it was in evidence that the purchaser had asked for the deeds, and the vendor did not say that he had lost the deeds, but he promised to bring them on the following day. The question therefore was whether there was that absence of extreme circumspection which should have made the pur-**[310]**-chaser say, I will not pay my money until I see the deeds. In *Bozon* v. *Williams* all that the Court in fact says is, that the possession of the solicitor is the possession of the client. The judgment in that case went on the ground that the possession of the solicitor was the proper custody. All that that case decided was, that if the deeds are in the proper custody there is no ground for making any inquiry respecting them. In *Jackson* v. *Roe* (2 Sim. & S. 472) the Court held, that a purchase for a valuable consideration without notice was no protection against an adverse claim of which the purchaser might have had notice, if he had used due diligence in investigating the title.

In *Hiern* v. *Mill* (13 Ves. 114) Lord Erskine had to consider whether an equitable mortgagee should be preferred to a purchaser with notice; and in that case he observed, "a purchaser must look to his (the vendor's) title; and if, being asked for the deeds, he acknowledges he has not got them, the purchaser is bound to make further inquiry:" admitting that as many office or official copies of the court rolls may be obtained as may be necessary, still there is only one stamped official copy delivered to the copyholders on his admission, and that, properly speaking, is the only title-deed of the copyholder. It is said by Sir Edward Sugden that a purchaser of copyhold estates is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court rolls are scarcely

ever searched by a purchaser; and it has always been understood in practice that he is not bound by notice of their contents (Sugd. Vend. & P. 6th edit. 729). It is stated in Coventry's Conveyancer's Evidence (page 158), "that the conveyancer treats the stamped copy granted on the completion of the purchase, as the only legitimate muniment of the copy-**[311]**-holder's title. That copy may be deposited in the hands of a creditor; and will, in the hands of that party, create a lien on the estate. Without production, therefore, of that document, or clear evidence of its loss or destruction, the title cannot be safely accepted." It distinctly appears, from Boulnois's inquiry of Jordan whether the brewers had any mortgage, that he had a knowledge of the general dealings between the parties. It is impossible to say that Boulnois or his solicitor had not sufficient notice to induce them to make further inquiry. *Martinez* v. *Cooper* (2 Russ. 198), *Taylor* v. *Baker* (5 Price, 306), and *Horlock* v. *Priestley* (2 Sim. 75), were also cited.

Mr. Simpkinson, in reply. It is not pretended that we had any notice of the deposit; but it is contended that we ought to have gone to the brewers or some other person, and inquired whether they had any security. None of the cases go upon the ground of the purchaser being a vigilant purchaser. If it were so, what becomes of the rule on a purchase for a valuable consideration without notice? If the argument be correct, the only vigilant purchaser will be a person conforming to the practice among conveyancers. A conveyancer, in investigating a title, would of course use very different vigilance from an ordinary purchaser. In a bonâ fide case unaccompanied by fraud, and without that notice which would put an ordinary purchaser on inquiry, there can be no pretext for saying that the purchaser would not prevail. And there was no ground in the present instance to put the party on inquiry. It is clear, from the Stamp Act, that every additional copy of the court rolls would be liable to the same stamp duty as the first.

THE LORD CHIEF BARON.(*d*) I must consider this case **[312]** before I decide it. The language of Chief Baron Eyre (in *Plumb* v. *Fluitt*) is much stronger than I had thought it was, until I had read the case through. I should think an ordinary man would have exercised more caution than appears to have been used in the present case. The question is, whether there has been so much neglect as amounts to a wilful omission. I have not the least doubt that a deposit of court rolls amounts to a good equitable mortgage, though the proposition at first startles; and I am quite sure that no case has been decided contrary to *Ex parte Warner*.

Feb. 17, 1834.—THE LORD CHIEF BARON,(*b*) (after stating the facts in detail). An application was made by Jordan to Boulnois to allow this debt to increase, which Boulnois consented to on having security for the amount. He inquired of Jordan whether the house was incumbered; Jordan said it was not: the result was, that a mortgage was executed for 2500l. or 3000l. After a short period (about six or eight months afterwards) a second mortgage was executed of the same property, for securing the sum of 500l.; this was in September 1833: shortly afterwards, either in October or November following, Jordan being embarrassed in his circumstances, a proposition is made to Boulnois for the sale of the house, to which he accedes; the house is accordingly advertised for sale by auction. That circumstance being known to Messrs. Whitbread & Co., a correspondence takes place between their solicitor and Jordan. The house was sold to Mr. Whisson, who, in pursuance of the conditions of sale, paid a deposit in part of his purchase money. In this state of things, a bill is filed by Whitbread & Co. for an injunction to restrain the money from being paid over by the purchaser to Boulnois; and an injunction was granted for want of answer.

[313] The answer being subsequently filed, an application was made to dissolve the injunction. The question is whether, under these circumstances, the Court ought in the present stage of the cause to dissolve the injunction. It has not been disputed, or at least it has not been disputed with effect, that an equitable mortgage may be created by a deposit of copies of court rolls. It is quite clear that there may be an equitable mortgage of copyhold property. Boulnois did not act in this transaction on his own advice; he consulted Messrs. Appleby & Charnock. Boulnois inquired of Jordan whether the brewers had any charge on the property; Jordan stated that the property was not charged, and referred to the steward of the manor. An application

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(*d*) Lord Lyndhurst. (*b*) Lord Lyndhurst.

was made to the steward of the manor, and he stated that there was no charge on the property. But how is this to be understood? It must be understood to mean legal charge; because an equitable mortgage would not be known to the steward, as it would not be entered on the rolls of the manor. What are the other circumstances? It is known to Boulnois that Jordan was indebted to Messrs. Whitbread & Co. for money advanced by them. He knew also that some personal security, at least, had been given; for Jordan had stated that they were satisfied with his promissory note. With such information I think any prudent man would have made inquiry of Messrs. Whitbread & Co. whether they had any incumbrance on the property. But it does not rest here. Jordan was applied to for an abstract of his title: he said, I have none, but my title will be found on the rolls of the manor. Messrs. Appleby & Charnock then applied for the copies of the court rolls: he said he had mislaid them. This alone might not perhaps be sufficient; but taken in connection with the strong fact, that it was well known that Jordan was indebted to Messrs. Whitbread & Co., it ought to have put Boulnois and his solicitors on inquiry.

It must be recollected that I am not now deciding the **[314]** cause. It is sufficient for me at present to say that, under the circumstances of this case, I think the injunction ought not to be dissolved.

Feb. 28th, 1835.—On this day the cause came on for hearing.

In addition to what has been already stated, the bill charged that, in July 1829, Jordan applied to the plaintiffs to lend the documents so deposited with them to Mr. Phillips his solicitor, for the purpose of being used at the trial of an action of ejectment; that accordingly the plaintiffs lent to Mr. Phillips the several documents, with the exception of the copy of Jordan's admission; that it was thereupon agreed that Mr. Phillips should hold the documents for the purposes aforesaid, as agent of the plaintiffs; and that Mr. Phillips then signed a paper purporting to be a receipt for the several documents, which were specified, and an undertaking to return them. The bill also charged that the copy of Jordan's admission was never in the hands of Phillips, and that none of the documents were ever shewn by Phillips or Jordan to the defendant Boulnois, or his solicitors, and that the same were afterwards returned to the plaintiffs, without ever having been produced or shewn to Boulnois.

The bill further charged that, upon the purchase by publicans in London of premises to be used for the purpose of their trade, it is a usual and ordinary practice among the porter brewers to advance money to a publican, to enable him to complete the purchase, and to carry on the business; and that such sums are usually secured, not by a legal mortgage, but by an equitable mortgage by means of a deposit of the title-deeds of the premises; and that Boulnois, as a wine and spirit merchant, was aware of this practice.

[315] The plaintiffs supported the material allegations of their bill by the evidence of several witnesses. In reference to a statement made by Jordan in his answer and repeated in his evidence, namely, that upon the occasion of the deposit he signed a memorandum in a book, and also gave a promissory note to the plaintiffs; the clerk of the plaintiffs stated that he could find no such memorandum or note amongst their papers, and that he never knew the plaintiffs to enter memoranda of that nature in a book. He said, however, that in the hurry of business, it sometimes happened that such memoranda and notes of hand were omitted to be taken.

The clerk of the deputy steward of the manor of Tottenham being likewise examined for the plaintiffs, stated it to be the practice in that manor (and this was corroborated by the evidence of the deputy steward) to grant only one stamped copy of a tenant's admission; that the deponent had informed Jordan of that practice, and added that no new stamped copy would be granted to him; and that the loss of it would certainly prejudice his title. That upon the occasion of the defendants Jordan and Boulnois calling upon the deponent respecting the intended mortgage to Boulnois, the deponent told Boulnois that he had better consult his solicitor as to what deeds would be necessary to effect the security. That in consequence of this, the solicitor called on the deponent, and inquired if Jordan was tenant on the rolls, and if there was notice on the rolls of any incumbrance. That the deponent thereupon searched the rolls, and stated to the solicitor that he found no incumbrance: upon which the solicitor inquired whether a certificate of search was not usually given by the steward on these occasions; when the deponent replied, a certificate could

certainly be had if required; but the solicitor expressed himself satisfied and dispensed with the certificate.

To shew that the defendant Boulnois had some sus-[316]-picion of Jordan's situation with regard to the plaintiffs, they read the evidence of one William Shenton, which was corroborated in every material respect by the defendant Boulnois himself, in a further answer. The deponent stated that, having heard that the premises were advertised for sale, he asked the defendant Boulnois, whom he knew to have had dealings with Jordan, how he stood with Jordan? to which Boulnois answered that Jordan owed him a good deal of money; and he wished that if the deponent heard any thing of Jordan's circumstances, he would inform him, Boulnois, thereof. That some time afterwards the deponent asked Boulnois the same question, when Boulnois answered that he was all right, for that Jordan had given him a good security on his copyhold property. That, to the best of his recollection, the deponent expressed some surprise that Jordan should be able to give any security, inasmuch as the brewers usually took the best security that the publican could give. That Boulnois answered, "he has made it all right with me," or used words to that effect.

On the part of the defendant Boulnois, the evidence of Jordan, after some discussion as to whether it was receivable or not, was permitted to be read. He stated, in contradiction to the plaintiffs' case, that at the time when the deposit was made with the plaintiffs, he was possessed of a leasehold interest in the premises, by virtue of an under lease, of which a year and a half remained unexpired; and that he had also the reversion in fee in the premises. That the security intended to be given to the plaintiffs was solely upon the deposit of this lease, and not upon the reversionary interest. That, amongst the documents deposited, he did not include a copy of his admission to his reversionary interest, because he did not intend that the plaintiffs should have any other security than the lease. That, at the time of the deposit, it was not agreed or understood between the plaintiffs and the deponent [317] that the deponent should deposit the copy of his admission with the plaintiffs. That he signed a promissory note and memorandum at the time of making the deposit. That, in April, 1828, being in want of the further sum of 500l., he obtained from the steward of the manor the copy of his admission, and took it to the plaintiffs, in order to induce them to make a further advance to him on that security; that he could not obtain from them such further advance, but that, being much in the power of the plaintiffs and unwilling to offend them, he did not insist on taking back the copy of his admission, but left it in their custody. After adverting to the loan of the title-deeds to Phillips for the special purpose mentioned in the bill, the deponent stated that, immediately after the trial of the ejectment at the end of the year 1829, they were given up by Phillips to the deponent, and retained by the deponent till November or December 1833; and that they could all, with the exception of the copy of his admission, have been produced to the defendant Boulnois, if he had insisted on their production.

The custom of brewers in London advancing money to publicans for the purposes of their trade was admitted by the defendant Boulnois to be known to him, but he stated that he was ignorant whether such advances were made by way of legal or equitable mortgage.

Evidence was produced on both sides relative to the practice of solicitors upon the sale or mortgage of copyholds, in requiring or not requiring stamped copies of the admissions of the vendors or mortgagors. On the part of the plaintiff it was stated by several solicitors to be their practice—and, as they believed, the general practice of the profession—to require from the vendors or mortgagors of copyhold premises the production of such copies; and that it was the duty of the solicitor, if such copies could not be produced, to inquire and satisfy himself of the reason of their non-production, and to explain the circum-[318]-stances to his client. On the other side, an equal number of solicitors were examined, who stated that they had always considered the court rolls to be the sole evidence of the title to copyhold estates. That, though the loss of title-deeds might materially affect the title to freehold property, the loss of copies of court rolls did not in their opinion affect the title to copyholds; and that they would accept, on the behalf of a purchaser or mortgagee, a title to copyhold property, where the mortgagor or vendor had lost or mislaid his copies of court roll, and had not in his possession any document of title whatever, if on the court rolls the title of such mortgagor or vendor appeared to be clear and unin-

cumbered. That, within the knowledge of the deponents, it had always been the practice for the stewards, at the request and costs of copyhold tenants, to make out from the court rolls fresh copies of admissions whenever required so to do; and that the deponents had never known any refusal by a steward to grant fresh copies of admissions under such circumstances. In the opinion, however, of some of the deponents, such fresh copies, though stamped, were on paper, while the originals were on parchment. In the opinion of others, all copies indiscriminately were on parchment, differing only in date, or possibly in the stamp or signature of the steward.

Mr. Wigram and Mr. Sharpe, for the plaintiffs, used the same arguments, and cited the same cases as had been brought to the attention of the Court on the previous occasion. They also contended that it was impossible to believe the statement of Jordan relative to his mortgaging only his leasehold interest in the premises. They likewise insisted that the priority of the plaintiffs' lien was not destroyed by the loan to Phillips; such loan having been made, like that in *Ex parte Meux* (1 Gl. & Jam. 116), for a particular purpose and upon an agreement of redelivery; but that **[319]** all difficulty which might arise upon that point was removed by the fact that Jordan, if he received the deeds from Phillips, never produced them to Boulnois.

Mr. Simpkinson, Mr. Kindersley, and Mr. Chandless, for the defendant Boulnois. The question is whether a person taking a bonâ fide security is to be postponed because he has not taken every little precaution which it was possible to take. It is laid down in Scriven on Copyholds, that the "vendor of copyholds is bound at his own expense to produce to a purchaser the originals or authenticated copies of such documents as are comprised in the abstract of title, whether on record or not; and must therefore obtain further certified copies of any surrenders, admissions, or other acts entered upon the court rolls, when the copies originally made out and delivered by the steward are lost" (vol. 1, p. 186). Now in this case, according to the plaintiffs' evidence, Jordan could not have obtained fresh copies, it not being the practice in the manor to give them. In truth, however, such copies are mere waste paper. It is clear that, by the custom of many manors, fresh copies of admissions may be obtained at any time upon application. The evidence of many respectable solicitors establishes that fact; and indeed it is clear that the Stamp Act contemplates the granting of subsequent copies. These copies, however, are not essential to making out the title; on the contrary, it is in evidence that a large proportion of professional men are satisfied if a clear title appears upon the court rolls. Now in the present case, Jordan is asked for an abstract or copies; he says he has lost or mislaid them: an inquiry is then made of the steward; there appears to be no incumbrance on the court rolls, and the defendant is satisfied with Jordan's assertion and with the title as he finds it. Then **[320]** why is he to be put to the useless expense of having a copy of what he himself has inspected? The decision of Lord Eldon in *Ex parte Warner* (19 Ves. 202; 1 Rose, 286), has always been considered to carry the doctrine of lien very far; and in *Ex parte Corrie* (Eden, B. L. cap. 17, sect. 5) Sir John Leach appears to have decided the contrary.

But supposing that with an indefeasible title appearing on the rolls, it is the custom nevertheless for the vendor to produce these copies; is such a custom sufficient to vitiate this transaction? The facts of this case are much more favourable to the legal mortgagee than are the corresponding facts in *Plumbe* v. *Fluitt* (2 Anstr. 432), a case which is fully supported by *Evans* v. *Bicknell* (6 Ves. 174, 183), *Wiseman* v. *Westland* (1 Y. & J. 117), and *Martinez* v. *Cooper* (2 Russ. 198). [Alderson, B. In *Plumbe* v. *Fluitt*, the only circumstance against the legal mortgagee was the non-production of the title-deeds. If you could reduce the present case to the simple question of non-production, then *Plumbe* v. *Fluitt* would be an authority in your favour.] Admitting that in this case the defendant was guilty of some degree of negligence, still the laches was equal on both sides and the defendant has got the legal estate. He might, it is true, by a very particular inquiry have ascertained that the plaintiffs had a lien on the property; but the circumstances of the property were not such as to excite suspicion or to give grounds for inquiry. Had it been in the possession of persons connected with the plaintiffs, or if their agent had been often seen upon the premises, the omission to inquire would not have been justified. Here the only ground for inquiry which can be possibly suggested is, the circumstance that the defendant knew or ought to have known the usual mode of dealing between

brewers and publicans in regard to the deposit of leases. But [321] that is not a custom of which he was bound to take notice, nor will it relieve brewers from the consequences of general rules of equity. It then becomes a question whether the defendant, having shewn equal diligence with the plaintiffs in completing his security, is not, under all the circumstances, to have the preference; and whether they can sustain this bill against him without shewing that they have done every thing in their power to prevent the possibility of fraud. In some cases of incumbered property, the creditor who, without having any legal transfer made to him, merely gives notice of his incumbrance to the trustees of that property, is held to be entitled to priority over a creditor who has not given such notice: *Dearle* v. *Hall* (3 Russ. 1). But in this case the defendant has gone a step farther, and has taken the precaution to have the legal estate conveyed to him: *Foster* v. *Blackman* (1 Myl. & K. 97). It was not necessary for him to take further precaution; and unless he can be fixed with crassa negligentia, or negligence amounting to evidence of fraud, there can be no decree against him. The true principles which determine crassa negligentia in cases of purchase are pointed out by Lord Erskine in *Hiern* v. *Mill* (13 Ves. 119, 122), where his Lordship adverts to the absurdity of purchasing lands without a careful inquiry for the title-deeds. Those principles, however, scarcely apply to the purchase of copyholds, and the cases which have been decided upon them materially differ from the present. *Head* v. *Egerton* (3 P. W. 280), 1 Fonbl. Treat. Eq. 167.

Mr. Bligh and Mr. Bethell, for the assignees of Jordan. The plaintiffs have no charge upon the inheritance of the premises in question. Upon the advance of the 2000l. being made, the lease was the only security given to the [322] plaintiffs. It is admitted that, at the time of the deposit, the copy of Jordan's admission was not in their hands. Afterwards, in the year 1828, Jordan handed it over to them; but that was done for the express purpose of obtaining a further loan from the plaintiffs, and it formed no part of the original security. The lease therefore was the only interest comprised in the deeds which were deposited with the plaintiffs. Now, upon a deposit of deeds, the security cannot be carried beyond the estate which appears on the deeds themselves: *Ex parte Pearse* (Buck, 525), *Ex parte Wetherell* (11 Ves. 398). It is said, however, that the evidence of the circumstances under which the deposit was made is contradictory. If that be so, no lien can be established: 1 Mad. Ch. 538. [Alderson, B. The contradictory evidence must be such as embarrasses the judge.] The law on the subject of equitable mortgages has already been carried too far: *Ex parte Hooper* (1 Mer. 7). Here the plaintiffs have not completed their security. The lord of the manor is the trustee of the court rolls for all the copyholders: when therefore the plaintiffs took the copy of Jordan's admission, they should have given notice of that fact to the lord as to any other trustee: *Dearle* v. *Hall* (3 Russ. 1), *Loveridge* v. *Cooper* (id. 30). If their title is not perfected, they cannot set it up against the assignees.

Mr. Wigram, in reply. After the decision in *Ex parte Warner* (19 Ves. 202; 1 Rose, 286), confirmed by that of *Winter* v. *Lord Anson* (3 Russ. 492), there can be no question as to the validity of the deposit of the copy of court roll by way of mortgage. Now here all the title-deeds relating to the premises, and not a part only, were deposited with the plaintiffs; and therefore *Ex* [323] *parte Pearse* and the other cases of partial deposit are not applicable. Then the deeds so deposited related to the fee of the premises; and it is perfectly clear, notwithstanding Jordan's evidence, that it was the fee upon which the plaintiffs advanced the money. With respect to the defendant Boulnois, he had at least constructive notice of this transaction. Upon the motion for the injunction, Lord Lyndhurst was strongly of opinion that there were sufficient circumstances to put the party on his inquiry, though his Lordship added that he would not prejudge the question. Now it is clear that Boulnois had knowledge of the dealings between brewers and publicans, and he must have at least had suspicion of this particular transaction. Either he was afraid to ask his solicitors too much, or having taken upon himself to act, he did not give them that full information which was necessary for further inquiry. The cases of *Evans* v. *Bicknell* (6 Ves. 174) and *Plumbe* v. *Fluitt* (2 Anstr. 432), in which the particular facts charged were held not to amount to crassa negligentia or fraud, do not affect the present case. *Martinez* v. *Cooper* (2 Russ. 198) is altogether different in its circumstances. There is no case in which any facts, which ought to put a party on his inquiry, having been proved to

come under his observation, the Court has nevertheless decreed in his favour. If a man overlooks such facts, the Court will sometimes excuse him; but never when they have been brought under his observation.

The whole question amounts to this: whether, in the consideration of a Court of equity, a person may have an interest in copyhold property, though holding a security which is not upon the court roll; whether, in short, there may be an equitable mortgage of copyhold property. It is said that notice should have been given to the lord of the delivery to the plaintiffs of the copy of Jordan's admis-**[324]**-sion; and in support of that argument, *Loveridge* v. *Cooper* (3 Russ. 30) has been cited. No doubt, upon the authority of that case, there is no perfect assignment of an equitable interest, without notice to the trustee in whom the property is vested: but the lord or steward of the manor does not stand in that situation; and a notice to an immaterial party is a mere nullity. Here there was no party to whom such notice could have been given. [Alderson, B. There is no evidence to shew that it is usual to give such notices.] Then the question is whether the defendant has exercised that caution which he was bound to exercise, in order to guard against invading the rights of the plaintiffs. Now it is clear that he should have used so much circumspection in this matter as a prudent man would have used in the conduct of his own affairs. In this case the security was taken for an antecedent debt; but suppose an application had been made to the defendant for a loan, and he had known that the deeds were in the possession of the plaintiffs, would he have advanced the money without making any inquiry of the plaintiffs on the subject? Equity says that where a man in the course of his dealings may possibly affect the rights of third persons, he shall use just so much precaution against trenching upon those rights, as he would have used for the preservation of his own.

Feb. 28th.—ALDERSON, B. This was a case originally made by bill filed against the defendants Jordan and Boulnois, and afterwards by supplemental bill against the present defendants and Boulnois, Thomas Jordan having in the interim become a bankrupt, praying that an account might be taken against the assignees of Jordan, as to the sums remaining due from them as such assignees to the plaintiffs; and also, that it might be declared that in respect of such account they might have the priority over any claim upon **[325]** certain copyhold premises called the Valiant Trooper by the defendant Boulnois.

The case was very fully and ably argued before me a few days ago; and I have taken time to examine the facts and authorities quoted before I proceeded to give my judgment in the cause.

The claim of the plaintiffs depends, as regards the assignees of Jordan, upon the fact whether certain documents, being surrenders and admittances relating to the copyhold property in question, were deposited with them under such circumstances as to give to them an available equitable mortgage on the property in question; and whether any thing has since occurred by which that equitable mortgage, if it ever existed, has been given up.

I take it to be well established law that there may be an equitable mortgage of copyhold property, and that the deposit of title-deeds relating to freehold property, if made under proper circumstances, may amount to an equitable mortgage. The authority of Lord Eldon in *Ex parte Warner* (19 Ves. 202) is full and express upon the point; and in the case of *Winter* v. *Lord Anson* (3 Russell, 493) Lord Lyndhurst expressed a clear opinion to the same effect; an opinion to which in the previous motion in this individual cause he still adhered. In opposition to this, there is only a vague suggestion that a case to the contrary is supposed to have been decided by Sir John Leach when Vice Chancellor. I must doubt the accuracy of such a statement; and when I find the case itself opposed to clear and recognised authorities, proceeding, as it seems to me, on plain and clear principles, I cannot for a moment doubt which I ought to follow. In the absence of these authorities, I feel no doubt that I ought to have come to the same conclusion, referring only to the principle stated by Lord Eldon, as the ground on which Lord Thurlow's decision as **[326]** to freehold lands originally proceeded; and which, if sound, applies equally to the deposit of the title-deeds of copyhold as of freehold.

Then if so, it is only a question of fact, whether these deeds were so deposited as to give the plaintiffs an equitable mortgage on the property. It is clear that, on the 15th of November, 1827, an advance of 2000*l.* was made by the plaintiffs to Jordan,

and that certain deeds, which did not, however, include the admittance in fee of Jordan to the copyhold estate, were deposited with Messrs. Whitbread & Co. as a security for that advance. In this, all the testimony concurs; but Jordan, who has been examined as a witness, states that the only deeds intended to be deposited were those actually deposited, and that the only interest intended to be pledged was a leasehold interest, and not the fee in the premises in question. On the other hand, the evidence for the plaintiffs goes to shew that the agreement was for a deposit by him of all the interest which he then had in the premises, and that it was concluded that the deeds deposited were to that effect; and that on its being subsequently discovered in April, 1828, that the copy of Jordan's admission in fee was not included, it was on application to him immediately supplied, and that then a complete deposit in performance of the original agreement was ultimately effected. This makes it unnecessary to advert to those cases of partial deposits of title-deeds cited in the argument. For here I apprehend that the facts shew that the whole of the deeds, though deposited at different times, were in truth deposited under one and the same agreement, made at the time of this original advance of money by the plaintiffs to Jordan. It is clear that, on the 21st of April, 1828, the admission of Barnett to the premises was handed over to Jordan at his request; and that, on the 28th of April, he returned it, together with the other deeds, and his own admission in fee, to the plaintiffs, by whom they have ever since been **[327]** kept. Jordan's account of this transaction appears to me to be incredible and inconsistent with the admitted facts of the case. He is a witness who, by his own shewing, has been guilty of something very like a fraud upon the defendant Boulnois; and his testimony therefore should be received with great caution. I think him a competent witness, but not a credible one. It seems to me also that his statement as to the original deposit is equally inconsistent with the real facts of the case. I cannot think it credible that Messrs. Whitbread should have ever agreed to advance 2000l. on the security of any thing except the fee of the copyhold premises in question. He says that it was on the leasehold interest. Now, at the time of the deposit, the only leasehold interest which he possessed had expired, and was consequently of no value; and the other leasehold interest which it is suggested in argument, but not in proof, that he might have meant to deposit, was one of which he did not become possessed till some time afterwards, and when he did, it was by a purchase for less than 100l. I cannot believe that this could have been taken by any man in his senses as a security for an advance of 2000l. On the other hand the evidence of the plaintiffs' witnesses is consistent with the probability of the case.

I have no doubt, therefore, that in this case there was a deposit of the deeds under circumstances in which the plaintiffs would be entitled to an equitable mortgage on the fee of the premises in question. Under these circumstances a part of the deeds so deposited were afterwards delivered over by the plaintiffs to Jordan's attorney, Phillips, in 1829. This fact, to my mind, affords a strong confirmation of the accuracy of the previous conclusion at which I have arrived. But another question arises upon it, viz. whether it has at all affected the plaintiffs' claim. I think the cases cited in argument shew that it has not. For it was a delivery over to him not generally, but for a specific purpose; and the deeds were again, after that spe-**[328]**-cific purpose was accomplished, returned to the plaintiffs. In addition to this, it is to be observed that the important deed, the admission in fee, was never parted with at all. This brings me to the main question in this case, which affects the defendant Boulnois alone.

He, it seems, is possessed of a legal mortgage of these copyhold premises, to secure about 2500l., which has been executed to him since the deposit with the plaintiffs of the title-deeds by Jordan. Now it is conceded that, if he is a purchaser for valuable consideration without notice, he is entitled to priority over the equitable mortgagee. There is no doubt that, under the circumstances here disclosed, he is a purchaser for a valuable consideration; but the doubt is whether he is a purchaser without notice.

If, indeed, by notice be meant actual notice, there is no proof of any such actual notice brought home to him. But the cases establish that constructive notice is enough. If, for instance, a party having knowledge of a deposit, avoids asking the circumstances under which such deposit was made, the Court may reasonably infer that he omitted to do so, in order to avoid having express notice; and they will in that case hold it equivalent to express notice: that was the case of *Birch* v. *Ellames* (2 Anstr. 427). On the other hand, the mere fact of the deeds not being forthcoming

was held in *Plumbe* v. *Fluitt* (2 Anstr. 432) not sufficient, if unaccompanied by other circumstances, to raise such a conclusion. But I apprehend that when a party, having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained. He is not, indeed, bound to use extraordinary circumspec-**[329]**-tion; nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is at all events quite sufficient to fix him with notice; for, as it is well laid down in 1 Equity Cases Abridged, 331, pl. 7, the purchaser who cannot make out a title but by a deed which leads him to another fact shall be presumed cognizant thereof, for it is crassa negligentia that he sought not after it. Now what are the facts here? It is clearly established, by the evidence on both sides, that it is a very general practice for persons in the situation of Jordan, being in distress for money, to deposit either with their brewer or spirit merchant, in case they are indebted to him, their title-deeds, for the purpose of giving an equitable mortgage. It is reasonable to conclude that Boulnois, a spirit merchant, was acquainted with this; and in fact it would appear from his own account of the transaction that, when the mortgage was talked of between himself and Jordan, he was aware of it. He knew that Jordan was indebted to the plaintiffs, and he asked him whether his property was not under mortgage to his brewers for the amount due. He knew also, from the transaction itself, that Jordan was much in want of money. The evidence of William Shenton is strong upon this part of the case, and also as to the knowledge, on the part of the defendant Boulnois, of the ordinary practice of brewers before mentioned. Now when, under these circumstances, he also found that Jordan had not possession of, or at least that he could not produce the ordinary indicia of property, the title-deeds of his copyhold estates, it appears to me almost impossible to conceive how, without the grossest neglect on his part, he should have omitted to apply to the plaintiffs for information. Instead of that, however, he seems to have been contented with a reference to the manor rolls, which of course could only inform him as to any legal incumbrances on the estate; and there is a labo-**[330]**-rious inquiry into that part of the case which, contrasted with the absolute neglect to make any inquiries in the most natural and obvious quarter, is any thing but satisfactory to my mind as to the bonâ fides of the transaction. I do not particularly advert to the contradictory evidence as to the custom of obtaining fresh copies of admissions and of accepting titles of copyhold estates, on which much argument was employed and many witnesses examined: for whatever may be the result of this part of the case, there is no evidence at all which shews that any attorney or skilful person would, with a full knowledge of all the circumstances known to the defendant Boulnois, have omitted to make the inquiry above suggested. And, in fact, it appears that, either from negligence or design, there was an omission on the part of Boulnois to make a full communication to his solicitor, Mr. Appleby, of this most material fact in the case. Upon the whole, I think, this is such gross negligence as would be a cloak for fraud if permitted, and that it must be held to amount to constructive notice to the defendant Boulnois of the prior equitable mortgage to the plaintiffs.

I think, therefore, that Boulnois is in no better situation than Jordan himself would be with respect to the plaintiffs' claim, and that the plaintiffs are entitled to the account they claim against the assignees of Jordan, and to priority against the claim of Boulnois. I think, also, that the decree as against Boulnois should be with costs, but as regards the assignees without costs.

Decree accordingly.

[331] ANONYMOUS. March 3, 4, 1835.—A barrister who had attended the Court, not professionally, but as a party interested on a motion for a receiver, was arrested by a sheriff's officer shortly after he had quitted the Court: the officer refused to bring him into Court, and took him to a lock-up-house. On motion for his immediate discharge, the Court doubted whether he could be discharged without being brought into Court, and recommended a writ of habeas corpus to be issued; which having been done, and the party brought into Court, he was discharged, and the sheriff was ordered to pay the costs.

[S. C. 4 L. J. Ex. Eq. 46.]

A barrister had attended the Court during its sittings in Gray's Inn Hall, upon a motion for a receiver in a cause in which he was a defendant. He did not attend as counsel, but as a party in the cause, and to instruct the counsel retained on his behalf. After the motion had been disposed of, he left the Hall, and had proceeded a few paces into Holborn Court, when he was arrested. He represented to the sheriff's officer that he was privileged from arrest, and required to be taken into Court that he might be discharged. The officer refused to bring the party into Court, and carried him to a lock-up-house.

Mr. Younge, who had been counsel for the defendant on the motion for the receiver, moved for his immediate discharge.

The Lord Chief Baron expressed some doubt as to his authority to make the order, as the party was not in Court, and recommended a writ of habeas corpus to be obtained.

A writ having been accordingly sued out, the party was brought up for his discharge on the following morning.

Mr. Younge, on behalf of the party, cited *Eylesbury* v. *Troughton* (1 Ch. Rep. 92), *Lightfoot* v. *Cameron* (1 Sir W. Bl. 113), and *Orchard's case* (5 Russ. 159), and was stopped from citing other cases by the Court.

Mr. Hoggins, for the sheriff, resisted the application.

[332] THE LORD CHIEF BARON ordered the prisoner to be discharged, and the sheriff to pay the costs of the proceeding.

MEMORANDA.

During the vacation after Hilary Term, His Majesty was pleased to appoint Thomas Starkie, Esq., and Robert Alexander, Esq., both of Lincoln's Inn, to be his Counsel learned in the law.

On Thursday the 23rd of April, Lord Lyndhurst resigned the Great Seal, which was on the same day delivered by His Majesty to the Right Honourable Sir Charles Christopher Pepys, Knt., Master of the Rolls, the Right Honourable Sir Launcelot Shadwell, Knt., Vice Chancellor of England, and the Honourable Sir John Bernard Bosanquet, Knt., one of the Justices of the Court of Common Pleas, as Lords Commissioners for the custody thereof.

About the same time Sir Edward B. Sugden, Knt., resigned the office of Lord High Chancellor of Ireland, and was succeeded by Lord Plunkett.

Sir Frederick Pollock, Knt., resigned the office of Attorney-General, and was succeeded by Sir John Campbell, Knt.; and Sir William Webb Follett, Knt., resigned the office of Solicitor-General, and was succeeded by Robert Monsey Rolfe, Esq, one of His Majesty's counsel, who was soon afterwards Knighted.

[333] TARLETON *v.* HORNBY. April 25th, 1835.—To a bill against the assignees of a bankrupt for a general account of their dealings under the bankruptcy, one of the assignees demurred for want of equity, and the demurrer was allowed: Held, that the other assignees might plead this matter in bar of the suit.

The Court having in this case allowed the demurrer of the defendant James Barnes, one of the assignees under the bankruptcy of the plaintiff (ante, p. 172), the defendant, John Hornby, another of the assignees, put in the following plea in bar of the plaintiff's suit:—

"This defendant, by protestation &c., doth plead to the said amended bill,(*b*) and for plea saith, That by the means hereinafter mentioned, James Barnes, in the said bill mentioned, hath ceased to be a party, and is not now a party to the said amended bill. And this defendant for plea further saith, That, on the 10th day of November, 1834, the said James Barnes, being then a party defendant to the said amended bill, duly put in and filed in this honourable Court a general demurrer to the said amended bill; and by such demurrer prayed the judgment of this honourable Court, whether

(*b*) The bill was, in fact, an amended bill. It was thought unnecessary to mention that circumstance in the former report.

he ought to be compelled to put in any further or other answer to the same bill; and he by his said demurrer prayed to be dismissed with his reasonable costs in that behalf sustained. And this defendant for plea further saith, That the said demurrer was duly set down for argument in this honourable Court, and duly came on to be heard before the Right Honourable the Lord Chief Baron of this Court; whereupon counsel appearing as well for the said plaintiff as for the said defendant James Barnes, the same was debated before his Lordship. Whereupon his Lordship, the Lord Chief Baron, by an order of this honourable Court, bearing date the 23rd of January, 1835, duly made upon the said bill and demurrer, did think fit to allow the said demurrer; and the same being to the whole of the said complainant's **[334]** bill, the Court did order that the said complainant's bill did stand dismissed out of this Court as against the said defendant James Barnes, with costs, to be paid by the said complainant to the said James Barnes; and such order hath been duly inrolled in the office of His Majesty's Remembrancer of this honourable Court, as by such demurrer and order and inrolment respectively remaining as of record in this honourable Court, reference being thereto had, will appear; and which order this defendant saith now stands unreversed and in full force: wherefore and whereby the said James Barnes hath ceased to be and is not now a party to the said amended bill. All which matters," &c.

Mr. Spence, Mr. G. Richards, and Mr. Booth, in support of the plea. The bill was filed for an account against all the assignees, all of them being necessary parties for that purpose. Now the demurrer of one of the assignees was allowed upon the merits, which shews that there was no equity against any of them; for it never was yet understood that a plaintiff might call several persons to an account and obtain a decree against some of them only. The plea therefore of this defendant must be allowed, and it cannot be objected that the matter pleaded has occurred since the filing of the bill: *Turner* v. *Robinson* (1 S. & S. 3), *Barnes* v. *Wilson* (in Ch. 29 June, 1830).

Mr. Simpkinson and Mr. Teed, for the bill. The plea does not involve any of the points on which the demurrer was allowed; it relates to matter which has occurred subsequently to the filing of the bill, and, therefore, it is not sustainable. In the two cases which have been cited for the defendant, no allusion was made to the case of *De Minckwitz* v. *Udney* (16 Ves. 466), in which a plea of this nature was **[335]** overruled. In *Rowe* v. *Wood* (1 J. & W. 315), which was a suit for an account, one of the defendants pleaded an agreement which had been entered into since the commencement of the suit, and Lord Eldon held that such a plea could not be allowed in equity. The present, however, is not merely a bill for an account. The defendants are charged with fraud; and the absence of one of the parties committing the fraud does not prevent the plaintiff from pursuing his remedy against the others: *Walker* v. *Symonds* (3 Swanst. 75). The decree against this defendant will not be made on the ground of contract, but on that of fraud.

Mr. Spence, in reply. *De Minckwitz* v. *Udney* is not applicable to the present case, because there the defendant pleaded the insolvency of the plaintiff, which was immaterial, inasmuch as his assignee might come in by supplemental suit. [The Lord Chief Baron. The difficulty I have is how I can take notice of the ground on which the demurrer was allowed.] It is only necessary to shew that Barnes is removed as a party to the suit. Not that the fact which has occurred has merely had the effect of transferring an interest; on the contrary, though it occurred subsequently to the filing of the bill, it shews that the suit was bad ab initio. This is not a bill of tort, but of common account; and yet the names of two only of the three assignees who are called upon to account appear upon the record. The case of *Walker* v. *Symonds* is inconvenient in practice, and the late Master of the Rolls never admitted its authority. In that case, however, there was no question of account. One specific sum was misapplied; and the question was whether the plaintiff could sue one of the trustees only in respect of that misapplication. In the present case it would be necessary to go into an account in the first instance in order to ascertain whe-**[336]**-ther there was any thing to misapply. It is true that there is a charge in the bill that the sale of some of the property was made at an undervalue, but the Court will not admit the bill against the two, where the third might be the very one to prove that a full value was given. Besides, if there be a surplus, it cannot be decreed to be paid by A., B., and C., C. being absent.

THE LORD CHIEF BARON. The objection that the plea is too late, because the matter pleaded has occurred since the bill was filed, appears to me to be immaterial. The case of *De Minckwitz* v. *Udny* has no application to the present, because there the bill was properly filed against the only party who could administer the relief prayed for. After the bill was filed the plaintiff became insolvent; but the effect of that was not to destroy the plaintiff's right to relief, but only to compel him to bring before the Court the assignee. It would have been different if the bill had been filed after his insolvency, because the answer to that would have been that the law had taken from him the title to sue, and had given it to his assignee: whereas, in the case cited, the bill could be filed in no other manner.

Another case which has been cited has had a stronger tendency to shake my opinion. The principle is no doubt just, that mere wrong doers, who have no other connexion with each other than the common injury they do, may be brought to account for their transactions either singly or altogether. It is a familiar principle of law that an action of trespass may be brought either against all the joint trespassers or against each of them singly; it is equally true that at law the joint trespassers cannot sue inter se for contribution. The question is whether these principles apply to the present case and bring it within the rule that where trustees are guilty of a breach of trust they may be sued either jointly or separately, which is the case **[337]** of *Walker* v. *Symonds* (3 Swanst. 75). That case, however, appears to me inapplicable. This bill calls the defendants to account as assignees, and nothing can be done completely in the suit till they do account. It would be unjust to say that one of these persons—who, it is to be recollected, are made trustees by act of Parliament—that one only shall be called upon to give that account, which possibly the other only could justly give. The other might be the very person who could best inform the Master or the other parties upon the subject. This is not like an account required of one specific sum; on the contrary, the assignees are called upon to give an account of joint transactions. If we were to take it pro confesso that the whole of the debts were paid, and that a certain sum remained in their hands, which was misapplied by them, then the case of *Walker* v. *Symonds* might require application. In the present case, however, we have not arrived at that stage of the proceedings, but only at the account. Then the question is whether an uncertificated bankrupt, who has not superseded his commission, but has resisted it, shall be allowed to call his assignees to an account of their proceedings under the bankruptcy; and that has been already decided. The plea must be allowed.

[338] SMITH *v.* SMITH. May 8th, 12th, 1835.—A., upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at S., for securing to them a sum of 15,000l., the trusts of which were declared to be for A. for life, and afterwards for the benefit of his wife and children. A. not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein to B., as a security for the repayment of a debt due from A. to B. A. having afterwards become bankrupt, B. filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of his security; and a decree was made in that suit, directing the life interest of A. in the 15,000l. to be sold, and the produce to be paid to B. In the course of the proceedings in the bankruptcy, the assignees sold the S. estates, but the proceeds of the sale did not amount to 15,000l.: Held, that the trustees were entitled, as against B., to retain the annual produce of the sum for which the S. estates were actually sold, until the whole of the 15,000l. should be reinstated.

[Discussed, *Burridge* v. *Row*, 1842, 1 Y. & C. C. C. 192; *Stack* v. *Royse*, 1861, 12 Ir. Ch. R. 246. Considered, *In re Weston*; *Davies* v. *Tagart*, [1900] 2 Ch. 167.]

John Maberly, Esq., upon his marriage with Ann, the daughter of James Baillie, Esq., executed a bond to the trustees of the marriage settlement, conditioned for payment to them of the sum of 15,000l. with interest, within six months after the marriage. He likewise, as a further security for that sum, executed to them a mortgage of his estates at Shirley. A like sum was secured to the trustees by the bond of Mr. Baillie, and was payable to them twelve months after his decease. By

the terms of the settlement, the trustees were to invest these two sums, when and as they became payable, either in the public funds or upon real securities, and were to pay the interest and dividends thereof to Maberly for his life, and after his decease for the benefit of his widow and children, as mentioned in the settlement.

Upon the death of Baillie, which took place before the year 1828, the sum of 15,000l., which had been secured by his bond, was paid to the surviving trustees of the settlement, and by them invested in the purchase in their names of 15,824l. 3l. 10s. per cent. Reduced Annuities. The sum of 15,000l., which had been secured by Maberly's bond and mortgage, was not paid to the trustees at the time limited by the settlement.

Maberly, being indebted to the plaintiff in a sum of 13,600l., for the purpose of securing the repayment of that sum, with interest, executed to the plaintiff a bond, bearing date the 22nd of June, 1829, and by an indenture of assignment of even date with the bond, he assigned to the plaintiff his life interest in the 15,824l. stock, and 15,000l. sterling, upon trust, in case default should be made **[339]** in repayment of the said debt of 13,600l. by a given day, to sell Maberly's life interest in the above-mentioned sums, and to reimburse himself out of the produce of the sale.

In January, 1832, a fiat in bankruptcy was awarded and issued against Maberly, under which he was declared a bankrupt; and soon after that event, the plaintiff applied to the trustees of the settlement for payment to him of the dividends of the 15,824l. stock. The trustees, however, refused that application, and in the mean time retained the dividends in their own hands. The plaintiff then filed his bill against the trustees and the assignees under the bankruptcy, praying for an account of what was due to him for principal and interest in respect of his debt; that it might be declared that, for securing the repayment of such debt, he was entitled to Maberly's life interest in the said 15,824l. stock, and 15,000l. sterling; that such life interest might be sold; and that he might be at liberty to go in under the fiat, and prove as a debt the difference between the value of Maberly's life interest and the amount of what remained due to him.

By the decree made on the hearing of the cause, and dated the 23rd of November, 1833, it was amongst other things declared that the plaintiff was entitled to the benefit of the assignment of the 22nd of June, 1829. That an account should be taken of what was due to the plaintiff for principal and interest on his debt. That the trustees should pay the dividends due and to grow due on the said 15,824l. stock, during the life of Maberly, to the plaintiffs, until the life interest of Maberly therein should be sold. That they should raise and receive the interest which had accrued due since the 22nd of June, 1829, in respect of the said sum of 15,000l. secured upon mortgage as aforesaid, and all such interest as should thereafter accrue due in respect thereof during the life of Maberly, until his life interest therein should be sold, and should pay the same to the plaintiff. That the assignees should **[340]** forthwith proceed to a sale of Maberly's life interest in the said two sums, and should pay the produce arising from the sale, after deducting expenses, to the plaintiff. That after such accounts were taken, and payments made, the plaintiff should be at liberty to prove the balance under the fiat, and to be paid a dividend thereon rateably with the other creditors of the bankrupt.

In pursuance of this decree, the assignees sold the life interest of Maberly in the 15,824l. stock by public auction, the plaintiff being the purchaser thereof at the price of 3250l. They, however, delayed the sale of Maberly's life interest in the 15,000l. sterling, until the Shirley estates upon which that sum was secured should be sold. Upon the sale of those estates, it was found that the proceeds were insufficient to raise the whole of the 15,000l.

Under these circumstances, it became a question whether the trustees were entitled to retain, during the life of Maberly, the annual produce of the sum produced by the sale of the Shirley estates until the whole 15,000l. should be raised; or whether the assignees should sell the life interest of Maberly in the sum actually raised, though it did not amount to 15,000l.

In order to settle this question, the assignees presented their petition in the cause, alleging that the decree contained no direction to the Master to settle the conditions of sale of the life interest in the 15,000l., and praying that the sale might take place before the Master, under such particulars and conditions of sale as he might approve; or that it might be referred to the Master to settle and approve the particulars and

conditions of sale under which the petitioners should proceed to sell the life interest by public auction as directed by the decree.

Mr. Simpkinson and Mr. Spence, for the petitioners, the assignees. Admitting that the question which has been raised has been left open by the decree, the present case **[341]** comes within the principles on which *Stratton* v. *Hale* (2 Bro. C. C. 490), *Ex parte Smith* (Co. B. L. 223), and *Ex parte Shute* (3 D. & C. 1) were decided. *Stratton* v. *Hale* is reported to have been overruled by *Ex parte Turpin* (Mont. 443); but the correctness of the latter decision may be doubted. Giving, however, full weight to that authority, it does not necessarily govern the present case. There the question was between parties representing the bankrupt himself and the trustees. The assignees could only take the bankrupt's interest, subject to all the equities to which that interest was liable; and the Court held that as the bankrupt could not, before the whole sum was made up, have demanded the interest upon it, so neither could the assignees. Here the party who really makes the claim is a purchaser for a valuable consideration from the bankrupt. He is not bound to make up the 15,000l. His interest was secured, at the hearing, against all the other parties. By the terms of the decree, he is entitled to the interest, not of 15,000l. absolutely, but of 15,000l. secured by mortgage, let the mortgaged estates realize what they will. The decree expressly directs that that interest shall be paid to him.

Mr. Wigram and Mr. G. Richards, for the trustees. The decree was not framed with reference to the event which has occurred. It did not contemplate a deficiency in the value of the mortgaged property. Supposing there was no bankruptcy, there would be no question but that the trustees would have a right as against Maberly to retain his life interest. They would also have the same right against Maberly's assignee as against Maberly himself. In *Priddy* v. *Rose* (3 Mer. 86), where a person on his marriage had covenanted to pay 4000l. to the trustees of the **[342]** settlement and had failed to do so, the trustees were permitted to retain, in satisfaction of that sum, the dividends on certain stock in their hands, in which the settlor had a life interest, although those dividends had been assigned for value. In the course of his judgment, Sir William Grant said: "If, as against Hunt (the settlor), the trustees had the equity of stopping the dividends to make good the debt of 4000l., could he, by this act, without their knowledge or consent, deprive them of that equity? The assignee taking no legal interest in the funds, could only take subject to the same equity to which the assignor was liable." Here the trustees were mortgagees, and had a right to retain the estate unsold in their hands till the whole sum due to them was satisfied out of the rents and profits. They could have entered upon the premises immediately on the forfeiture of the bond; and in fact could have dealt with the estate as their own, until they had received satisfaction. If that be so, the produce of the estate must be dealt with in the same manner as the estate itself. They are, in fact, creditors having a security in their hands which they are entitled to retain, and the bankruptcy does not affect them. It is not necessary for them to call in aid the case of *Ex parte Turpin;* yet if that case and *Ramsay* v. *Ramsay* (Mont. 452, n.) be taken into consideration, your Lordship will see no reason to doubt their authority.

Mr. Simpkinson, in reply. It is impossible for the trustees to repudiate the bankruptcy. They have entered into various arrangements with the assignees in regard to the mortgage and otherwise, and cannot now be heard to say that the bankruptcy does not affect them. It is said that if the estate had not been sold, they might have had their remedy at any time against it. Now the form of **[343]** this mortgage was such that they could only have foreclosed. [The Lord Chief Baron. Suppose they had foreclosed, and the estate had only realized what it has realized under the present circumstances, they might still have resorted to their other remedies for compelling payment of the remainder.] After having sold the estate, they could not have proceeded on the bond, without opening the foreclosure. [The Lord Chief Baron. Is there any case where a debtor having made a mortgage, the foreclosure is the only remedy?] They clearly could not have sold the estate in this case without foreclosure. The mortgage deed contained no power of sale.

May 12th.—THE LORD CHIEF BARON. The decree evidently assumes throughout that the estate would produce the whole of the 15,000l. It turns out, however, from the sale that has been effected of the estate itself, that less than that sum has been produced. A question then comes before me, upon this petition, in consequence of that alteration of facts, or rather in consequence of a fact discovered since the decree

was made, which was not suspected or imagined at the time it was made. I entertained some doubt whether I could modify in any shape that decree, or whether I could do anything with it in the shape of a petition. It appeared to me, at the outset, that this was rather a case for a supplemental bill, in the nature of a bill of review; but understanding that both parties were desirous to accommodate their proceedings to such opinion as I should give upon the point in difference between them, I undertook to do so, in order that they might, without any expense of a further proceeding, come to some arrangement.

I own that, having considered the subject, which perhaps I ought to have been better prepared to decide in the first stage of the argument, it appears to me that the trustees in this case have a right to appropri-**[344]**-ate the interest or the dividends arising from the sum realized by the sale of the estate, until such time as they have raised the full amount of the 15,000l. for which the estate was a security to them. The contest between the parties is whether the trustees should be allowed to do that which would make Mr. Smith's interest sell for so much the less by the number of years dividends required to form that accumulation; or whether it is to be considered that the trustees have no title at all to any of the dividends during the life of Mr. Maberly; but that Mr. Smith, the assignee of those dividends, has a right to the whole. Now, in order to support the right of Mr. Smith, in which the assignees suppose that they are interested also in contending for, a case has been cited to me of *Stratton* v. *Hale* (2 Bro. C. C. 490) (and there are other cases upon the same subject), in which the principle seems to have been adopted that, where the trustees of a marriage settlement have been allowed to prove as creditors under a commission of bankrupt and have acquired dividends under that proof, those dividends stand in the place of the original sum, and the assignees of the bankrupt are entitled to the dividends during the life of the husband, in pursuance of the trusts of the settlement; and there are undoubtedly cases to that effect. On the other hand, those cases are said to have been overruled by a recent case of *Ex parte Turpin* (Mont. 443) before the Court of Review. Now if this question depended entirely upon those cases, I own that I should be disposed to entertain some doubt whether that last decision was founded on a correct principle. At the same time, I wish only to express a doubt, because, in questions of this nature, where there are certain fluctuating principles of equity that appear, when stated, very plausible, and to afford very reasonable grounds for a decision, it is much better, if that decision has once taken **[345]** place, to adhere to it; because it then becomes a rule for the administration of property; and in a variety of cases where the question is more positivi juris than any thing else, it is much safer for property that the rule should be adhered to, than that it should be liable to fluctuation.

If the case were res integra, then I should be disposed, before I decided it myself, to hear a discussion upon a ground which was not taken in argument in the case of *Ex parte Turpin*, which is this: A bankrupt under his commission is obliged to dispose of his effects by the power of an act of Parliament. It is the act of Parliament that places the dividends in lieu of the original debt, and absolves the bankrupt, if he conforms to the law, from all further claims. Now it is contended that, in that case, the partial payment of the debt to the trustees still entitles them to claim as an equity against the assignees, in the same manner as they would against the bankrupt had he been solvent, the payment of the remainder of the debt before they divide and give him any portion of the fund. As against the debtor, supposing him to be solvent, no doubt they would have a right to make that claim, because if he paid only a portion of the debt, and he proceeded to insist that they should give him the benefit of that portion, they would have a right to say, "how can you claim that of us, when you owe us a large sum in the shape of the balance of the principle due to us?" And whether they made that resistance in a Court of law (supposing a Court of law would entertain an action), or in a Court of equity, it appears to me the result would be the same; namely, that they should be allowed to claim that amount against any demand he might have under the settlement for interest or for dividends. But where a bankruptcy takes place, the bankrupt is placed in a different position; for by virtue of an act of Parliament, over which he has no control, his debts are all satisfied by the dividends which are paid under his commission. It is said, **[346]** however, in pursuance of the original argument, that the assignees can have no greater equities than the bankrupt, and that when they claim to have the dividends paid to them, they ought to be treated in the same manner as the bankrupt would be, if solvent. But the reply

to that argument is that the assignees owe nothing to the trustees. The trustees are permitted, by a laudable practice, to come in as creditors, although there has been no actual advance of money. They are permitted, under peculiar circumstances, being trustees under the marriage settlement for the benefit of the wife and children, to stand in the place of creditors, and to receive the dividends in proportion to the security they have. But the assignees clearly are not bound to make them any other payment than the amount of the dividends, though the bankrupt would have been bound to do so, had he remained solvent. It is not perhaps, therefore, quite correct to say that the assignees are bound by the same equities as the bankrupt, because they are certainly not bound to pay any debt of the bankrupt in full. The case appears to me more to resemble that which I think it has not been likened to in any report I have seen, or any discussion I have heard, and upon which I should like to hear it argued, if I am called upon to decide it, namely, this: Suppose an act of Parliament were to be passed, declaring that any particular individual should only pay 10s. in the pound of his debts; or suppose, which I hope will not happen, that a system of robbery and plunder should take place under the name of an equitable adjustment, and there should be an act of Parliament enabling us all to satisfy our debts by paying 10s. in the pound. Now put the case of a person having given a bond for 15,000l. to the trustees of his marriage settlement, would he not by authority of law satisfy that debt by paying 10s. in the pound? And could the trustees in that case say, "The law does not affect us, and therefore we shall not pay any dividend to **[347]** you upon this sum until the dividends are accumulated, so as to make up the whole 15,000l.?" Now it appears to me a matter of very considerable and grave doubt, whether that could be maintained for the trustees; and I should think, if I had to decide the case of *Ex parte Turpin*, and other cases of the same nature, that at least that ground should be well sifted before I came to such a decision.

The case of *Ex parte Turpin* certainly does not stand alone. There are other cases, particularly that of *Ex parte Maister* (Mont. 452, n.), which bear upon the same point; and I observe that a learned Judge, to whose experience in matters of bankruptcy I pay great respect, is made to state that it has been the practice for a considerable time to allow trustees in such a case to accumulate the dividends until the whole debt is realized before any thing is paid to the assignees. I am therefore glad that I am not called upon in this case to make any decision upon the point which has been so much adverted to, because I do not conceive that the case of *Ex parte Turpin* governs the present case. Here a specific security was put into the hands of the trustees by law, and for the express purpose of paying the 15,000l. I ventured to ask the question in the progress of the argument, in what way a mortgagee would be treated, in case he had realized all that his real security or his pledge could give him, and, finding that to be insufficient, he had proceeded upon his bond or his covenant to recover the balance against the mortgagor; and I was told by a gentleman of great experience that according to the rules of a Court of equity, if a mortgagee resorted to his specific security, he in effect abandoned all further claim. That was certainly at variance with my pre-conceived notion. Nothing is a more common proceeding at law than for a mortgagee to take possession of **[348]** the estate by ejectment; and, if he finds it inadequate for payment of his debt, to proceed upon the bond. Now I have looked at some references I had in early times to proceedings in Courts of equity, and I find that the very point was decided by my Lord Thurlow. It is not a point likely to occur frequently in Courts of equity, because lenders of money in general take especial care not to lend upon inadequate security. It did, however, occur in the case of *Tooke* v. *Hartley*,(*a*) which was a remarkable case. There a man mortgaged

(*a*) 2 Bro. C. C. 126; 2 Dick. 785. Where the mortgagee has foreclosed, and the mortgaged premises are clearly not sufficient to satisfy the debt, a question has arisen, whether, either before or after sale of the premises, the mortgagee can be restrained from proceeding against the mortgagor on the bond or covenant. From the report of *Tooke* v. *Hartley* in Dickens, it would appear to have been Lord Thurlow's opinion that, before sale of the premises, the mortgagee might be so restrained, "because by not knowing what the estate would produce, he could not say that any thing was due;" but that after a bonâ fide sale had taken place, the real deficiency would appear, and for that the mortgagee might bring his action. According, however, to Lord Eldon's recollection of the case of *Tooke* v. *Hartley*, Lord Thurlow made no distinction

a leasehold estate for 1600l., and afterwards assigned his equity of redemption, and the assignee assigned again to another assignee. The **[349]** original mortgagor died; the mortgagee also died, and the executor of the mortgagee filed a bill against the last assignee to foreclose and bring to a sale the estate; and it was sold for less than the mortgage money. He then brought an action upon the bond against the executor of the mortgagor; and upon that action being brought, a bill was filed by the defendant at law to procure an injunction, restraining him from proceeding in that action, and Lord Thurlow dismissed the bill. The question was pressed very much upon him. He said it was a new case, and if the parties were disposed to discuss it, and would bring the money into Court, he would allow them to do so; but without bringing the money into Court, he should dismiss the bill for he stated that he had no doubt at all upon the subject. Now that is a case exactly in point. It follows, therefore, applying that case to the present, that if the mortgagees—that is to say, the trustees—had taken all the means that were allowed them to realize their securities and bring them to sale, and they had been found deficient, they might still have proceeded as creditors on the bond.

But it is not necessary even to go into that point to decide the present case. I consider that the mortgagees—in this case, the trustees—had a right by law to take possession of this estate. If they had a right by law to take possession of this estate by a proceeding in ejectment, if Mr. Maberly would not deliver it up to them, what law is there, or what equity is there, to compel them to pay the rents and profits of that estate to Mr. Maberly during his lifetime, before they have raised the 15,000l.? If this, instead of being a mortgage, had been what is called by civilians a vivum vadium—not an absolute conveyance of the fee or the whole interest pledged, but merely to hold it until the debt was paid—it is quite clear they must have held it until they had received rents and profits enough to pay the debt. But take it as a mortgage; **[350]** which is an assignment of the whole interest with a proviso only, that, in case the mortgagor pays the whole debt, he shall be allowed in a Court of equity to redeem, it is clear that the mortgagor has no case at law; that it is only in equity that he can be allowed to redeem at all; and that if he attempted to redeem, a Court of equity would say, you cannot do so until you pay the whole debt; you must let the estate remain until the whole debt is paid by some means or other. Now I cannot conceive that the right of the mortgagee, which is so clear at law that it cannot be disturbed, and so clear in equity that the equity of redemption will not be allowed till the debt is fully paid, is to be affected by proceedings taking place here. The bankruptcy cannot affect that right at all, because it is paramount to the bankruptcy, and no intervening right in any other party can affect it. It stands as it stood before, both at law and in equity. In law the mortgagee has a full right to the whole of his mortgage money before he parts with the estate, and in equity the mortgagor cannot compel him to part with the estate till he has received the whole of the money. That being the case, if a Court of equity decrees the estate to be brought to a sale for the purpose of satisfying any interest Mr. Smith might have or for the general benefit of creditors, why should that prejudice the right which the mortgagees had both at law and in equity to payment of their full demand? Clearly, a Court of equity will say that the produce of the estate stands bound by all the equities and all the claims by which the estate itself is bound.

It appears to me, therefore, in this case, without referring to the case of *Ex parte Maister*, and others of that class,-that this is a case of a specific security for the

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of this nature; holding that an action might be brought for the difference, whether the estate was sold to a stranger or remained in the possession of the mortgagee. See 8 Ves. 531. Upon the whole, it seems to be the better opinion, that though such an act on the part of the mortgagee opens the foreclosure, yet the Court will not in either case restrain him from proceeding for the difference. Eden on Injunctions, 37. In *Perry* v. *Barker*, 13 Ves. 198, Lord Erskine decided the other way; but his Lordship's judgment was founded in a great measure on the special circumstances of the case. See further in connexion with this subject, Powell on Mortgages (edit. Coventry), 1002, n.; *Lyster* v. *Dolland*, 1 Ves. J. 431; *Greenwood* v. *Taylor*, 1 Russ. & Myl. 185; *Davis* v. *Battine*, 2 Russ. & Myl. 76. As to the mortgagee resorting to his several remedies at the same time, see *Booth* v. *Booth*, 2 Atk. 343; *Burnell* v. *Martin*, 2 Doug. 417; *Colby* v. *Gibson*, 3 Smith, 516.

purpose of raising a specific sum; that no proceeding in bankruptcy can affect the right of the trustees to have the benefit of that security to the full amount; that they have a right in equity to apply the money until the interest of the money or the dividends have produced the 15,000l., **[351]** and that then, and not till then, will the right of the plaintiff attach upon him to receive the dividends upon the sum.

I may here add that I also consider myself warranted in this decision by the case of *Priddy* v. *Rose*, referred to in the course of the argument. That case did not relate to real estate, but to a specific sum in the funds; and Sir William Grant entertained no doubt that the trustees had a right to hold that fund till they were paid what was due to them from the bankrupt before the bankrupt's creditors received any benefit from it. That case appears to me to be fully in point on the present occasion.(*a*)

CLARKE AND ANOTHER *v.* RICHARDS. May 9, 15, 20, 1835.—The office of sworn clerk of the Court of Exchequer is not abolished by any of the several statutes of 11 Geo. 4 & 1 Will. 4, c. 58, 11 Geo. 4 & 1 Will. 4, c. 70, and 2 & 3 Will. 4, c. 110. The object of the first-mentioned statute is to provide the means of paying the officers of the various Courts of justice by salaries instead of fees; that of the second, to abolish the monopoly of attornies' business which existed on the plea side of the Court of Exchequer; and that of the third, to distribute the duties of the officers of that Court, and to give to them appropriate names.—The remuneration awarded to a sworn clerk of the Court of Exchequer under the provisions of the 11 Geo. 4 & 1 Will. 4, c. 58, is not given as compensation for the loss of his monopoly of business as an attorney practising in that Court, nor even for the loss of his office of sworn clerk, that office not in fact being abolished; but it is given to him as a fixed salary for an office which he continues to hold, instead of a variable return of profits depending on casual fees.—Quære, whether a legal partnership could exist in the profits of the offices of sworn clerk or side clerk of the Court of Exchequer, as those offices were formerly constituted? or, whether such a partnership can at present exist in the profits of the office of clerk of the rules of that Court?—Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership has expired.

[S. C. 4 L. J. Ex. Eq. 49.]

In the year 1801, the plaintiff Clarke entered into partnership with the defendant in the business of attornies and solicitors, under the firm of Clarke & Richards. In January, 1811, they agreed with John Tarrant, who was then one of the four attornies or sworn clerks on the plea side of this Court, for the purchase of his business of attorney, the consideration for this purchase being that Clarke & Richards should pay 700l. per annum to Tarrant for his life, and 400l. per annum to his wife Elizabeth Tarrant for her life, in case she survived him. Tarrant practised in all the **[352]** Courts of law and equity; but the proportion of the profits which he derived from each branch of practice was disputed by the parties to this suit. In pursuance of the above agreement, Tarrant, by an indenture dated the first of January, 1811, in consideration of the said several annuities, assigned to Clarke & Richards all that his business of attorney at law in the several Courts of King's Bench, Common Pleas, and Exchequer, at Westminster, and of solicitor in the High Court of Chancery, and his practice in conveyancing; and he covenanted that he would not at any time, either alone or in partnership, or as principal or agent, carry on the business of attorney or solicitor within twenty miles of London, but would diligently recommend the partnership of Clarke & Richards to his clients.

According to the usage of the Court of Exchequer, before the recent changes, no attorney could practise therein except in the name of one of the aforesaid four attornies or sworn clerks; or through the agency of the side clerks of their respective divisions, who had the privilege of using the names of the sworn clerks. It was usual for the side clerks to pay to the attorney in their respective divisions the fee of 300 guineas upon their appointment, and ten guineas annually. Upon the death of a sworn clerk,

(*a*) See *Smith* v. *Smith*, 2 Cromp. & Mees. 231.

he was succeeded by the senior side clerk in his division: and if the sworn clerk had a son or partner, one of these persons succeeded to the vacant side clerk's place; the son, according to the defendant's statement, having the preference. Upon the death of a side clerk having a son or partner, the vacancy was filled up in the same manner. According, however, to the plaintiff's evidence, no preference was given to the son in these cases, except where he had been a partner with his father.

At the time when the above-mentioned agreement was entered into, one of the places of side clerk in Tarrant's **[353]** division was vacant, and the defendant was appointed to that office; and by an indenture dated the 4th of January, 1811, and made between Tarrant of the one part, and the defendant of the other part, Tarrant, in consideration of 300 guineas therein expressed to have been paid to him by the defendant, assigned to him the vacant side-seat in his (Tarrant's) division in the office of pleas in the Court of Exchequer, together with all the privileges and emoluments belonging to a side clerk in the said office; the defendant paying to him the yearly sum of ten guineas for the liberty of practising in his name.

The circumstances attending the appointment of the defendant as side clerk were disputed by the parties. The plaintiff alleged and, to some extent, gave evidence of an agreement or understanding between the plaintiff Clarke and the defendant, that as they could not be jointly named as side clerk, and as the former attended to a different department of the business, the latter should hold the office. On the other hand, the defendant denied that he became entitled to the place under any such arrangement, alleging that it had been granted by Tarrant to him alone; and that the connexion with Tarrant having been originally brought about by his means, he had insisted that he should be appointed side clerk in preference to the plaintiff Clarke.

Soon after the execution of the assignments, Tarrant died, leaving his wife surviving him, and was succeeded in his office by Benjamin Price, the senior side clerk of his division.

The partnership firm of Clarke & Richards continued till the year 1818, when the plaintiff Medcalfe was introduced into the firm. Upon that occasion an indenture of partnership was executed between the plaintiffs and the defendant, bearing date the 24th of January, 1818, by which they agreed to become partners in the profession of solicitors in equity, attornies at law, conveyancers, and **[354]** agents, for the term of twenty-one years, in the respective shares and proportions therein mentioned. The deed also, amongst other provisions, contained the following:—That upon the expiration or sooner determination of the partnership, except by death, a general account should be taken of the partnership debts and effects, and that a division of them should be made between the partners according to their respective shares, and that they should give mutual bonds to secure the payment by each partner of his share of the debts due from the firm, and execute mutual assignments to secure to each partner his share of the debts due to the firm. That upon the death of any of the partners within the term, his share should be secured to his executors in manner mentioned in the deed; and that if the plaintiff Clarke, or the defendant, should so die (and, as to the defendant, notwithstanding he might have retired from the said copartnership under the provision thereinafter contained), then, and in such case, the surviving partner or partners should deliver to the executors of the deceased, a bond securing to those executors an annuity of 300l. from the time of such death to the expiration of the said twenty-one years. That in case of the death of the plaintiff Clarke, or the defendant, or the resignation of the defendant, during the term as thereinafter mentioned, the surviving or continuing partner or partners should pay to Elizabeth Tarrant her annuity of 400l. That it should be lawful for the defendant to retire from the co-partnership at the end of the first or any other year of the said term, upon giving six calendar months' notice in writing of his intention to the other partners; and that, thereupon, his share of the subsequent profits should go to the continuing partners, and that the money due to him should be accounted for and paid in the same manner and proportion as if he had departed this life, or as near thereto as circumstances would permit; yet, nevertheless, he was not, while living, to be entitled to receive the annuity of 300l., which, in case of his death, would be pay-**[355]**-able to his executors; but that the continuing partners should execute a bond for securing to him, for his life, an annuity equal to one-third of his share of the partnership profits.

In November, 1820, Benjamin Price, who succeeded Tarrant in the office of sworn

clerk, died, and was succeeded in that office by the defendant, who was then the senior side clerk in that division.

The fee of 300 guineas, which Tarrant received upon the admission of the defendant as side clerk, was paid by the plaintiff Clarke and the defendant, out of their partnership funds. The annual sum of ten guineas, which, according to custom, was payable in respect of the defendant's place as side clerk to the sworn clerk of his division, was likewise, during the time that he held that situation, regularly paid out of the partnership funds. Both the sum of 300 guineas and the annual sum of ten guineas were considered by the parties as partnership property, and so treated in the partnership accounts. When the defendant became a sworn clerk, the annual sums of ten guineas, which he received from the side clerks of his division, were regularly carried to the partnership account, and entered in the partnership books, as property belonging to the partnership; and the several fees of 300 guineas which he received were divided between him and the plaintiffs in the same proportions as the partnership profits were divided.

By stat. 11 Geo. 4 & 1 Will. 4, c. 58, s. 1, it was enacted that every person who on the 24th of May, 1830, should have held any office in any of the superior Courts of common law in fee, or for life, or years, should make out and render to the commissioners to be appointed by virtue of that act an account in writing of all fees and emoluments which would have become due in respect of such office, and of all disbursements, allowances, and charges affecting the same, in each of the ten years preceding the said 24th of May, 1830. By the 5th and 6th **[356]** sections of that act, the commissioners were to ascertain the gross and net annual value of such fees and emoluments according to the fair average of the said ten years, and they were to certify the same to the Lords Commissioners of his Majesty's Treasury. By the 8th, 10th, and 11th sections, every person who, on the 24th of May, 1830, should have held any such office or employment as aforesaid, should, during his continuance therein, render to the Lord High Treasurer or the Commissioners of the Treasury, upon oath, a true account in writing of the gross and net amount of all such fees and emoluments as should become due on account of such office or employment; and in case such net amount should exceed the net annual value thereof which should have been certified as aforesaid, the surplus should be paid into the receipt of the Exchequer to the credit of the consolidated fund; and in case such net amount should fall short of the net annual value which should have been certified as aforesaid, every such person should be entitled to receive the full amount of the difference out of the consolidated fund. By the 16th section it was enacted that in case any such office or employment as aforesaid should be abolished, every person who would be entitled to the difference between the net amount of the fees and emoluments and the certified value of the office in case it were not abolished, should be entitled to receive during all the time for which such person was entitled to hold the said office so abolished, such annual sum as the Lord High Treasurer, or any three of the Commissioners of the Treasury, and the Lord Chief Justice or Lord Chief Baron of the Court to which such office or employment might belong, should, under certain restrictions, fix and appoint as a full and fair compensation for the loss of the same.

By stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 10, which commenced and took effect on the 12th of October, 1830, **[357]** it was enacted that all persons admitted to practise as attornies in the Courts of King's Bench and Common Pleas might in like manner be admitted to practise as attornies on the plea side of the Court of Exchequer, without being obliged to employ any of the sworn or side clerks as their attorney; and the Barons were thereby required to distinguish by their rules and orders the fees which should continue to be taken by the sworn and side clerks for their duties performed as officers of the Court, from such fees as should be allowed to be taken by the attornies so admitted to practise.

By stat. 2 & 3 Will. 4, c. 110, sects. 1, 2, and 3, reciting, amongst other things, that Stephen Richards (the defendant), and the four other persons therein named, were the five principal acting officers on the plea side of the Court of Exchequer, it was enacted that there should continue to be five principal officers on that side of the Court; and that the said Stephen Richards should in future perform the duties of the clerk of the rules, and the other persons therein named should perform the duties of other offices in the said Court, and thereby particularized; and such officers were to hold their offices during good behaviour, and they were prohibited from acting as

attornies, solicitors, or agents, from and after the 2nd day of Easter Term, 1833. By the 10th section it was enacted that the said five officers should receive, by way of salary, such annual sum as the Lord Chief Baron and the other Barons of the Court of Exchequer, with the approbation of the Treasury, should think proper, to commence from the 12th day of October, 1830: such salaries to be retained and paid out of the fees by law payable in respect of the duties performed by the officers of the common law side of the said Court; and the surplus of such fees, after deducting expenses, to be accounted for and paid into the Treasury. And any sum which might be awarded to the said officers by the commissioners, under the 11 Geo. 4 **[358]** & 1 Will. 4, c. 58, was to be taken into consideration in fixing and ascertaining their said respective salaries.

On the 20th of September, 1832, the defendant caused a notice of that date to be served on the plaintiffs, by which, after reciting his appointment as clerk of the rules under the last-mentioned act, and that by virtue of that act he would be disabled from acting as an attorney from the 2nd day of Easter Term following, he gave the plaintiffs notice that he should retire from the partnership existing between him and the plaintiffs under the indenture of 24th of January, 1818, on the first day of the said Easter Term, or sooner, if agreed upon; and should cause his name to be erased from the rolls of attornies of the King's Bench and Common Pleas, reserving to himself all such rights and advantages to which he might be entitled under and by virtue of the said articles of partnership.

Previous to this notice, the defendant, in pursuance of the regulations of the stat. 11 Geo. 4 & 1 Will. 4, c. 58, had laid before the commissioners appointed under that act an account of the profits and emoluments of his office as sworn clerk for the ten years next preceding the 24th of May, 1830, which account was made out and stated from the partnership books. After taking these accounts into consideration, the commissioners certified to the Lords of the Treasury that the yearly sum of 1370l. was a proper sum to be awarded to the defendant under the provisions of that act. This annual sum was accordingly received by the defendant, and the aggregate amount of it from the 5th of November, 1830, to the 15th of April, 1833, the time of the dissolution of the partnership, was 3500l. In addition to this annual sum of 1370l., the further annual sum of 500l. was settled upon the defendant, under the provisions of the 2 & 3 Will. 4, c. 110, s. 10, in order to make up an adequate salary for him as clerk of the rules.

The plaintiffs filed the present bill against the defendant, **[359]** stating most of the foregoing facts, and charging that the partnership between them and the defendant was put an end to by his voluntary act, and in a manner inconsistent with the partnership articles: insisting also that the defendant having for some years devoted his time exclusively to the business of the office, and having been excused from transacting the ordinary business of the firm, his partners are entitled to the benefit of his labours in that respect, more especially as, pending the inquiry before the commissioners, in which he alone was engaged, he represented that he was prosecuting his claim for compensation for the benefit of the copartnership. That though the sum awarded to the defendant was awarded as compensation for an abolished office, yet the plaintiffs, under the circumstances, are entitled to have the aforesaid sum of 3500l., being the amount of the compensation accrued before the termination of the said partnership, and also so much of the said salary as accrued during the existence of the said partnership, considered as part of the present joint monies of the said concern, and to have the same divided between all the partners, in proportion to their shares in the said partnership. That the aforesaid yearly compensation of 1370l. to be received by the defendant at the Treasury for the future, during the term of his life, belongs to the plaintiffs, as the continuing partners in the said concern, and as an indemnity for the loss sustained by the abolition of the said partnership office. That the defendant is and will be a trustee for the plaintiffs of the said yearly compensation, for the time to come; but the plaintiffs are willing that the yearly sums to be received by the defendant for the time to come, by way of salary for the said office of clerk of the rules, should, under the circumstances, be considered to belong to him.

The bill prayed for a general account of the partnership dealings, and that it may be declared that the said sum of 3500l., and also the salary that accrued due during **[360]** the late partnership, form part of the monies and effects thereof; and that the

plaintiffs, as the continuing partners, are entitled to the aforesaid yearly compensation of 1370l. for the time to come, during the life of the said defendant; and that he may be declared a trustee thereof for the plaintiffs.

The defendant, by his answer, denied that the partnership was terminated by his voluntary act; contending, that it was entirely the result of the acts of Parliament. He admitted that the commissioners under the 11 Geo. 4 & 1 Will. 4, c. 58, had certified to the Lords of the Treasury that the yearly sum of 1370l. would be a fair compensation to the defendant for the loss sustained by the abolition of his office. He also admitted that the plaintiffs were entitled to have the sum of 3500l., or any other sum due for compensation between the 5th of November, 1830, and the 16th April, 1833, considered as part of the present monies of the partnership; but he denied that the aforesaid yearly compensation of 1370l., or any other sum to be thereafter received by him at the Treasury, during the term of his life, or any part thereof, belonged to the plaintiffs as the continuing partners, or by any other right whatever, or that any person, save the defendant, had any right therein; or that the office which had been abolished was a partnership office; or that the salary of the clerk of the rules, or any part thereof, belonged to the plaintiffs; or that he, the defendant, ought to be a trustee for the plaintiffs of the said compensation and salary, or either of them, since the termination of the partnership.

In his answer to the amended bill the defendant insisted that the act of 2 & 3 Will. 4, c. 110, did not abolish the office of sworn clerk of the Exchequer, which was held by the defendant before the passing of that act; and that notwithstanding that act, the defendant was still one of the sworn clerks in the said Court, and was liable to the performance of the duties thereof.

[361] The cause now came on for hearing, both upon the pleadings and the evidence. It was stated by some of the witnesses for the defendant that the office of sworn clerk was not a saleable or assignable office; and that the office of side clerk was no further saleable than as related to the fee of 300 guineas, payable upon the appointment of each side clerk.

Mr. Simpkinson, Mr. Wakefield, and Mr. Cooper, for the plaintiffs. The defendant having by his own act rendered it impossible that the partnership should be continued, the partnership property must be divided amongst the partners, according to their respective interests, and the business must go to the continuing partners. Now the compensation, which is the subject of this suit, was awarded to the defendant before the determination of the partnership, in respect of business in which the partners were jointly interested; it must, therefore, be distributed amongst the partners precisely as any other partnership property; and the circumstance of its being payable by instalments can make no difference. The notice of retirement given by the defendant to his copartners was not a valid notice within the terms of the articles: the partnership must, therefore, be considered as having been dissolved by one of the parties in a manner not contemplated by the articles, or as having terminated by effluxion of time, or by a new agreement between the parties. Supposing the partnership to have expired by effluxion of time, what would have become of the office? At law the defendant would have continued to hold it; but in the absence of all agreement upon the subject, could it be contended in equity that what had been bought with the partnership money should wholly belong to the defendant? If the partners could not perform the duties jointly, would not the party for whose life the office was tenable act for the benefit of them all? And must **[362]** he not in such case have paid his former partners a proportion of his emoluments? Here a trust is created of the office, by the circumstance that it was bought with the partnership money, and that its profits were dealt with as partnership emoluments. Moreover, the assignment of Tarrant's business to the firm of Clarke & Richards amounts to a declaration of trust on the part of the latter, that he holds the office for the benefit of the partnership; for the assignment is useless, unless it has reference to the subsequent instrument of the 4th of January, 1811. Whether, therefore, we look to the origin of the office, or the manner of dealing with it, it is clear from the understanding of the parties, independent of any general rules of equity, that the defendant held the office in trust for the partnership, and he cannot withdraw from this trust. [The Lord Chief Baron. There seems considerable difficulty in it. Suppose there had been no acts of Parliament, and the partnership had expired by effluxion of time, and the defendant had remained in the execution of his office, what right would the other partners have had to any part of the profits? The profits arise

from his personal labour.] There would be no impossibility in holding him to be a trustee in such a case. Here, however, it is clear that whatever might be the trouble of the office the defendant undertook it. There is nothing in the agreement which shews what the limit of the trust is to be. [The Lord Chief Baron. The true question is not whether, if it be a trust, a Court of equity would not deal with it, notwithstanding the difficulty; but whether in fact it be a trust prolonged after the expiration of the partnership. Is it not a question of evidence, as to whether the trust was intended to be so prolonged?] The parties having assigned no limit to the trust by the articles of partnership, it must be presumed to continue for the benefit of all the partners. If by words they had limited the trust to the duration of the partnership, then, **[363]** however disadvantageous to some of them such a stipulation might appear, yet the Court would say that they were free agents in the matter, and might have had their motives for giving the defendant the greater share of the benefit. That, however, is not the case here. The extent of the trust is not defined by any deed, it is not the subject of any written agreement, and, consequently, in the absence of any evidence to the contrary, the parties must be considered as interested in the profits of the office in proportion to their respective interests in the partnership. Had the intention of the parties been otherwise, the defendant would have taken care to see that his interests were expressly provided for; when the parties entered into the new partnership in 1818, he would have secured this office for himself or his son, in the event of a dissolution. A prudent man would have come to a definite understanding upon such an important point. So far from that having been the case, the subject is not even mentioned in the partnership articles; on the contrary, the profits of the office are dealt with precisely in the same manner after 1818 as before, being uniformly carried to the general partnership account, and divided amongst the partners. It is, therefore, for the defendant to shew that, upon the expiration of the partnership term, he alone would have been entitled to the beneficial interest in this office.

There is another argument, which, supposing the office in question to have been the proper subject of a trust, seems fatal to the defendant's claim. In case of his retirement from the partnership with notice, he was by the terms of the articles entitled to an annuity to be paid to him by the continuing partners, equal to one-third of his former profits as a partner. Now suppose that the notice which he gave to his copartners had been a valid notice, or suppose that he had retired upon due notice, and afterwards the office had been abolished, could it have been **[364]** contended on the one hand that the fund from which he was to take his annuity was thereby destroyed, or on the other hand that he was entitled to take both the annuity and compensation? Yet one of these results must arise, if the defendant's view of the case be adopted.

It will be contended that the office of sworn clerk, or side clerk, was not a saleable or assignable office, and that the profits of it could not be the subject of partnership dealings. But in *Ellis* v. *Walmesly* (Rolls, 16 Feb. 1835) the office of side clerk in the Exchequer was expressly included in the terms of a partnership deed, made between Gorton, Walmesly, and others. Upon the construction of that deed, the Master of the Rolls held that the annuity, which was granted by way of compensation for the loss of the profits of the office, was to go to the partners during the partnership term, and afterwards to belong to Gorton and Walmesly jointly. It has always been the practice for sworn clerks, as well as side clerks, to have partners who share their profits. What has been done for a long course of years is evidence of the law in that respect: and the cases in Salkeld (*b*) shew that a person holding an office may agree to share the profits of it with a deputy, notwithstanding the 5 & 6 Ed. 6, c. 17. The office of sworn clerk is analogous to that of attorney in the King's Bench or Common Pleas. Before the practice of an attorney or solicitor was known, a party could only by licence of the crown sue a defendant in the name of another (3 Bl. Comm. 24). This was long ago found to be a hardship, and it gradually became the custom for suits to be conducted by attornies. In the reign of Hen. 6, the number of these persons became so great that it was limited by act of Parliament. This restriction was lost sight of, and is now obsolete in the King's Bench and Common Pleas, but not so in the **[365]** Exchequer. From some cause or other, which is lost in the obscurity of time, there continued to be only four attornies in this Court, though, as

(*b*) *Gulliford* v. *De Cardonell*, 2 Salk. 466; *Godolphin* v. *Tudor*, id. 468.

the business of the Court increased, side clerks were appointed. In Burton's Exchequer Practice (vol. 1, p. 11) it is said that "the four under clerks or attornies (whenever a vacancy happens to be) are supplied out of the sixteen side clerks, and are nominated by the chief clerk or master of the office, and approved of by the Barons." It appears, therefore, that they must be approved in the same manner as an attorney or solicitor is approved; and it is clear, from this and the other observations on the subject in Mr. Burton's book, that the office both of the sworn clerk and the side clerk was on the same footing as that of attorney; and the modern usage is, not to take persons as side clerks, except they have been admitted as attornies. Now though the business of an attorney cannot be sold or assigned to an unqualified person, yet, as regards profits, it may be made the subject of partnership with an unqualified person, notwithstanding the statute (stat. 22 Geo. 2, c. 46). The contract in *Bunn* v. *Guy* (4 East, 190) was analogous to the contract in this case. [The Lord Chief Baron. My difficulty is, how I am to hold that, under the circumstances of this case, a trust of the profits of this office is raised for the benefit of the partnership during the life of Mr. Richards. Suppose three or four persons were to enter into partnership as bankers for a term of years, and one of them were to be admitted a stock-broker at the expense of the partnership, for the purpose of investing the partnership money in the funds; would he, when the term of the partnership had expired, be obliged to be a stock-broker for the benefit of the partnership for the rest of his life?]

The Attorney-General, Mr. Knight, and Mr. G. Richards, for the defendant. This is an unconscionable de-[366]-mand. The remaining partners, who file the present bill, are placed in a far better situation by the acts of Parliament than the defendant himself. They contend that the partnership has been dissolved by the act of the defendant; on the contrary, it was dissolved by the vis major of the legislature; not by consent of the defendant, but in spite of him. The 2 & 3 Will. 4, c. 110, s. 3, dissolves this partnership; and if the legislature declares that the profits of the office shall be applied in a certain manner, that will overrule all the supposed previous equities attaching to those profits. It is contended, however, that the office in question is abolished, and that the plaintiffs are entitled to share so much at least of the defendant's salary as consists of compensation for the abolished office, namely, the annual sum of 1370l. But in *Stokes* v. *White* (1 Cr. M. & R. 223; 4 Tyr. 786) it was expressly decided that the office of side clerk is not abolished by any of the recent statutes; and what the plaintiffs call compensation is no more than the regulated salary to which the defendant is entitled under the stat. 11 Geo. 4 & 1 Will. 4, c. 58, instead of the casual profits which were received before that act. The 1st, 5th, 6th, and other sections at the commencement of that act relate to offices which continue; the 16th relates to offices which may at any future time be abolished. With respect to continuing offices, the 5th and 6th sections enact that the commissioners shall ascertain the annual value of each office, according to a certain average, and certify such value to the Lords of the Treasury. By other sections, it is enacted that every person holding such office shall account upon oath for the fees which he receives; and that if they exceed the certified value, the surplus shall be paid into the Treasury, and if they fall short of that value, the difference shall be paid to the holder of the office out of the consolidated fund. Now the sum certi-[367]-fied by the commissioners in respect of the defendant's office was 1370l. per annum. Under the subsequent stat. 2 & 3 Will. 4, c. 110, which regulates the duties of the officers of the Court of Exchequer, the Chief Baron and the other Barons were to fix the salary of such officers; and in so doing, were to take into consideration the sums awarded to them by the former act. In estimating the salary of the defendant, the Barons took into their consideration the 1370l. per annum which had been already awarded to him, and then allowed him 500l. per annum in addition. Now it is clear that these two sums stand precisely on the same footing. The plaintiffs, it is true, set up no claim to the latter sum; but there is no principle calling upon them to relinquish the 500l. per annum, which does not equally call upon them to relinquish the whole. The whole constitutes the modified salary of a continuing office. It is not a compensation for any thing that is gone; it is an annual payment issuing out of fees payable in respect of an office still going on, and for which both skill and integrity are required. The 11 Geo. 4 & 1 Will. 4, c. 70, recognizes the continuance of the office by separating the fee of the attorney from the fee of the officer.

The office, therefore, not having been abolished, and not being saleable or assign-

able, it follows that what the plaintiffs seek is the payment to them from time to time of a portion of the fees of this office, by virtue of a contract entered into between them and the defendant. Suppose, for the sake of argument, that there ever was such a contract; we deny its legality. What was the nature of the office when the contract is alleged to have taken place? It could only be held by an admitted attorney; it was connected with the administration of justice, and had important duties attached to it; it was in the gift of the clerk of the rules and under the control of the Court; and in the due performance of it the Court, the suitors, and the public were all interested. To hold that such an **[368]** office can be made the subject of contract is contrary to every principle of law and, with the exception of one case, is at variance with all the authorities. In a single instance, that of *Bellamy* v. *Burrow* (Ca. T. T. 97), the contrary position is supported by the high authority of Lord Talbot, who reversed the decree of Sir Joseph Jekyl upon that point. His Lordship's judgment, however, is but a bare decision, not a reasoned judgment; nor does he at all enter into the question of the severance of the duties and profits of an office which was so cogently urged by Sir Joseph Jekyl. With this exception, the authorities are all the other way, the policy of the law being that the duties of an office of this nature shall not be separated from its emoluments: *Law* v. *Law* (3 P. W. 391; Ca. T. T. 140); *Hanington* v. *Du Chatel* (1 Bro. C. C. 124); *Lidderdale* v. *Duke of Montrose* (4 T. R. 248); *Garforth* v. *Fearon* (1 H. Bl. 327); *Hartwell* v. *Hartwell* (4 Ves. 811); *Ex parte Curtis* (4 Ves. 814, cited by Romilly); *Osborne* v. *Williams* (18 Ves. 379); *Waldo* v. *Martin* (4 B. & C. 319; 6 D. & R. 219). All the reasoning of Lord Loughborough in *Garforth* v. *Fearon* applies as well to equitable as legal contracts; and all the decisions accord with the doctrine there laid down. In *Palmer* v. *Bate* (6 Moore, 28; 2 Brod. & Bing. 673) the assignment by a clerk of the peace of the profits of his office to trustees for the benefit of his creditors was held to be invalid. [The Lord Chief Baron. That was a strong case, because by act of Parliament the clerk of the peace may appoint a deputy.] In Comyn's Digest, where the older cases on the subject of offices are collected (Com. Dig. Officer (C.), (D. 2), it is laid down that an office of trust cannot be assigned without the consent **[369]** of him who granted the office. This was an office of trust in the gift of the clerk of the pleas; and the question is whether a Court of justice can now sever the emoluments from the duties of that office, by reason of a contract. By so doing, the Court may leave it to be administered by an individual who has no interest in the due performance of it, and who may delegate it to others for the purpose of extortion. Can the Court so deal with an office, in which skill, personal character, and respectability are concerned? If the defendant could declare himself by contract a holder of any part of the emoluments for the benefit of another, he might do the same by the whole. The plaintiffs call upon your Lordship to say that this officer shall perform the functions of his office at an insufficient salary, or it may be with no salary at all—in short, to deal with an office not assignable in ignorance of the person who conducts it. The clerk of the pleas was not bound to take the defendant as a sworn clerk: he might in strictness have chosen any of the side clerks for that purpose; but he selected the defendant for his personal skill. According, however, to the argument of the plaintiffs, he selected him in ignorance that he had bound himself by a contract with others. This is against the policy of the law and against the authorities.

These observations, we submit, would have been applicable, even if the contract on which the plaintiffs rely had actually taken place. But in truth there was no such contract; or if it ever was made, the plaintiffs have not proved it. They who undertake to shew that any thing illegal has been done must prove even a negative: *Williams* v. *East India Company* (3 East, 193). Now the plaintiffs call upon the Court to presume an illegal contract. Another point is that, when parties put any part of their agreement in writing, they shall be held constructively to have put **[370]** their entire agreement in writing. That rule is settled in equity, as well as at law. Its application has been relaxed in the case of a defendant resisting a bill for specific performance; but an agreement cannot be decreed to be performed, which is partly in writing and partly not. Here, partnership articles are cautiously prepared between professional men; and those articles are entirely silent on the subject in dispute. Can it be said that on mere inference you are to add to the agreement so material a term as this? Their whole case proceeds on an assumption not warranted by authority—namely, that in all cases of payment a contract or trust

is raised by implication in favour of the payer. Now in regard to that point, *Crop* v. *Norton* (9 Mod. 233; 2 Atk. 74) bears upon the present case. There, it was held, that though in general payment by one for a thing acquired in the name of another would raise a resulting trust in favour of the individual paying, yet where there were other considerations which were difficult or impossible to value, in the absence of any express contract, there was no implied contract in the payer's favour: that in such a case the Court might apply the trust as well to one consideration as another, and being, therefore, in the dark upon the subject, could not deal with it at all. It is true that Lord Hardwicke's language in that case has, in point of extent, been misunderstood; but the principle upon which he proceeded stands unimpeached: *Wray* v. *Steele* (2 Ves. & B. 388). Now here it is clear that the 300 guineas was not the consideration for the office, supposing that the office was assigned. There were a variety of other considerations, which it is impossible to estimate. In point of fact, however, Tarrant never assigned the office, though he attempted to do so, and though by the contract he lost all the benefit of the office, except what arose from the side clerk's premiums.

[371] As to the annuity which the defendant was to have upon his retirement, it is clear, upon the construction of the articles, that it was to be calculated with reference to the profits which he relinquished, that is, the profits arising in the usual course of the business of the firm as attornies. It is not necessary, however, to consider that question, because not one of the causes of dissolution contemplated by the articles has taken place; and the plaintiffs cannot apply the equities which they might otherwise insist upon, to an event not contemplated by the articles. This is a casus omissus by the parties; their rights are affected by positive law, and must be regarded almost in the same manner as those of the testator's next of kin, where they take the property undisposed of by his will.

Mr. Simpkinson, in reply. The defendant by his answer does not raise the question of the illegality of the contract, but relies upon the acts of Parliament and the violent disruption of the partnership against his will. It has been argued on his behalf, on strict technical distinctions drawn from the acts of Parliament, that the office was not abolished, and that compensation was not given; and that, in fact, the Judges having awarded the compensation by mistake, the defendant is entitled to retain it. Now the office was only a monopoly of the business on the law side of the Court of Exchequer. The business of it was carried on by four sworn attornies and sixteen other persons, called side clerks. In other respects, there was no difference between them and other attornies. The moment that monopoly was destroyed, which it was by law, all benefit of it fell to the ground. Under the 16th section of 11 Geo. 4 & 1 Will. 4, c. 58, compensation was claimed and awarded. It was received and paid as compensation, and is admitted by the defendant in his answer to have been awarded in respect of the abolition of his office; and he cannot say that the plaintiffs are not entitled to a share **[372]** of it. But then it is said that there is another act, which imposes on the defendant the necessity of acting in the Court of Exchequer—that he has no choice upon the subject—that, in short, he is compelled to accept the office against his will, and that he is placed in a less advantageous situation than he was before. Now, it is quite clear that he acted in it for some time voluntarily; but, at all events, if he thought the partnership more beneficial, he might have repudiated the office. There is nothing in any of the acts of Parliament which prevented him from resuming the business of attorney, after relinquishing the office. In truth, there was no such violent disruption of the partnership. Admitting that it was dissolved in a manner not contemplated by the articles, yet it was dissolved by act of the party, and the compensation awarded by the Barons became distributable among the partners. It is contended that under the 2 & 3 Will. 4, c. 100, s. 10, the compensation was reconverted into salary, for the benefit of the defendant, the 500l. per annum being merely a completion or addition to it. That is not the case: the compensation and salary are totally distinct things. No doubt the Barons, in fixing the salary, were to take into their view the amount of compensation already awarded; but they could not make it part of the salary.

But it is said that if any agreement existed for sharing the profits of this office, it was clearly illegal. No doubt that would be so, if the office were one connected with the administration of justice within the statute of Edw. 6. But it was not of that nature, it was only a monopoly of the business of attorney in the Exchequer, and

therefore not distinguishable as the subject of contract from the business of any other attorney. This appears not only from the nature of the duties of the office, but from the stat. of 22 Geo. 2, c. 46, which places attornies under certain regulations, and exempts from these regulations attornies or clerks of the several offices in the Exchequer, **[373]** thereby treating them as ordinary attornies. That being so, the law as to attornies in general applies to their case. Now it is clear that a contract for the sale of the good will of an attorney is valid: *Bunn* v. *Guy* (4 East, 190). And with respect to partnerships between attornies, they are held to be so strictly binding that they cannot be dissolved as against a client who objects to the dissolution: *Cooke* v. *Rhodes* (19 Ves. 273). And an agreement by an attorney to pay a share of the profits to another person who is not an attorney is legal, notwithstanding the statute 22 Geo. 2, c. 46: *Candler* v. *Candler* (Jacob, 225); *Armstrong* v. *Lewis* (2 Cromp. & Mees. 274). Here, however, the parties were competent to contract the relation of partners as attornies. In 1801 they became partners. They afterwards purchased Tarrant's business as an attorney, which included his monopoly of business in the Court of Exchequer. At the same time, and in connexion with this purchase, the defendant was appointed to be side clerk in Tarrant's division. That situation was purchased with the partnership funds, and the fees of it were carried over to the partnership profits. It is clear, therefore, that the office in question was purchased for the benefit of the partnership, and formed part of the monopoly; and that, although the compensation was awarded to the defendant alone, yet it was awarded to him only as the nominal possessor of the office.

May 20th.—THE LORD CHIEF BARON. This was a bill filed by Messrs. Clarke & Medcalfe, against Mr. Richards, their former partner, praying for an account of the partnership dealings, and a settlement of the partnership affairs. The question raised by the bill relates to a claim made by the plaintiffs, either for the whole or some part of the salary which Mr. Richards now possesses under the order of the **[374]** commissioners, who have fixed his salary as a sworn clerk of the Court of Exchequer and, under the order of the Barons, who have made some addition to his salary. It is insisted by the bill that Mr. Richards's situation of sworn clerk was part of the subject of the partnership, that all profits derived from that situation are the subject of joint interest between himself and his partners, and that the present salary being but a substitution for that in which the partners had a joint interest, they are entitled, either by express covenants or a necessary equity arising from the covenants in their articles of partnership, to a participation in those emoluments. I regret that this question should have arisen between gentlemen of such well-known respectability, and that it should have fallen to my lot to decide a controversy so much better fitted to be settled by some friendly tribunal. As, however, I have been pressed to do so, I feel that I have no means of avoiding that duty, and therefore I have bestowed great pains and attention upon the subject.

The question has been elaborately and ably argued on both sides. It seems to me to depend mainly on two considerations: first, what was the nature of the office of sworn clerk in Court or attorney of the Court of Exchequer; and secondly, how far the partnership articles, either expressly or by implication, involve the mere profits of the office in the partnership concern. Now the office of sworn clerk in the Exchequer has been established for ages; it is probably as old as the Court itself, and has been expressly proved to have existed by name since the time of Edw. 1. Upon an inquiry, however, into the nature of the office, it is not necessary to trace its existence to so very early a date. Its duties and rights are so well understood that it would be pedantic to seek for its origin now; suffice it to say that the officers called the clerk of the pleas and the sworn clerks were the ancient common law officers belonging to the Court of Exchequer, because **[375]** that Court, as every body knows, incidentally to their power of administering justice between the king's debtors and others, acquired a common law jurisdiction.

Now the duties of sworn clerk and side clerk in the Court of Exchequer have been very well defined and understood. Part of these duties consisted in being entering clerks for the purpose of making out writs, entering up judgments, and transacting various matters which in other Courts of law were transacted by officers having more appropriate names. In this respect their labours were the same as those of the prothonotary, the clerk of the rules, the clerk of the papers, and other officers in other Courts of justice; but connected with, though perhaps not necessarily dependent on

those duties, they had also the privilege of acting as attornies, and were indeed the only attornies by whom the King's suitors in this Court had a right to be heard or represented. Probably the original jurisdiction of the Court of Exchequer at common law was so trifling as not to require a larger establishment; but however that may be, the Court recognized no other attornies but these, and directed that all proceedings requiring the intervention of an attorney should be conducted here by one of these four persons, or some side clerk in their names. This undoubtedly gave to these four attornies in the course of time a considerable monopoly of practice; but to me it is very obvious that their duties as entering clerks, which they perform in behalf of the Court, are not to be confounded with the duties which they owe to their clients as attornies conducting suits. It happens by the constitution of the Court, that the attornies who conducted the suits were the same persons as the officers of the Court; but their duties are distinguishable, and ought not to be confounded together.

Now see what was the effect of the acts of Parliament on the several orders and rights of the officers. In 1830 an act was passed called the 11 Geo. 4 & 1 Will. 4, c. 58, **[376]** which was enacted, not for the purpose of abolishing, nor does it abolish any office: the policy of that statute was to provide the means of paying the officers of the different Courts of justice by salaries instead of fees. Whatever might be the advantage of one mode of payment or the other, that was the policy of the act. It was thought, I presume, that an interest in the amount of the fees was found to present considerable difficulty in the way of reforms, and therefore that the emoluments of the officers ought to be wholly independent of the fees, in order to prevent a perpetuation of abuses. Therefore the act appointed commissioners for inquiring into the fees and emoluments of the several officers, and enacted that the officers should lay an account before the commissioners of all the fees which they had received for the last ten years previous to a certain date. That was to be the basis of an average calculation of what their salaries were to be in future, and that period of ten years was fixed upon with much consideration. The act then provides that when those sums were ascertained the commissioners should report to the Treasury what was the annual value of each office calculated on that basis. The officers were to receive the fees as before, but instead of appropriating them to themselves they were to pay them into a common fund, and from that fund they were each to take such portion as the commissioners should fix. If there was any surplus, that was to be paid into the Exchequer to the credit of the consolidated fund; and if there was any deficiency, that was to be paid to the respective officers out of the consolidated fund. These clauses were not intended to abolish, and in no case can they have the effect of abolishing, any office. The meaning of the act was to convert into salary what had previously depended on casual fees. It was not intended as a relief to the public, but to prevent any obstacle in the way of any improvement which might afterwards be made in the constitution of the Court.

[377] When that act passed, another was in progress through the House of Commons: namely, the 11 Geo. 4 & 1 Will. 4, c. 70. That act proposed to throw open the monopoly of the Court of Exchequer by allowing other attornies in the several Courts of law to be admitted there, and to have the benefit of practising there in their own names. That act, as might be expected, produced some sensation amongst the officers of the Court of Exchequer; and I wish to explain the nature and history of a particular clause in that act which was noticed in the course of the argument. By the 10th section it will be found that the Barons are directed to investigate and ascertain what proportion of the emoluments of the sworn clerks and of the side clerks was derived from their fees for the performance of their duties as officers of the Court, and to distinguish those fees from the profits which they received as attornies. The reason of that was that those emoluments to which they had a right as officers of the Court might be more easily made subject to the regulations of the former act. I had the honour of introducing the latter act myself. Feeling, as I was bound to do, anxious to attend to every interest, I had a communication with the sworn clerks and side clerks of this Court. A representation was made to me at the time that the official and the attorney's fees were so mixed up and undefined from the long monopoly that had existed, that it would be very difficult for the commissioners to make the distinction unless they could from some authority know what those fees were; and that the commissioners might think that, as attornies' fees, to examine into them would not be within their jurisdiction. Undoubtedly a struggle

was at the same time made to preserve the monopoly, but I well remember that the answer I made was this: "What you will lose by the abolition of the monopoly will be made up to you by the increased fees arising from the increased business consequent on the destruction of the monopoly." It was with **[378]** a view then to that distinction that the 10th section was introduced. I am now given to understand that it has not been acted upon by the Barons; (*a*) but, if this be so, I must presume that the commissioners had some other means of obtaining the same information; because I do not see how they could inquire into the fees of attornies. They could inquire into the fees of the officers of the Court, but not into the fees charged by them as attornies to their clients. However, the result has been that the sworn clerks did attend before the commissioners. The commissioners investigated the amount of their respective fees for ten years according to the provisions of the 11 Geo. 4 & 1 Will. 4, c. 58, and they fixed the amount of Mr. Richards' salary at 1370l. per annum. Did they by this proceeding abolish his office? The statute of 11 Geo. 4 & 1 Will. 4, c. 70, abolished the monopoly of the attornies' business undoubtedly, but it still left the sworn clerks to do their duty as officers of the Court. It was necessary that there should be some clerks to make out the judicial writs to enter up judgments and transact other business of the Court, and who were to do this but the sworn clerks? They remained the only persons under obligation and with authority to do these things, and for that they had a right to receive a remuneration calculated upon the ten years' profits in the manner prescribed by the acts.

But it is obvious that there had been a communion of business amongst these officers resulting from their duties not being sufficiently distributed and defined, inasmuch as they all did all the duties of the various offices; so that each was a filacer, a clerk of the rules, and a clerk of the papers, and a clerk of the judgments, and there was no distinction between them. That gave rise to the statute of 2 & 3 Will. 4, c. 110. Did that act abolish the **[379]** sworn clerks? No. It gave them new names and distributed their duties. It recites that there were five principal officers of the Court, and proceeds to enact that they shall now be known by certain definite appellations. Three are to be prothonotaries, one is to be clerk of the rules, and one is to be filacer. The clerk of the pleas is no longer to exist; that is a sinecure and is abolished by the act; but the others are described and named; and as the Barons were to fix their salaries the act provides that those salaries shall be fixed with reference to the remuneration which might be awarded by the commissioners. The act might have been silent on the subject; but it had been thought expedient to refer the matter to the Barons, qualified by that direction, in order, I presume, to prevent the possibility of giving to the sworn clerk his whole salary in conjunction with what he already enjoyed. The consequence was, in the case of Mr. Richards, that though the Barons recommended that the salary of the clerk of the rules should be 1000l. per annum, yet, in consequence of his salary having been already settled at 1300l. per annum by the commissioners, he was to have only 500l. per annum in addition to that sum. This, however, gave him 500l. per annum in addition to the salary which the commissioners had settled that he ought to possess.

On review of these several statutes, it must clearly be considered that the salary which the sworn clerk now enjoys is not any portion of what he before derived from the emoluments of his practice as an attorney, but is confined to what he received as sworn clerk. It has been suggested that, for the calculation of the profits of the office, the commissioners received a statement of his general profits as an attorney. If they did, and the Barons omitted to perform the duty imposed on them of distinguishing the nature of the different fees which were received, I can only say that I must presume the commissioners at least did their duty, and made that distinction **[380]** which the Barons ought to have made. It was indeed the duty of the commissioners to do this, even if no such clause as the 10th section of the 11 Geo. 4 & 1 Will. 4, c. 70, existed; because they were to receive the accounts of the fees of these officers, quà officers only, and not as attornies. It became then imperative upon them to adopt the best means they possessed of making the distinction themselves; and I conceive that if they could find no other means, or if the Barons could not furnish them with any previous directions, they had an obvious line of duty to pursue; namely, to look to the other Courts of justice for examples. The fee which the clerk

(*a*) This was a mistake; it was acted upon.

of the rules receives is not an attorney's fee, but that of the clerk of the rules; and if no rule had been made in the Court of Exchequer for that purpose, it was their duty to resort to such other means as I have mentioned; and to ascertain what was payable to the filacers and other officers who performed similar duties in the other Courts. Whether they did that, I have no means of knowing, but I must presume they did their duty; and that the 1300l. was not awarded to Mr. Richards as compensation for the loss of the monopoly of his business of attorney, but in lieu of fees which he ceased to appropriate to himself; but which he put, in pursuance of the act, into a common fund. I think, therefore, on this bill that Mr. Richards' office is not abolished; that the compensation in question has not been received by him in his character of attorney, but in lieu of the fees which he was before accustomed to receive as a clerk of the Court. It is true, from a statement in his first answer, Mr. Richards appears to think that the remuneration which he received was compensation for the abolition of the office. I was surprised at that statement; but it is qualified; for he says in effect, that he did not receive compensation for any thing but the office; and, in his second answer, he altogether denies that the office was abolished.

Supposing that I am right in this opinion (and I pro-**[381]**-nounce it with some hesitation), I now proceed to the second question, which it is necessary to consider; namely, how far the profits of this office are involved in the partnership interest. Now, if Mr. Richards had received the sum in question as compensation for the abolition of a monopoly, which monopoly he had communicated to the other gentlemen, I think it quite clear that it ought to be taken to be compensation as well to them as to him. But the question is whether the partnership articles, or any proceedings founded on the partnership articles, justify the conclusion that they meant to ensure to themselves any interest in the profits of his situation as sworn clerk.

It appears to me that if the partnership articles had involved that question, it would be necessary to consider whether those profits might be communicated by assignment; but before that question arises, it is fit to inquire whether they were actually assigned. Now, Mr. Tarrant being a sworn clerk in the Exchequer, Messrs. Clarke & Richards made a proposal to him to purchase his business as an attorney. Tarrant accordingly agreed, in consideration of 700l. per annum to be paid to himself and 400l. per annum to be paid to his wife, to assign to them that business. Now, looking at the statement in the bill and to the assignment, I do not find that the assignment of Tarrant's fees as sworn attorney formed any distinct part of that instrument. By the assignment, Tarrant engaged not to act as an attorney within twenty miles of London, and he assigned all the good-will of his business for twenty-one years. Suppose his clients had said to Tarrant, "You have assigned away your business to Clarke & Richards, but we do not choose to employ them, we will pay you off, and take our papers from your office." I wish to ask—as Messrs. Clarke & Richards could have done nothing to prevent this, but would still have been under the obligation of paying Tarrant 700l. per annum—what would have become of Tarrant's duties as sworn **[382]** clerk in such a case? Would he not have been obliged to attend and perform those duties? It is clear he thought so; for his first act was to take to his own use 300 guineas for the purchase of the situation of side clerk. He also received the 10 guineas a year additional, or at all events he would have received them if he had lived; for it is to be presumed that what he did as to the 300 guineas, he would have done as to the rest.

Supposing, again, Mr. Tarrant had said to Messrs. Clarke & Richards under these circumstances, "I am sorry that you have lost your business, but I have done my best for you—I have assigned to you the good-will of my business, and nothing is left to me but the annuity and the emoluments as side clerk—no client will employ me—my name is never used—and all the business I formerly had is yours." Would they have had a right to say to him, "You shall pay us the fees of 10 guineas a year which the side clerks pay upon their admission?" To dispose of that question, let us look at the assignment. It contains nothing to warrant the assumption of such a right. It simply states the contract for the sale of the business of an attorney from Tarrant to Richards; and it is clear that the parties did not contemplate any thing more. If they had, the 300 guineas paid by Richards would not have been paid to Tarrant only. Either it would not have been paid at all, or would have been paid by Richards to the partnership. It is clear that the parties did not act as if the assignment had given them an interest in Tarrant's emoluments as sworn clerk.

However, Mr. Richards was, about the date of the assignment, admitted a side clerk upon payment of this fee to Tarrant, and acquired a right to use Tarrant's name in conducting the business of his office; and that continued till 1810, when Mr. Medcalfe became a partner. Now, if we look at the articles entered into on that occasion, there is no such expression contained in them as **[383]** that of sworn clerk. True, it is stated that all the emoluments which Richards received in that character were carried to the partnership account. But that was a mere personal matter and cannot be binding to the extent contended for. If the deed contained very ambiguous words, perhaps that circumstance might be taken into consideration; but, looking at the articles, I do not find that the emoluments of side clerk are contained in them at all. These are articles between attornies. They are like any other articles of that nature; and by them the partners brought into a common stock the emoluments of their practice for twenty-one years. But it is said that Mr. Richards has brought into the common accounts this salary. If he did so, I presume he did it on a notion that his office was abolished, and that he received compensation for the loss of the monopoly as attorney. Acting upon that notion, he was right in what he did; for whatever he received as compensation for his monopoly, he must have dealt with upon that principle. I think he was mistaken in his opinion, if that was his opinion; but it is not necessary to go into that subject now.

The question comes to this, whether or not these articles, which were articles of partnership between attornies for twenty-one years for the purpose of dividing the emoluments of their practice between them, of necessity embraced the official emoluments of any one of them as sworn clerk. Suppose that one of several attornies entering into partnership is steward of a manor, from which he derives a considerable part of his practice. He acquires from that practice emoluments which he would be bound to communicate to the partnership. But supposing the partnership to be dissolved, would he still be bound to communicate to the partnership the profits which he might receive as steward? But still it is said that upon the connexion of Mr. Richards with the partnership, his situation of side clerk was purchased with the partnership **[384]** money; and, therefore, if capable of being purchased, it was like the purchase of a lease or any thing else producing a clear profit, and must consequently be taken in equity to have been purchased for the benefit of the partnership; and that if this was a lease for Mr. Richards' life, and the rents and profits of it were divided among the partners, the conclusion would be inevitable, that it was taken for the purpose of a partnership in those profits, and must be made the subject of partnership division. I agree to that proposition in the general; but then I must see clearly that the intention was to purchase an office of this kind for the life of the party. At the time he was admitted, the partnership was to continue for the remainder of a term of twenty-one years. Why then should I infer that because the office was purchased with the partnership money, the partnership in the office was intended to last during the life of Mr. Richards? I put the case, during the discussion, of a banker's firm, and one of the partners in it a stockbroker, whose licence is purchased with the partnership money; does it follow that he is to play the part of stockbroker for the benefit of the partnership for the rest of his life? In such a case it would be a sufficient consideration for the partnership to advance the money, that by possibility the partnership might last long enough to be repaid the sum laid out. I should not be bound to presume, when the partnership ceased, that they held the profits of that situation for the life of another, merely because that one partner who held it might possibly hold it for that time. Now, suppose in this case that the partnership had expired by effluxion of time, would any of the partners have a right to say to their co-partner who held the office, "The partnership is at an end, but you must still divide the profits of your office with me—I may go where I please, but you are a sworn clerk of the Court of Exchequer, and must remain to perform your duties—I claim, as a purchaser, an equal **[385]** interest with you in the profits of your office; and, if you refuse, I shall compel you to perform the duties of it for the remainder of your life; for if I have not a right to your future fees as attorney, still I have a right to share the fees of your office as long as you live!" I think it is impossible that the parties could have contemplated such a result.

It appears to me that the purchase of the office with the partnership money by no means involves the consequence that it was partnership property. If it did involve that consequence, then the question would arise as to the legality of so deal-

ing with the office; but, under the circumstances of the case, that question does not arise. Then, inasmuch as it appears to me that the profits which are the subject of this suit are not received as a compensation for the loss of a monopoly of the profits of an attorney, but as an official salary only; and, inasmuch as they were not included in the partnership articles, and are not, for the other reasons which I have mentioned, to be considered as partnership property, I am of opinion that I must make a decree in favour of the defendant.

JOHN WHITE, *Plaintiff;* NATHANIEL GARDNER, JOHN STEVENS, AND WILLIAM INNES BAKER, Clerk, *Defendants.* May 11, 16, 18, 1835.—Agreement to lease the rectorial tithes of a parish, including the tithes of 90 acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the 90 acres as his counsel should advise: Held, not to be within the Statute of Maintenance.—Where an equitable lessee of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes, and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant: Held, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs.

The bill was filed by the equitable lessee of the rectorial tithes of the parish of Lashborough, praying against **[386]** the two first-named defendants, who were executors of one William Gardner, an account of tithes in respect of an off-going crop upon 80 acres of land within that parish, and praying that the other defendant, the rector, might be directed to pay to the plaintiff all such costs and charges as the plaintiff had or should be put to in the prosecution of the suit, in consequence of his refusal to be joined as a co-plaintiff.

The bill stated that the plaintiff had, by virtue of annual demises (which appeared on the hearing to be parol demises) of the tithes in question, from the defendant W. I. Baker, entered into the perception and receipt thereof, or of the greater part thereof, from Michaelmas, 1824, down to Michaelmas, 1827, at which time the said W. I. Baker agreed to lease such tithes to the plaintiff for a period of three years. That a memorandum in writing was signed and executed by the said W. I. Baker and the plaintiff for that purpose, dated the 2nd of February, 1828, whereby the said W. I. Baker agreed with the plaintiff, that he by a good and sufficient indenture of lease would demise and let to the plaintiff all and every the rectorial tithes and glebe lands of and belonging to the said rectory of Lashborough, including as well the tithes of about 90 acres of land, supposed to be within the said parish, which had not since the incumbency of the said W. I. Baker paid to him any tithes or compensation for the same, as also all the glebe lands which were supposed to belong to the said rectory, and which for many years past had not been enjoyed by the rectors of the said parish, for the term of three years from Michaelmas then last, if he the said W. I. Baker should so long live and continue rector of Lashborough, at the yearly rent therein mentioned.

The agreement contained a stipulation, which did not appear in the bill, that the intended lessee should covenant to commence and prosecute within six months, if so **[387]** advised by counsel, all proper and necessary legal proceedings for the recovery of the tithes of the 90 acres of land, and also for the recovery of certain glebe lands alleged to belong to the rectory, but which were in the possession of Lord Ducie.

The bill alleged that the plaintiff was advised that the said W. I. Baker was a necessary party to the suit, and that the plaintiff had in various ways requested him to allow his name to be used as a co-plaintiff; which the said W. I. Baker having refused to do, it became necessary to make him a defendant.

The defendants Gardner and Stevens, by their answer to the original bill, submitted that if any such demises as in the bill alleged were made to the plaintiff, or any such agreement as therein alleged was entered into, the said plaintiff did not thereby acquire any legal right or title, and did not, under the said alleged demises, acquire any right or title whatever to the said tithes; and that he was not competent to sue for the same, or any of them, in this Court. By their answer to the amended bill,

they alleged that if any such demises or leases were made, it was not stated, nor did it appear that the same were made in writing; and they submitted to the judgment of the Court, whether the said plaintiff became, or was by virtue thereof entitled (and they did not know that he was otherwise entitled) to the payment of tithes from all occupants in the parish of Lashborough.

The defendant W. I. Baker, by his answer, admitted the contract between him and the plaintiff, as stated in the bill, and that applications had been made to him, though not till after the filing of the bill, to allow his name to be used as a co-plaintiff. He stated that he had offered to accede to those applications, in case the plaintiff would give him a full and sufficient indemnity against the consequences of his becoming such co-plaintiff, and also in case the plaintiff would pay and discharge the arrears of rent **[388]** which had become and were due to the defendant from the plaintiff under the aforesaid contract or agreement for the said tithes. He added that inasmuch as the plaintiff was, at the time of making such applications, indebted to him, the defendant, in a considerable sum, he was unwilling to incur a liability on behalf of the plaintiff, whilst the latter refused or neglected to perform the agreement. He alleged that he was at all times ready and willing, and had offered to concur in any receipt or discharge for the tithes now sought to be recovered; and, therefore, he submitted that his being made a party to the suit was wholly unnecessary and vexatious, more especially as he was advised that the plaintiff was competent alone to recover and give effectual discharges for what was sought by the said bill to be recovered. Wherefore he denied that he ought to pay to the plaintiff the costs demanded of him by the bill.

Mr. Simpkinson and Mr. Macdougall, for the plaintiff. The defendants, the executors, contend that although the rector is a party to the suit, yet the plaintiff is incompetent to sue. On the other hand, the rector contends that the plaintiff might sue alone; that to make him, the rector, a party, is unnecessary and vexatious, and that he ought not to be compelled to pay the plaintiff the costs which the latter seeks by his bill. Both these defences are untenable. The rector is a necessary party; but being made a party, the equitable lessee may sue: *Henning* v. *Willis* (3 Gwill. 898; 2 E. & Y. 188); *Jackson* v. *Benson* (M'Clel. 62; 3 E. & Y. 1121); *Williams* v. *Jones* (1 Younge, 252). Whether the party legally entitled to the tithes is made a co-plaintiff or a co-defendant, is immaterial. In *Jackson* v. *Benson*, the Court allowed the plaintiff to amend his bill, by making Lord Lonsdale, the impropriate rector, a party; but the allowance to amend did not specify whe-**[389]**-ther Lord Lonsdale should be made a plaintiff or a defendant; and it is clear that by either mode any objection for want of parties would be obviated. Then as the rector is a proper and necessary party to the bill, the plaintiff must be allowed the costs which he has incurred in consequence of the rector not consenting to be made a plaintiff except on terms. He had no right to make such terms. Under the agreement, there was an implied contract that the plaintiff should be at liberty to use the rector's name.

Mr. Wilbraham, for the defendants, the executors of Gardner. It may be conceded that the rector being made a party, no objection to the suit can be sustained, on the ground that the plaintiff is merely an equitable lessee of the tithes. But admitting a part of the tithes claimed by the bill to be due to the plaintiff under the annual demises, he has, at all events, no legal claim to the remainder, the agreement under which the remainder is alleged to be due being void under the Statute of Maintenance (32 Hen. 8, c. 9). The rector cannot, without possession, take upon himself to let the tithes of the 90 acres to the plaintiff; nor can the plaintiff enter into a covenant to take legal proceedings for the purposes mentioned in the agreement. The agreement is one and entire; not a separate demise of one part and of another part. It is an agreement to demise the whole of the tithes, part of which have not been for years in the rector's possession. This is fatal to the plaintiff's whole case as regards the tithes claimed under the agreement.

Mr. Bethell, for the defendant, the rector. The plaintiff was not entitled to call upon the rector to join him as a co-plaintiff; he is, therefore, not entitled to the costs **[390]** which he prays by his bill. Where there is an express trust, the person having the equitable interest may generally call on his trustee to join him in a suit relating to the trust property. But there was no express trust between this defendant and the plaintiff. All that the defendant has done is to enter into a written agreement to grant the plaintiff a lease. This, no doubt, confers on the plaintiff an equitable

interest, but it raises no trust of such a nature as to compel the defendant to join with him in a suit. The plaintiff ought to have called upon the defendant to grant him a lease. The agreement to grant the lease might have been carried into effect the next day. It is from the plaintiff's own laches that he stands in his present situation. [Alderson, B. All that he has been guilty of is the taking an equitable instead of a legal interest. Could the defendant refuse to join on that ground alone?] He could insist upon being paid his costs. You cannot compel a man, upon a mere indemnity, to join you in a Chancery suit. [Alderson, B. The defendant professed to give the plaintiff a present interest, with a prospect of a future lease; but by taking this course he is not giving him the full benefit of his present interest. Why should the plaintiff be compelled to take the more expensive mode of suing?] It is the result of the plaintiff's own act. Besides, the defendant was willing to join as plaintiff upon having a full and sufficient indemnity.

Mr. Simpkinson, in reply. With respect to the objection raised by the two first defendants, it is clear that this case has nothing to do with the Statute of Maintenance. The object of that statute was to prevent a person from selling that of which he was not in the possession. Now, the rector in that character was entitled to all the rectorial tithes. The agreement was for a lease, not of the tithes of any particular tract of land, but of all the tithes, both great and small, of the rectory. Then, the mere non-**[391]**-perception of a portion of them cannot operate as a total disseisin of the rector. It is impossible that an agreement to lease all the rectorial tithes, where some have not been paid, should be within the statute.

In reply to the argument of the rector, it is to be observed that no lease, if it had been immediately executed, could have given the plaintiff a legal right in the by-gone tithes. The plaintiff was satisfied with the implied contract, which always takes place in cases of this nature, which was to have the use of the assignor's name to recover the tithes in the usual manner. If he had refused to lend his name, the plaintiff might have filed a bill to compel him to institute a suit; but the practice is, upon a refusal of this nature, to make the party a co-defendant. It is said that the defendant refused to be a plaintiff, because he could not have a full and sufficient indemnity; but he claims, by his answer, what he has no right to claim, namely, arrears of rent.

May 18th.—ALDERSON, B. The question with regard to the two first defendants is whether the plaintiff fulfils the character of equitable lessee of the tithes of the rectory of Lashborough; because it is quite clear from the authorities that, if he does fulfil that character, he, having made the lessor a defendant, has a right to the account which he seeks by his bill. Now it is said that he is not so entitled, by reason of the agreement between him and his lessor, the rector, falling within the provisions of the Statute of Maintenance. It appears that, for some years, the plaintiff held the tithes of Mr. Baker, the rector, by parol; but that in February, 1828, Baker came to a written arrangement with him to this effect—that he, Baker, would, by a good and sufficient indenture of lease, demise to the plaintiff all the rectorial tithes and glebe lands of the rectory of Lashborough, including the tithes of ninety acres of land which had not paid tithes during the rector's **[392]** incumbency, and also all the glebe lands which were supposed to belong to the rectory, and which for many years had not been enjoyed by the rector. The term for which the lease was to be granted was for three years from Michaelmas preceding the date of the agreement; and then there is a covenant that the plaintiff shall within six months after the commencement of the lease, if so advised by counsel, commence and prosecute legal proceedings against the occupiers of the ninety acres of land for the tithes of those lands, and also against Lord Ducie for the recovery of the glebe lands in his possession. It is said that this agreement falls within the Statute of Maintenance, inasmuch as it is not a mere agreement for a demise of all the glebe lands and rectorial tithes, but of certain tithes and glebe lands of which the lessor was not in possession; upon a covenant that the lessee should sue for the recovery of those tithes and lands. But it does not appear to me to fall within the provisions of that statute; for, in the first place, it does not appear from any statement in the bill that the rector was out of possession of the tithes of those lands. He must be considered as being rightfully in possession of the tithes of all lands within the parish. He lets all the tithes; and all that is stated is that he has not received tithes of those ninety acres. But that may be by reason either of a composition or of neglect on the part of the rector to receive or enforce the payment of them. It does not follow from the circumstance stated that he is out of possession

of them; he being in possession of them generally. Besides which, all that the lessee undertakes to do is to bring such actions for the recovery of those tithes and lands as his counsel shall advise. It is, therefore, not to be presumed that he will be advised to bring any actions which by law he is not entitled to bring. In addition to this, the observation in Co. Litt. 369 b., seems applicable to the present case. It is there said that "the words of the statute being any pretenced right, therefore **[393]** a lease for years is within the statute. But yet, if a man make a lease for years to another, to the intent to try the title in ejectione firmæ, that is out of the statute, because it is in a kind of course of law; but if it be made to a great man, or any other, to sway or countenance the cause, that is within the statute." Upon the whole, therefore, it appears to me that this agreement is not within the statute, and that the right of the plaintiff to the tithes for the away-going crop being in other respects established, he is entitled to a decree.

It was contended on the part of the plaintiff that the defendant Baker ought to pay him the costs which he had been put to in making Baker a defendant instead of a plaintiff. On the other hand, it was contended that, being made a defendant solely for the purpose of establishing the plaintiff's claim, Baker must be paid his costs. Now it appears to me that the question depends on this consideration—whether there was any agreement expressed or implied between Baker and White, that Baker should permit the use of his name as co-plaintiff. If there was any such agreement either expressed or necessarily implied, then White is entitled to succeed; but if there was no such agreement, then Baker is entitled to his costs of being brought before the Court. Now it is clear to me that there was no express understanding on the part of Baker to permit his name to be used, nor any necessary implication to that effect; because all that the agreement amounts to is that Baker will, at the request of White, execute to him a legal instrument, giving him a legal claim. It was White's fault that he did not get the agreement put into a legal shape before he commenced the suit. If he had so done, there would have been no necessity for making Baker a party at all. If he had not so done, but had made his claim upon Baker to execute the lease, and that claim had been neglected or refused, then he would have been entitled to place Baker in the situation **[394]** of plaintiff. Further, if he had entered into this agreement, and there was no other mode of obtaining redress, then there would have been a necessary implication that Baker agreed to be made a plaintiff. But when I find that by the practice of Courts of equity he may obtain redress by making the rector either plaintiff or defendant, this appears to me to put an end to any necessary implication that, under such an agreement as this, the rector was bound to lend his name as a plaintiff. Therefore I think that, though the defendant Baker has not altogether put his refusal to join in the suit on the right ground, because he seeks for a further payment from the plaintiff beyond the indemnity; yet, as he has not necessarily agreed to permit his name to be used as co-plaintiff, he is entitled to his costs.

ESDAILE AND OTHERS *v.* LA NAUZE AND HEYLAND. May 29th, June 15th, 1835.—Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a Court of equity will restrain even a bonâ fide holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled.—Where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee, after the bill has arrived at maturity, will not give the holder any title.—A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal.

[S. C. 4 L. J. Ex. Eq. 46.]

Langford Heyland, Esq., by a power of attorney, dated the 27th of August, 1830, authorized Robert Hitchcock to oversee, let, manage, and improve his several estates in Ireland, specifying them by name, and every other property belonging to him, wheresoever situate, or of whatsoever description, or howsoever called or known; and

for the purposes aforesaid, in the name of his principal, to execute agreements and leases, to receive and distrain for rents, to give acquittances of every description, and to bring actions and suits at his discretion for the recovery of rents, or any other debt, duty, matter, or thing due or coming to his principal for or in respect of [395] the premises, or in any other respect whatever. "And, in my name, to give, and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom; and generally to act for me and on my behalf in all matters as fully and amply in all respects as I might or could do therein, were I personally present and had done the same."

In pursuance of this power of attorney, Hitchcock became the manager and receiver of Heyland's estates in Ireland; and in the course of his dealings in that character, he was in the habit of making remittances to Heyland by bills of exchange, drawn by St. George Gregg & Co., bankers at Dublin, upon and accepted by the plaintiffs, who are bankers in London. He was also, as such agent, in the habit of making lodgments of money with Gregg & Co.; but at the time when the bill in question in this cause was drawn, Gregg & Co. had no effects in their hands belonging either to Heyland or to his agents.

In March, 1832, Hitchcock sent Gregg & Co. a letter containing a banker's cheque for 500l., drawn upon the Coleraine branch of the provincial bank of Ireland, accompanied with a request that, in consideration of such cheque, Gregg & Co. would draw a bill on London for the sum of 500l. in favour of Heyland. Accordingly, in compliance with that request, Gregg & Co. drew a bill of exchange for 500l. upon the plaintiffs, dated the 10th of March, 1832, payable to Heyland, or his order, at sixty-one days after sight, which they delivered to Hitchcock's clerk, retaining in their hands the cheque drawn upon the Coleraine bank.

Immediately upon the receipt of the bill, Hitchcock indorsed it in the name of Heyland to one Stewart, who, on the 12th of March, sold it to the defendant, La Nauze, a bill broker, for 492l., and afterwards left the country. It was [396] admitted that La Nauze had no notice of the fraud. Upon the purchase of the bill, he immediately sent it to the plaintiffs for acceptance, and they accordingly accepted and returned it.

Upon presentment of the cheque for 500l. for payment at the Coleraine bank, payment was refused, and it was then found that the cheque was a nullity, and that Hitchcock had absconded to America. In April, 1832, Gregg & Co. became bankrupt, being indebted to the plaintiffs in a large balance over and above the amount of the bill.

After the bill arrived at maturity, which was on the 17th of May, the defendant, La Nauze, was for the first time apprized of the fraud. Having failed in his applications to the plaintiffs to pay the bill, he was advised to get the bill indorsed in reality by Heyland, who, during the whole of these transactions, was abroad. Heyland accordingly did so, in consideration of being paid one-half of the amount of the sum to be received upon the bill. La Nauze then brought his action against the plaintiffs to recover the amount; and the present bill was, consequently, filed against him and Heyland (who was still out of the jurisdiction), praying to have the bill delivered up to be cancelled, and for an injunction to restrain the action.

The plaintiffs having obtained an injunction to restrain the action at law, that injunction was, after argument before Lord Lyndhurst, continued to the hearing.

The cause now came on to be heard upon the admissions of both parties. On behalf of the plaintiffs a letter was read which had been written to them by the defendant Heyland, in which he stated that Hitchcock, by indorsing the bill in his name, had committed a forgery.

Mr. Hayter and Mr. L. Wigram, for the plaintiffs. The defendant La Nauze, by his original answer, admitted that he procured a second indorsement to be made of Heyland's name, and, consequently, that the former indorsement [397] was invalid. Upon that answer it was considered by Lord Lyndhurst that no property had passed in the bill before it arrived at maturity, and that afterwards no property in it could pass; and therefore he continued the injunction. The bill was afterwards amended, and by his further answer the defendant La Nauze attempted to set up a different case. He said that his former answer proceeded on a mistake; that Hitchcock indorsed the bill as the attorney of Heyland, and that the second indorsement was a mere nullity. The truth is, however, that the whole of the facts on which the Court

is to proceed exist as they did at the time of the injunction. La Nauze had no legal title to the bill at the time it arrived at maturity. The letter of Heyland shews that the first indorsement of his name was a forgery. Now, however, that there is an arrangement between La Nauze and Heyland, they are silent as to the forgery, and resort to the power of attorney, in order to shew that Hitchcock was authorized to sign bills in Heyland's name. The setting up the power of attorney was only an afterthought. At all events, there is nothing in the instrument itself which authorizes the agent to sign bills of exchange. [Alderson, B. *Murray* v. *The East India Company* (5 B. & Ald. 204) went much farther than the present case. Here there is no power whatever to indorse bills. I think the case stands as it did before Lord Lyndhurst.] Then the Court will direct the bill to be delivered up: *Lisle* v. *Liddle* (3 Anstr. 649), *Mayor of Colchester* v. *Lowten* (1 Ves. & B. 226), *Peake* v. *Highfield* (1 Russ. 559).

Mr. Simpkinson and Mr. G. Richards, for the defendant La Nauze. The power of attorney is expressed in the most general terms with reference to the affairs of Heyland. There are two sets of general words, the first **[398]** applicable to rents and debts on account of rent, and the second applicable to all circumstances whatever. It seems clear that Hitchcock, under this instrument, had power to indorse in the name of Heyland, and not merely by procuration. But, at all events, there is no case in which a Court of equity will enforce the delivery up of an instrument where the party who holds it, whether it be void or not, is a purchaser for a valuable consideration without notice. It will leave the parties to settle the matter at law. Mitford, Pl. (3rd ed.) 222; *Hoare* v. *Parker* (1 Cox, 224), *Bechinall* v. *Arnold* (1 Vern. 354), *Jerrard* v. *Saunders* (2 Ves. J. 454), *Wallwyn* v. *Lee* (9 Ves. 24). The principle is applicable here. A defendant is not bound to resort to a plea in order to insist on a purchase for a valuable consideration. He may do this by his answer, as was the case in *Jerrard* v. *Saunders*. It would be different if he attempted to recover in a Court of equity as a plaintiff, but equity will not interfere against him. Here the defendant was a purchaser for a valuable consideration without notice of the fraud, and the second indorsement cannot affect his title in that character. The acceptors in this case must be liable to the loss. They accepted the bill on the credit of Gregg & Co. Their acceptance implies that they had effects of Gregg & Co. in their hands sufficient to answer the amount, and they cannot now say that they had no such effects. At all events, the equity of the defendant is equal to that of the plaintiffs.

Mr. Hayter, in reply.

June 15th.—ALDERSON, B. The facts of the case, as stated by the mutual admissions of both parties, are these. On the 9th March, 1832, Robert Hitchcock, jun., who was the agent **[399]** of the defendant Heyland, under a power of attorney, the terms of which I shall presently advert to, wrote to St. George Gregg & Co., the drawers of the bill of exchange now in dispute, the following letter. [His Lordship then read the letter.] In pursuance of this letter, the bill now in question was drawn by St. George Gregg & Co. on the plaintiffs, bankers in England, and given to Hitchcock. As soon as he got possession of it, he put upon it the indorsement of the name of Heyland, in favour of whom it was drawn, who was then absent from Ireland, and caused it to be put in circulation through a person of the name of Stewart, before it could be possible for Gregg & Co. to be aware of the dishonour of the Coleraine cheque, or to take any measure to prevent the acceptance of the bill by the now plaintiffs in equity. The defendant La Nauze, on the 12th, became the purchaser of this bill, without any knowledge of the fraud or suspicion of the genuineness of the indorsement, and paid full value for it. As soon as the bill had been thus put into circulation, it was transmitted for acceptance, and duly accepted by the plaintiffs. On sending, however, the cheque mentioned in the letter of the 9th March to Coleraine, it was dishonoured; and as to this part of the case, I entirely adopt the view taken of it by Lord Lyndhurst. It seems to me to have been a fraudulent contrivance by which Hitchcock obtained for his own use the amount of the bill in question. Subsequently to the bill becoming due, the defendant La Nauze, who had then discovered the fraud and contrivance which had been practised, and who was apprized of the doubt as to the validity of the original indorsement, procured another and a real indorsement from Heyland, on the terms of equal division of the amount to be obtained from Messrs. Esdaile & Co. La Nauze having afterwards brought an action at law, this bill has been filed.

The first objection to it is that there is no ground for interference in equity, because La Nauze is a bonâ fide [400] holder for value. If this were so, the authorities cited in the argument would lead me to think that the bill ought to be dismissed. But there is a fallacy in so considering him. It is not disputed that the plaintiffs would be entitled to redress in equity as against Hitchcock, the person by whom the fraud was accomplished, or Heyland, who is the same as Hitchcock for this purpose, being the principal on whose behalf Hitchcock appeared to act. And though a defence at law might be made under these circumstances, still fraud is equally cognizable in equity and the subject of relief. But here, although La Nauze is in the possession of the bill, having paid value for it, yet if the indorsement under which he received it is a forgery, it is the same as if there were no indorsement at all; and then he is not, in truth, the holder of it, for he has no title by indorsement, the only way by which he could obtain a title to this bill.

So it stands as to the indorsement originally written on the bill, unless, indeed, Hitchcock, who wrote it, had authority under the letter of attorney to indorse bills for Heyland. But looking at that instrument, I am clearly of opinion that it confers no such power. The general words are not sufficient, for they must be construed with reference to the antecedent matter, which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect.

But a power to indorse bills is not necessary, and being in truth an almost unlimited authority to pledge the credit of Heyland, it would be very dangerous to infer it, unless the power were very clearly to be inferred or expressly given. Neither of these circumstances occur here. Whether the letter of attorney and the generality of its phraseology be sufficient to excuse Hitchcock, if criminally indicted, on the ground that he may bonâ fide have be-[401]-lieved he had such a power, I do not presume to decide. That would be a question for the jury. I think, therefore, that in fact this first indorsement was in truth no indorsement, and consequently that it does not confer on La Nauze the privilege of a bonâ fide transferee of the bill for value. Nor does the subsequent indorsement alter the case. That was made after the bill was over-due, and the plaintiffs, as against La Nauze, claiming under that indorsement, would have all the equities they could have as against Heyland.

Upon the whole, I think the plaintiffs entitled to the relief they claim. But as I am satisfied that La Nauze is equally with them a victim of the fraud of Hitchcock, I think the decree for the plaintiffs should not be accompanied with any decree against him for costs. Let the plaintiffs, therefore, have a decree in the terms they pray for, but let each party pay their own costs.

Decree accordingly.(*a*)

HIPWELL AND ANOTHER *v.* KNIGHT. May 16, 18, July 13th, 1835.—Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired: Held that, under these circumstances, the benefit of the stipulation as to time was waived by the purchaser.—Where a person had contracted for the purchase of an estate from trustees under a deed of release and assignment for the benefit of the creditors of a trader, upon a stipulation that a good title should be made by a given day, and that day fell within the period during which a fiat in bankruptcy might have issued against the trader: Held, that he was in the situation of a purchaser who had waived a stipulation that time should be of the essence of the contract.—Where parties contract that the purchase of land

(*a*) See *Mead* v. *Young*, 4 T. R. 28.

shall be completed within so many months, calendar and not lunar months are intended.

[S. C. 4 L. J. Ex. Eq. 52. See 4 Y. & C. Ex. 566.]

William Pool, of Steventon, in the county of Bedford, baker and farmer, being indebted to the plain-**[402]**-tiffs and other persons, by indentures of lease and release and assignment, dated respectively the 7th and 8th days of September, 1832, but which were not gazetted pursuant to the provisions of the stat. 6 Geo. 4, c. 16, s. 4, conveyed all his real and personal property to the plaintiffs, upon trust to sell the same absolutely, and to apply the proceeds for the equal benefit of his creditors.

In pursuance of these trusts, the plaintiffs caused certain freehold and copyhold premises belonging to Pool to be put up to auction on the 31st of October, 1832, in fifteen lots, subject to certain conditions of sale. By the third of these conditions, each purchaser was immediately to pay a deposit of 20l. per cent. on his purchase-money into the hands of Mr. Eagles, the vendor's solicitor, and to sign an agreement for paying the remainder on the 6th of January following, when the purchase was to be completed; and if the completion of the purchase were delayed by any cause whatever beyond the 6th of January, the vendors were to be entitled to interest after the rate of 5l. per cent. for the remainder of the purchase-money.

The sale took place, and the defendant, by his agent Thomas Knight, was declared the purchaser of lots 1, 2, 8, and 15, for the sum of 3085l. Thomas Knight thereupon signed an agreement for the payment of 617l., as a deposit, upon a given day, and of the remainder of the purchase-money on the 6th of January following. The defendant soon afterwards took possession of the three first-mentioned lots, and demised them to Thomas Knight, who planted an orchard upon them, and exercised various other acts of ownership.

On the 6th of January, 1833, the day appointed for the completion of the purchase, no abstract of the title had been delivered to the defendant. A correspondence then took place between the solicitors of both parties, in the course of which, and particularly by letters dated the 7th and 19th of March, the solicitors for the defendant **[403]** threatened to abandon the contract, and insisted that, at all events, as the purchase was not completed on the 6th of January, their client ought not to pay the interest which had been stipulated to be paid from that day. In consequence of this correspondence, an interview between the solicitors of both parties took place on the 23rd of March, on which occasion a fresh agreement was drawn up and signed by them, in the following terms:—

"Memorandum of an agreement, made and entered into the 23rd of March, 1833, between, &c. Whereas, John Knight, of Harrold, gentleman, by his agent, Thomas Knight, lately purchased by public auction lots 1, 2, 8, and 15 of certain estates at Steventon, belonging to the assignees of Mr. William Pool, the purchase of which was to have been completed, under the conditions of sale, on the 6th day of January last, and the said John Knight paid the sum of 617l., exclusive of the auction duty, on account of the purchase-money, amounting to 3085l.; and whereas the said John Knight entered into possession of the said purchased premises, but hath not yet completed his purchase, no abstract of title having been yet delivered to him or to his solicitor; and whereas the said John Knight is now ready to complete his purchase, it is agreed as follows:—That an abstract of title shall be immediately delivered, and a good title made according and subject to the conditions within four months from the date hereof. That at that period, or sooner, if the title is completed, the purchase-money shall be paid. That with respect to a sum of 2000l., part of the said purchase-money, no interest whatever shall be paid thereon from this time; and as to the remainder of the said purchase-money, 4l. 10s. per cent. only shall be allowed from this time. That if the title shall not be perfected within the time aforesaid, the said John Knight shall be released from his contract; and instead of the said John Knight receiving from his brother Thomas Knight, or whosoever may be in the occu-**[404]**-pation of the said premises, the rents and profits thereof, the vendors shall receive them; the said John Knight hereby guaranteeing that the rents shall be paid from the time of possession being taken, until Michaelmas next. That if the title shall not be completed as aforesaid, the deposit money and auction duty shall be returned to the said John Knight, with interest, as is usually allowed in such cases. That the said John Knight shall, if requested, join the vendors in giving a notice to

the said Thomas Knight to quit the premises at the expiration of his current year tenancy, or holding thereof; it being understood that the said John Knight shall not be under any obligation to compel the said Thomas Knight to quit the premises, although he will concur in any act which may be thought necessary for that purpose at the request of the vendors and at their expense. That the said John Knight will, at the request of the vendors or their solicitor, invest the said sum of 2000l., either in Exchequer bills or on such other government securities as may be thought advisable, the vendors indemnifying the said John Knight from any loss in case the title should not be perfected, and allowing him 4l. per cent. on the money."

On the 30th of March, an abstract of title to part of the premises was furnished to the defendant's solicitor, and on the 13th of April, at their request, an abstract of title of the remaining part was sent to them. On the 18th these were returned with several observations and requisitions on the part of the defendant's solicitors, who considered the title very imperfect. From that day till the 21st of July communications took place between both parties relative to the title; the solicitors for the defendant complaining that the abstract, and further abstracts, sent, were not satisfactory. There were expressions contained in the letters of both parties, shewing that they considered that the time for completing the contract was drawing to an end. On the 21st of July the last ab-**[405]**-stracts were sent, and on the 23rd of July, being the day fixed for the completion of the contract, the defendant's solicitors returned the abstracts, with some further observations and requisitions. On the same day, however, formal notice was given in writing to the plaintiffs, and their solicitor, that the contract was abandoned by the defendant. On the 25th of July the solicitors for the defendant wrote to the plaintiffs' solicitor as follows:—"We cannot but express our surprise that our first requisitions should have met with such little attention, and that after we had repeated them, we should, at the eleventh hour, indeed only the day before the expiration of the four months, have a further additional abstract of thirty-seven sheets. We have, as far as time would allow, observed upon the answers of the vendor's solicitor. We do not intend to confine ourselves to those objections only which we have already made upon the title, but reserve the right of making any others which may present themselves, if circumstances should render it necessary."

The plaintiffs filed their bill for a specific performance of the foregoing agreements, so far as related to lots 1, 2, and 8; offering to rescind the contract as to lot 15, as to which they admitted that a good title could not be made. They charged that they could make a good and marketable title to the three first-mentioned lots. That time never was of the essence of the contract, and that no damage or injury had been sustained by the defendant, by the non-completion thereof at the precise time specified; and, moreover, that a good and marketable title was made out by the plaintiffs to the said three lots within the time stipulated by the second agreement. That any objection to the title which might be raised on the ground that the release and assignment of the 8th of September, 1832, had not been gazetted, had been waived by the defendant.

The cause now came on for hearing.

On behalf of the plaintiffs, the evidence of their solicitor **[406]** Mr. Eagles was read. With reference to the charge in the bill, that time was not of the essence of the contract, this witness stated that when the abstracts were sent by him on the 21st of July, as before mentioned, to the defendant's solicitor, they were accompanied with observations, and a marginal note in the deponent's handwriting; that no notice was taken of these by the defendant's solicitor, but that further requisitions as to the title were made and demanded of the deponent at the time of the return of the abstracts, which he stated to be on the 26th of July, and consequently the deponent did not consider that the abstracts were returned to him as upon the termination of the contracts.

With reference to the alleged waiver by the defendant of the defect in the title arising from not gazetting the release and assignment, the same witness stated that at the meeting at which the second agreement was drawn up, Mr. Burnham, the defendant's solicitor, inquired whether the assignment had been gazetted, to which the deponent replied that it had not, but that the defect might be supplied by an affidavit by Mr. Pool, that all his creditors who could by possibility make him a bankrupt had executed the assignment. That Mr. Burnham replied that it would have been better

had the assignment been gazetted, as it would have avoided any question. That the deponent explained that the omission had arisen from the hurry of business occasioned by the elections, which took place at that time. That, upon this explanation, Mr. Burnham proceeded to draw up the agreement, mentioning three months for the completion of the purchase, which was afterwards altered to four months.

On the part of the defendant, the evidence of Mr. Burnham, one of his solicitors, was read. Upon the question of time, this witness stated that, at the interview between him and Mr. Eagles, the deponent asked Eagles **[407]** how long it would take to make out the title and complete the contract, with a view to having the time limited in the contract. That Eagles answered that the title was perfectly good, and that three months was sufficient. That the deponent thereupon prepared the contract accordingly; but that before or during the preparation thereof, he gave Eagles to understand that if the purchase was not completed within the time to be limited by the agreement, the defendant should be considered at liberty to abandon the agreement. That the deponent afterwards told Eagles that if he had any doubt about three months not being long enough, he had better take another month. That Eagles acceded to the deponent's offer, and altered the contract accordingly by striking out the word "three," and substituting the word "four."

With respect to the assignment, this witness denied that he, or, as he believed, any other person at the time of drawing up the agreement of the 23rd of March, 1833, undertook or promised to accept any affidavit by Pool, or any other person, as a waiver or abandonment of any objection to the title to the premises founded upon the circumstance of the indentures of the 7th and 8th of September, 1832, being an act of bankruptcy on the part of Pool.

Mr. Jervis, Mr. Simpkinson, and Mr. Hayter, for the plaintiffs. First, time was not of the essence of the contract. Even if it were of the essence of the first contract, it was not so of the second. The principal object of the agreement was to release the defendant from payment of interest. That is clearly shewn by the letter of the 19th of March, in which the solicitors for the defendant say, "You will recollect that by the conditions our client is to pay 5l. per cent. interest from the 6th of January, when the purchase was to have been completed; under these circumstances, we will not allow him at any rate to pay **[408]** this, and it will depend upon what passes at our interview whether we put into execution our threat or not." Then, in consequence of this desire on the part of the defendants, the second agreement was drawn up, and by that it was stipulated that in respect of 2000l., part of the purchase-money, no interest whatever should be paid. That was the primary object of the agreement, and the term of four months was inserted merely that some time might be named.

Secondly, the objection that time was the essence of the contract has been waived by the conduct of the defendant. The time limited by the agreement was four months, and there being nothing from which the Court can infer that the parties meant the contrary, the time must be calculated according to lunar and not calendar months: Co. Litt. 135 b.; *Catesby's case* (6 Rep. 61); *Wollaston Dixie's case* (1 Leon. 96; Vin. Abr. Time (C.)); *Barksdale* v. *Morgan* (4 Mod. 185); *Jocelyn* v. *Hawkins* (1 Strange, 446); *Tullett* v. *Linfield* (3 Burr. 1455); *Lacon* v. *Hooper* (6 T. R. 224); *Lang* v. *Gale* (1 M. & S. 111). According to that mode of calculation, the time mentioned in the contract did not expire on the 23rd, but on the 13th of July; and, therefore, any thing done by the defendant after that period amounted to a waiver of the objection as to time. Calculating, however, by calendar months, the abstracts were not returned till the 23rd of July, and even then the defendant's solicitors do not insist on the expiration of the time, but make additional observations on the abstracts, and express an intention "to reserve to themselves the right of making any other objections, should circumstances render it necessary." Can it be said after this letter, that the stipulation as to time was not waived by the defendant? The cases upon **[409]** this subject are collected in Sir Edward Sugden's Treatise (V. & P. 8th edit. pp. 365, 366), and amongst them that of *Seton* v. *Slade* (7 Ves. 265) may be mentioned as being a much stronger case than this. Upon the whole, a Court of equity is extremely reluctant to hold time to be of the essence of the contract; and it should seem that a strict construction of contracts, with reference to time, can only be supported in equity in cases of a special nature, as where the lease of a house, or an annuity, is the subject of contract: *Withy* v. *Cottle* (Turn. & Russ. 78); *Levy* v. *Lindo* (3 Mer. 81); *Doloret* v. *Rothschild* (1 Sim. & Stu. 596)

Thirdly, a good title was shewn within the limited time, and though under the Bankrupt Act the execution of the indentures of September, 1832, ought to have been gazetted, yet that objection was waived by the defendant's solicitor consenting to receive the affidavit of Pool; and now the lapse of time has conferred a good title, notwithstanding the statute.

As regards lot 15, the plaintiffs are willing that the defendant should be released from his contract; but inasmuch as the possession of that lot is not essential to the enjoyment of the others, the circumstance that a good title cannot be made to it does not enable the defendant to put an end to the contract as to the other lots: *Poole* v. *Shergold* (2 Bro. C. C. 118).

Mr. Boteler, Mr. Temple, and Mr. Daniel, for the defendant. Time may in equity be made of the essence of the contract in three ways; namely, by considerations arising either from the nature of the property, or the laches of the parties, or express agreement. It was denied by Lord Thurlow, that any express stipulation that the purchaser should not be bound after a certain time, **[410]** could be acted upon in a Court of equity. But that doctrine was impeached by Lord Loughborough in *Lloyd* v. *Collett* (4 Bro. C. C. 469), and afterwards overruled by Lord Eldon, as his Lordship notices on several occasions: *Levy* v. *Lindo* (3 Mer. 81); *Boehm* v. *Wood* (1 J. & W. 419); *Withy* v. *Cottle* (Turn. & Russ. 78). And it is now well settled that the purchaser may expressly stipulate that beyond a certain time he shall not be bound. In *Hudson* v. *Bartram* (3 Madd. 440) time was expressly made of the essence of the contract, and the Court would have decided accordingly, had not the defendant waived that part of the agreement. In *Lloyd* v. *Rippingale* (not reported) the plaintiff had contracted to sell a manor in Norfolk to the defendant. It was stipulated in express words that time should be of the essence of the contract. The abstract was delivered immediately and was retained by the purchaser till within two days of the expiration of the time for completing the contract, when it was returned with 80 or 90 objections. The parties then came to an arrangement that the time should be extended, which was accordingly done by a second agreement, containing the same expression as to time as the former. A clause was likewise introduced, that such extension of time should not do away with the right to object that the title was not good. In the end the purchaser turned round and would not take it, because the title was not made out at the time stipulated for. A bill was then filed for the specific performance of the contract, and it was contended on the part of the plaintiff that the purchaser had made an unfair use of the stipulation as to time; but the Vice Chancellor held that time was of the essence of the contract, and that the stipulation was not waived by the defendant. [Alderson, B. In that case the stipulation was express, **[411]** and the words "essence of the contract" were used. Is there any case where time is impliedly made of the essence of the contract? In *Seton* v. *Slade* Lord Eldon seems to question whether the specific intention of the parties is not controlled by what the equitable construction of their intention ought to be. The cases turn not so much on the general intention of the parties as to time, but on whether they intended, in the technical sense, that time should be of the essence of the contract. If you and I agree to do a certain thing on a given day, that is clearly our intention, but is that of the essence of the contract in a Court of equity?] It is apprehended that it is so now in equity; and if it be agreed that on a given day a person shall be released from his contract, that is now sufficient in equity to make time of the essence of that contract. Since the case of *Seton* v. *Slade* that mode of construction has been adopted by several Judges, though it did not happen to require adoption by Lord Eldon. *Hudson* v. *Bartram* is in this respect an instance in point; but *Williams* v. *Edwards* (2 Sim. 78) completely meets the present case. There one of the terms of the agreement was that the contract should be void, if the purchaser's counsel should be of opinion that a marketable title could not be made by a given time, and that was held to be a stipulation which made time of the essence of the contract. In addition to which, it may be remarked, that the inference which Sir Edward Sugden draws from the authorities is that the real intention of the parties is to be regarded in all cases (V. & P. 8th edit. 378, et seq.). Here the defendant found great inconvenience arising from the delay under the first contract. Time was not of the essence of that contract, for it contained a stipulation providing for the event of the title not being completed by the 6th of January. The defendant soon found that the completion of the purchase **[412]** was delayed. An urgent letter was written by his solicitors on

the 7th of March; a more decisive one on the 19th; and in the second letter they mention the payment of interest as one of the inconvenient results attending the delay, and not as a means of effecting a compromise. This led to the second agreement, which removes all the difficulty out of the purchaser's way. By this last agreement, no additional advantage as regards interest was given to the defendant, and, therefore, the stipulation as to interest is immaterial. It is clear, therefore, that the second agreement was made with an express view to shorten the time, and the alteration of the time for completing the contract from three to four months is an additional argument in favour of that view of the question, because it shews that the time was matter of anxious consideration.

But then it is said that the stipulation as to time has been waived by the defendant; and in support of that argument, the plaintiffs contend that the time, reckoning by lunar months, ended on the 13th of July. Notwithstanding the authorities cited on the other side, which, however, are contradicted by *Titus* v. *Lady Preston* (1 Str. 652), the time in these cases is to be calculated according to the common acceptation of the word "months." It was so calculated in *Seton* v. *Slade;* and in the present case it is clear that the parties put no other construction on the word "months" than that which it usually bears. The parties understood throughout their proceedings that the time would expire on the 23rd; and on that day the abstracts were returned and notice given of the abandonment of the contract. It is attempted to be said that the defendant agreed to waive the objection that the assignment had not been gazetted, and to accept Pool's affidavit that he had no debts upon which a fiat could issue. But the plaintiffs do not and cannot prove that the de-**[413]**-fendant agreed to accept such an affidavit; and even if he had so agreed, it would not have cured the defect in the title: *Lowes* v. *Lush* (14 Ves. 547).

Mr. Jervis, in reply. No doubt time may be of the essence of the contract in equity as well as at law. The question is whether it was the essence of this contract. In ascertaining this question, your Lordship will not look to the terms of the contract alone, for that will be doing nothing in a Court of equity, but to all the circumstances of the case. Here it is to be remembered that the defendant entered into possession of the premises, altered the boundaries, cut down trees, and let the property to his brother, who planted an orchard and made other alterations. These circumstances must be taken into consideration in dealing with the second contract. Taking them in connexion with the contract itself, it is clear that time was not of the essence of it. If the contract had been that, notwithstanding the defendant had taken possession, cut down timber, and exercised various acts of ownership, yet if the plaintiffs did not produce a good title by a certain time the contract should be rescinded; and time should be made of the essence of the contract—then, no doubt, it would be subject to the same construction in equity as well as at law. But in this case, the contract itself does not warrant, nor is it attended with circumstances that warrant, so rigid a construction. *Lloyd* v. *Rippingale* is distinguishable from the present case. There upon the time being extended, the stipulation as to time was repeated in the second agreement in the same words as before. In *Lloyd* v. *Collett* the defendant was not in possession.

ALDERSON, B. It is clear that if the title depended **[414]** on being completed on the 23rd of July, no title to the property was or could be made out on that day. There is no evidence that the defendant agreed to take the affidavit of Pool that all his principal creditors had executed the assignment, and the case which has been cited decides that a party is not bound to take a title so situated. There is nothing to shew that Mr. Burnham agreed to accept that title; and it ought to be a strong case to shew that a party on the part of his client agreed to waive a clear objection to the title. The question whether time was of the essence of this contract appears to me a nice and difficult question to decide; and I am the more disposed to think so, when I find that in *Seton* v. *Slade* Lord Eldon, with his profound legal attainments, says that if he were required to express himself with great accuracy upon the principle involved in a variety of cases on this subject, it would be necessary for him to look into those cases. If, therefore, I shall be called upon to lay down any general rule of equity upon this question, à multo fortiori, must I take time to peruse and consider the authorities.

July 13th.—ALDERSON, B. This was a bill filed by the plaintiffs, who are assignees of William Pool, a bankrupt, for the specific performance of a contract of

purchase entered into by him with them. The original contract was dated 31st October, 1832, the defendant having purchased at the auction of the bankrupt's lands, three lots, viz. Nos. 1, 2, and 8, the property of the bankrupt, and No. 15, being the property of the bankrupt's brother, Thomas Pool, and included in the same auction.

We may begin by laying all question as to No. 15 aside, by the mutual admissions of both parties. As to the other three lots, one of the stipulations at the auction was that a good title should be made on the 6th day of January following. Under this agreement the defendant entered **[415]** into possession, and let the lands to his brother, Thomas Knight, at a yearly rent, cut down some trees, and exercised various acts of ownership upon the property.

It is not disputed that time was not of the essence of this contract, and that, independently of the defendant's acts before enumerated, the omission to make out a good title on or before the 6th day of January, 1833, would have been no defence to the present suit, although at law it would have been a breach of the contract between the parties. But the present suit is resisted on grounds subsequently arising. From the correspondence between the solicitors, it appears that Messrs. Burnham & Co., acting for the defendants, had pressed Mr. Eagles, who acted for the plaintiffs, for the delivery of the abstract of their title; and by a letter, dated the 19th day of March, repeated the threat originally made by a letter dated March the 7th, that unless prompt measures were taken for completing the title, the defendant would throw up his purchase. Under these circumstances the parties met and entered into the agreement dated the 23rd of March, 1833, upon which, in truth, the whole question now turns.

Now the first question is whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a Court of equity is to be governed by this principle—it is to examine the contract, not merely as a Court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But in so doing I should think it prudent, in the first place, to look carefully at what the parties have expressed, because in general they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary.

[416] In the case of a mortgage, however, which I use rather for the purpose of illustrating the principle than as at all parallel to the present case, the Court looking at the real contract, which is a pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly, taking it to be clear that the general intention should override the words of the particular stipulation. So, in the ordinary case of the purchase of an estate, and the fixing a particular day for the completion of the title, the Court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is merely formal, and the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made. But this is but a corollary from the general proposition, which is, that the real contract and all the stipulations really intended to be complied with literally shall be carried into effect.

We must take care, however, that we do not mistake the corollary for the original proposition. If, therefore, the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion are instances of this. So also, if it appear that the object of one party known to the other was that the property should be conveyed on or before a given period, as the case of a house for residence or the like. I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a Court of equity. That is the real contract; the parties had a right to make it; why then should a Court of equity interfere to make a **[417]** new contract which the parties have not made? It seems to me, therefore, that the conclusion at which Sir Edward Sugden, in his valuable treatise on this subject, has arrived, is founded in law and good sense.

The only question, then, is to apply the test to the present case. Here the agreement of the 23rd of March arose out of a complaint of delay in completing the title. The agreement provided first that an abstract should be immediately delivered, and adds that a good title shall be made within four months from the date thereof. Then follows a stipulation for the payment of the residue of the purchase-money at the time the title is completed; and another stipulation relieving the defendant from the payment of interest in the mean time upon 2000l., which was in fact the greater part of the money remaining unpaid. If it had stopped here the case would have been quite clear. I should have considered the time only formal, and the real contract the relieving the defendant from payment of this interest during the reasonable delay necessary to complete the title. But the next stipulations are very important. They provide, first, that if the title be not completed within the fixed time, the defendant shall be released from this contract, and go on to stipulate as to the situation of the parties in that event, viz. that the vendors shall receive the whole rents of the premises from the tenant, for whose solvency, up to Michaelmas following, the defendant becomes guarantee, and that the deposit-money and auction duty shall be returned by the vendors to him with interest, and that, if required, he shall join them in giving a notice to quit to the tenant in possession.

I own that I cannot reconcile these stipulations with any other supposition than that both parties intended to fix a time for completing the contract, which was intended by them to be literally complied with. There is nothing inconsistent with this supposition in the admitted fact of **[418]** the change of the time from three months, as originally drawn, to four months, as it now stands. For the only question is whether a fixed time was intended to be part of the agreement. Indeed, I think this fact tends rather to confirm the supposition that time was intended to be of the essence of the contract: for, if not, it would have been almost immaterial whether the particular time named was three or four months, and probably no alteration would have been made. But if it were intended to be of the essence, then it would be material for the party who was to be bound by it to have the time for completing the contract as extensive as possible. I am therefore inclined to be of opinion that time was of the essence of this agreement.

But it is not necessary to give a decisive judgment on this point, inasmuch as I think that if it were so, still the stipulation has been waived. The result of the cases on this subject seems undoubtedly to be that slight circumstances are sufficient in a Court of equity to prevent a party from taking the benefit of such a stipulation; and that wherever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to this part of his agreement, he is to be taken to have waived it altogether.

The circumstances in *Seton* v. *Slade*, in which Lord Eldon held the stipulation to have been clearly waived, were of this description: the defendant, who had intimated, at a very early period of the transaction, his intention of requiring the contract to be completed by a given day, had nevertheless received, without objection, the abstract, and retained it till the expiration of the term; and yet, though he sent it back at the expiration of the period, and forthwith did all in his power to put an end to the contract, Lord Eldon held that his receiving the abstract without objection at a time when it was clear that the title could not be completed within the specific period was a waiver of that stipulation.

[419] Here the defendant received the abstract at a time when, as it seems to me, it was impossible for the title to have been completed within the period limited, for according to the evidence, there was no possibility of making a good title, at all events till the expiration of a twelvemonth from the execution of the assignment from Pool to the plaintiffs. The defendant's solicitor knew then that this assignment had not been gazetted, and according to his evidence, upon which I must act, there was no agreement for any affidavit of the assent of all material creditors as an equivalent for this omission. He ought, therefore, to have refused to accept the abstract, or to have sent it back forthwith. Instead of that, he keeps it to the last, and sends it back with observations, from which I should have concluded that the title was still open to further explanation, and more satisfactory proof. And even after this, on the 25th of July, the letter reserving a right to make further objections is written by the defendant's solicitors and sent to the plaintiffs.

Upon the whole, therefore, I think that this case is like *Seton* v. *Slade*, and that

the stipulation as to time has been waived by the conduct of the parties, and that I ought to decree that the plaintiffs are entitled to relief, in case they are able now to make a good title. I do not go on the ground that the time limited must be taken to be lunar months. It seems to me that that argument is not well founded.

It must be referred to the Master to examine and report whether the plaintiffs can now make a good title to the premises; and if they can, there must be a decree for a specific performance of the agreement. I think the Master must not, in that examination, allow any affidavit or proof of the assent of all creditors who could sue out a commission of bankruptcy, to be produced as a substitute for the non-gazetting of the deed of assignment by Pool to the plaintiffs. But if the mere lapse of time will be sufficient to cure that defect, that will be proper for him **[420]** to take into consideration. At present I do not give any opinion on that point. The question of costs must of course be reserved.

BLAKE *v.* WHITE. May 30th, 1835.—Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, a Court of equity will restrain an action on the bond, whether brought against the principal or the surety.—Upon a motion to revive the common injunction, the Court will hear the defendant on the merits.

[S. C. 4 L. J. Ex. Eq. 48. Applied, *Tucker* v. *Laing*, 1856, 2 Kay & J. 745; *Munster and Leinster Bank* v. *France*, 1889, 24 L. R. Ir. 82. See 4 Y. & C. Ex. 566.]

The late Sir Francis Blake being indebted to one White in the sum of 4300l., executed to him a bond for securing the repayment thereof, with interest, on the 4th of February, 1814; and in that bond the present Sir Francis Blake, the eldest son of the obligor, and the plaintiff his brother, were sureties.

In June, 1818, Sir Francis Blake the father died, having by his will devised several considerable real estates to his eldest son, charged with the payment of his debts, and likewise appointed him executor. There were also certain real estates which descended to Sir Francis Blake, the son, as heir at law to his father.

In October, 1818, White agreed with the agent of Sir Francis Blake the son, that upon receiving the arrears of interest which were then due on the bond, and upon receiving the future payments half yearly on the 1st of January and the 1st of July in every year, he would give time to Sir Francis Blake as the heir at law of his father, for payment of the principal sum mentioned in the bond. Accordingly the arrears of interest were paid, and the following memorandum was endorsed upon the bond, and duly signed:—

"October 27th, 1818. The sum of 296l. 6s. 5d. is this day paid to me in full of interest on the within bond, due up to January 1st, 1819, and the subsequent payments to be made every six months, commencing the 1st day of July, 1819."
"(Witness) J. Carmichael. (Signed) "JAMES WHITE."

[421] The interest was regularly paid to Mr. White at the times stated in the agreement. In 1830 it was, with his consent, reduced from 5l. to 4l. 10s. per cent. In 1832 White died. In 1833 his widow and executrix brought an action on the bond against the plaintiff, who thereupon filed his bill, stating that White had, upon the application of Sir Francis Blake, agreed to give him time for payment of the bond out of the real and personal assets of his father, and praying that it might be declared that the plaintiff, as surety in the bond, was released in equity from payment of the debt, and that the defendant might be restrained from proceeding in the action, or commencing any other action against him.

The plaintiff obtained the common injunction, which, however, was dissolved upon the coming in of the answer of the defendant, who denied, to the best of her belief, that any such application as that stated in the bill had ever been made to White, or that there was any understanding that the time for payment of the debt should be extended. Upon the dissolution of the injunction, the parties proceeded to the trial of the action at law, and a verdict was found against the plaintiff in equity. The plaintiff then amended his bill, by inserting in it a statement of the written agreement of October, 1818, and of the circumstances connected therewith; and the defendant having obtained leave for time to answer the amended bill, a motion was now made,

founded on affidavits, to restrain the defendant from entering up judgment on the verdict, or from suing out execution in the action.

The plaintiff, by his affidavit, stated that he was no party or privy to the arrangement in October, 1818, between White and the agent of Sir Francis Blake, or to the agreement or memorandum indorsed on the bond; and that he did not know until early in the present month (which was since the action), that such an agreement or memorandum had been made. He added that the pay-**[422]**-ments of reduced interest had been made without his knowledge or privity.

Mr. Cooper, in support of the motion, cited *Lingham* v. *Toule* (1 Anstr. 188), and contended that upon shewing that he had infused new equity into the bill, supported by affidavits, he had a right, as of course, to have the injunction revived; and that the Court would not hear the other party at this stage of the proceedings. But the Lord Chief Baron intimating his dissent from the latter part of this proposition—

Cooper proceeded to argue the merits. Till within the last few years the species of relief sought by this bill could only be had in Courts of equity; and in *Davey* v. *Prendergrass* (5 Barn. & Ald. 187) Lord Tenterden expresses his opinion to be that a discharge by parol ought not to be admitted as a defence in a Court of law to an action brought on an instrument under seal. Other Judges have shewn a disposition to admit the defence which Lord Tenterden deprecates. That, however, does not oust the jurisdiction of Courts of equity; and here the plaintiff was ignorant of what the actual agreement was until after the trial of the action. The surety under such circumstances has a clear title to relief in a Court of equity. [The Lord Chief Baron. Do you contend that in equity a parol agreement, without consideration, not to sue, is sufficient to discharge the surety? Does a Court of equity execute an agreement without consideration?] In *Nisbet* v. *Smith* (2 Bro. C. C. 579) the principal debtor in a bond having been arrested by the creditor, the latter agreed to waive further proceedings upon the debtor giving a warrant of attorney to confess judgment. Upon that warrant of attorney was in-**[423]**-dorsed an agreement, that no execution should issue for three years; and Lord Thurlow discharged the surety, upon the ground that the transaction was unjust, as it gave a credit for three years longer than the bond imported, contrary to the inclination of the surety. [The Lord Chief Baron. Is there any case where the surety has been discharged upon a mere parol promise to give time? In an action on a bond the defendant cannot, even if there be a consideration, set up any contract made between the obligee and the principal, unless that contract be under seal. Equity, on the other hand, makes no such distinction, if there be a consideration. Is there here sufficient consideration?] Here the consideration for the forbearance of the obligee was that he should receive interest upon the bond up to the 1st of January, 1819. That included interest which was not yet in arrear. Now a surety has always a right to come into equity and call upon the obligee to sue the obligor: *Rees* v. *Berrington* (2 Ves. jun. 540). But this arrangement put it out of the power of the obligee to sue with success.

Mr. Koe, for the defendant. There was, in this case, no such contract for giving time to the principal as will discharge the surety in equity. Before the surety can avail himself of such a contract, it must be shewn to be such as can be enforced between the principal and the creditor at law. This is not an express contract relating to the principal money secured, but only an implied contract as to the interest, and could not have been enforced at law. The obligee might still have recovered in an action on the bond. [The Lord Chief Baron. Because a Court of law has no discretion as to instruments under seal. But suppose there had been a parol contract to pay a sum of money at a given day with interest, and the **[424]** money not being paid on that day, the parties had agreed that the debtor should pay an anticipated interest; if, after that, the creditor brought his action, would not the new agreement have been a good defence at law? How can a man demand principal for what he has already taken interest?] The receipt of interest by anticipation is not evidence of which a surety can avail himself to shew that time was given. The relief given to the surety proceeds on the ground that he is damnified by the agreement between the creditor and the principal debtor. Here the surety was not in any way damnified by the agreement. [The Lord Chief Baron. The question is whether, if the obligee had brought an action on the 28th of October to recover the penalty of the bond, a Court of equity would not have entertained a bill to restrain that action upon the suggestion and proof that he had taken interest up to the 1st of January? Or suppose the case

of a simple bond, without any surety, and interest taken by anticipation, and then an action brought on the bond; would there be no remedy for the obligor in equity?] However that might be, it is submitted, that this is a mere implied contract, of which the surety cannot avail himself. The interest was considerably in arrear and the agreement was not to sue till the 1st of January. That is not sufficient to support the case of the surety. There may be many dealings between creditor and the principal debtor, which would not discharge the surety: *Mayhew* v. *Crickitt* (2 Swanst. 185). In *Heath* v. *Key* (1 Y. & J. 434) it was held that a Court of equity will not relieve a surety in these cases, unless there has been an express and positive contract for giving time to the principal debtor.

THE LORD CHIEF BARON. There appear to me to be strong grounds for granting this injunction. When the **[425]** case comes to be finally heard, it may appear in a different point of view. Possibly, at a subsequent stage of the proceedings, the plaintiff at law may make out that she is entitled to maintain her action; but the question is sufficiently doubtful for me to say that she ought not now to be permitted to enforce her remedies at law. I do not proceed on the ground that the question as to consideration is immaterial, because I consider that an agreement without consideration is as unworthy of attention in a Court of equity as in a Court of law. But in equity all agreements for consideration are equally binding, whether under seal or not.

Supposing that the case made by this bill were a good defence to an action, it does not appear that the defendant at law had any knowledge of the agreement before the time when it would have been necessary for him to have put in his plea, and, therefore, that circumstance alone would be sufficient to suspend proceedings against him. But I am of opinion that it would not be a good defence to an action, because it is not permitted at law to give evidence of the alteration of an agreement under seal, by an agreement not under seal. If I could allow this to be a good defence at law, and it could be shewn that the defendant at law had time to become acquainted with the circumstances, it might be a reason for coming to a different conclusion; but that not being so, the question is whether, under this state of facts, the plaintiff can sustain the injunction.

It appears that in 1818 the bond became due, and also arrears of interest to the amount of upwards of 200l., concerning which it is clear that some agreement took place. Now, whether this was or was not an agreement merely to give the debtor time till the 1st of January, would be a question perfectly unimportant; because a mere agreement to give time without any consideration, would not prevent the creditor from successfully prosecuting his action at **[426]** law. But the question is whether time was not given to the 1st of January, 1819, upon a valuable consideration? The fact is admitted that the obligee received interest up to that time in the month of October preceding. Could he then in the interim have been allowed by a Court of equity to bring his action on the bond? I think not. It is admitted that in the case of a principal only, without a surety, if the debtor had given six months' interest in advance, a Court of equity would interfere to stop the action. If, in such a case, the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but, if it appeared simply that the six months' interest had been given, what could the imagination suggest but a contract ipsissimis verbis, that the creditor should not sue for that time? Besides, the interest being paid, would a Court of equity endure that the creditor should put that interest into his pocket and next day sue for the principal?

If that be so, as between the principal debtor and the obligee, the same principles will apply to the surety. The question here is whether the party did not preclude himself from suing on the bond, by receiving by anticipation the interest due between October and January. The shortness of that period cannot affect the question. Taking even a hour's interest in the same manner, if it were the habit to reckon interest by hours, would be attended with the same consequences. Under the present circumstances, I must grant this injunction. Perhaps, at the hearing, the facts of the case will be more fully explained.

Injunction granted.

[427] LORD CAWDOR *v.* LEWIS. June 12th, 1835.—Where an agent had permitted his principal to expend money on an estate which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for mesne profits.—Where an action of trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law; there being no right of set-off in such an action.

[S. C. 4 L. J. Ex. Eq. 59. See 4 Y. & C. Ex. 566.]

The original bill stated that the late Lord Cawdor, the father of the plaintiff, was lord of the manor of Kidwelly, in the county of Carmarthen, and also seised in fee of divers real estates in the parish of Llanelly, within the said lordship and elsewhere. That Thomas Lewis, deceased, was, from the year 1810 to the year 1816, the land agent, steward of the manor, and solicitor of Lord Cawdor; and was, during the whole of that period, his confidential adviser, and thereby became well acquainted with the nature, extent, and value of his estates. That there is within the said manor, a piece of uninclosed ground, called Hook Bank, containing about ten acres, and bounded on one side by Penrhos Fawr farm (which is separated from it by a ditch or fence), and on the other side by the sea. That Hook Bank was in the occupation of Lord Cawdor from 1810 till his death, and considered by him to be part of his own property. That Lord Cawdor being owner of certain lead mines in Carmarthenshire, and being desirous of erecting a smelting-house, consulted Lewis on the subject; and, accordingly, in the year 1812, by the advice and with the approbation of Lewis, he erected a smelting-house and other buildings on Hook Bank. That Lewis superintended the works, and paid the expenses, which were allowed to him in his accounts as agent. That Lord Cawdor died in the year 1821; and, thereupon, the plaintiff became entitled to the manor of Kidwelly. That Lewis never at any time, during the lifetime of the late Lord Cawdor, and never during the possession of the plaintiff, until the year 1828, claimed or pretended to claim, or gave the late Lord Cawdor or the plaintiff any reason to know or suspect, that he claimed any right or title to the land called Hook Bank; but that, in 1828, he, for the first time, claimed to be absolutely en-**[428]** titled thereto as part of Penrhos Fawr farm, of which he was the owner. That Lewis died in the year 1829; and that thereupon his eldest son, the defendant, David Lewis, became entitled to Penrhos Fawr farm. That the defendant Lewis, together with the other defendants (who were trustees under certain terms for years in the Penrhos Fawr property), having brought their action of ejectment against the plaintiff for the recovery of Hook Bank, had lately obtained a verdict in that action.

The bill charged that Thomas Lewis designedly and fraudulently permitted the late Lord Cawdor to treat and deal with the land in question as his own, and to lay out large sums of money in buildings thereon, without informing him, as he was in equity bound to do, that he claimed the land as his own property. That the late Lord Cawdor, with the privity of Lewis, exercised various acts of ownership on the property, and, in particular, let one of the buildings in question at a weekly rent, though, by reason of the lessee's poverty, he received no rent; and that, in 1825, the whole of the smelting-house and buildings, with the privity of Lewis, were let by the plaintiff to Hugh Waddle for twenty-one years, at a rent of 20*l.* per annum.

The bill prayed that the plaintiff, as lord of the manor of Kidwelly, might be declared well entitled to the piece of land called Hook Bank, and might be reinstated therein, and quieted in the possession and enjoyment thereof; or that he might be declared to be entitled to compensation in respect of the sums of money expended by the late Lord Cawdor, in the erection of the smelting-house and buildings. That, if necessary, an account might be taken of those sums &c., and that the defendants might be restrained from proceeding in their action, or commencing any other action in respect of the premises.

The plaintiff having omitted to obtain any injunction in pursuance of the prayer of this bill, the defendants brought their action for mesne profits; upon which the plaintiff **[429]** filed his supplemental bill, praying that the defendants might be restrained from proceeding in that action.

The defendant Lewis, by his answer to the original supplemental bill, admitted

that from the year 1810 to 1816 his father, Thomas Lewis, was land agent, steward of the manor, and solicitor of the late Lord Cawdor, and enjoyed the confidence of Lord Cawdor. He admitted that there was an uninclosed piece of land within the manor of Kidwelly, called Hook Bank, but denied Lord Cawdor's title to it, or that it was waste land of the manor; alleging, on the contrary, that it belonged to Penrhos Fawr farm, and that it was only divided from that farm in the same manner as one inclosure of that farm is divided from another. He stated that in 1811, before the smelting-house was built, all the common lands in Kidwelly had been inclosed by act of Parliament; that two allotments were awarded to Lord Cawdor as lord of the manor, in respect of open lands, and that one of these allotments abutted on Hook Bank. That Lord Cawdor was well aware that all the open lands had been inclosed, and signed the award himself, with the map attached thereto. That in 1812 Lord Cawdor applied to Lewis to have part of the Hook Bank for the purpose of a smelting-house, to which proposal Lewis consented. The defendant then stated his belief that Lord Cawdor erected the smelting-house with the knowledge and approbation of Lewis; but he denied, to the best of his belief, that Lewis advised the plan or superintended the works; on the contrary, he alleged that one Neville superintended them. He denied, to the best of his belief, that Lewis was employed to pay the expenses of the works, further than that he, as the agent of the late Lord Cawdor, from time to time supplied money to Neville, in order to the payment of such expenses, for which money he regularly accounted in his agency accounts. He believed that Lord Cawdor considered Hook Bank to be the property of Lewis, but that there was an understanding **[430]** between the parties that Lord Cawdor was to have a lease of the smelting-house, though Lord Cawdor paid no rent for it in the mean time, by reason of the cross accounts between his Lordship and Lewis. He believed that the buildings were let, with the privity of Lewis, on the terms mentioned in the bill.

The defendant then stated that in consequence of the plaintiff's solicitor having expressed his opinion that Lord Cawdor had a right to the land in question, with the smelting-house and buildings, either by adverse possession or length of time, and having proposed to refer the matter in dispute to arbitration, the defendant acceded to such proposal, without prejudice to his rights, to bring the expense of the execution of the buildings into account, in any arrangement that might be made between him and the plaintiff.

The defendant then submitted that the question as to the plaintiff's title to the premises as lord of the manor of Kidwelly, was a legal question, and had already been determined at law; and he claimed the benefit of a demurrer as to so much of the bill as sought relief upon that point. With respect to that part of the bill which sought for compensation, and for an account, he insisted that the present suit was wholly unnecessary, he having been always willing to make a reasonable compensation to the plaintiff for the buildings in question, if the plaintiff had confined his claim to such compensation, and had not set up a title in himself as lord of the manor of Kidwelly.

An injunction having been obtained pursuant to the prayer of the supplemental bill, and afterwards extended to stay trial,

Mr. Wigram and Mr. Jemmett now shewed cause against dissolving the injunction. If a person, knowing that certain lands belong to himself, stands by and permits another to expend money upon them, without giving him notice of **[431]** his title, and afterwards asserts his claim, the Court will give relief to the party so aggrieved: *East India Company* v. *Vincent* (2 Atk. 83); *Attorney-General* v. *Balliol College* (9 Mod. 411). The only question is in what way the relief is to be given; whether by compelling the owner of the property to grant a lease, or by giving the injured party a lien on the land. We rely on the latter mode as the more beneficial. [The Court then called upon the defendants' counsel.]

Mr. Swanston, Mr. Wilbraham, and Mr. Pole, contrà. The bill proceeds on two assumptions, which cannot exist together; first, that Lord Cawdor is entitled to the legal estate in the premises as lord of the manor of Kidwelly, a declaration to which effect is prayed by the bill; and, secondly, that the legal estate is not in Lord Cawdor, but in Lewis; and that Lord Cawdor is entitled to an equitable compensation for the money laid out. The first part of the bill is demurrable. [The Lord Chief Baron. It is conceded that the plaintiff can proceed upon the second part only.] But having all along rested on his supposed legal title, he cannot now for the first time be heard to say that he has not the legal title. The application to stay trial must have been

founded on the ground that he had a legal title, and upon an affidavit that the discovery made by the defendant's answer would be material to his defence at law. Having obtained a discovery for the purpose of having his legal right tried, he cannot now alter his position. [The Lord Chief Baron. The defendant, in an action for mesne profits, cannot set up the legal ownership.] At all events, having failed in the action of ejectment, and having thereby given the defendant the consequential right to mesne profits, he cannot now come to restrain the defendant from pursuing that **[432]** right. The mesne profits may far exceed the compensation which he claims, and he does not submit by his bill to pay the difference which may be found against him.

THE LORD CHIEF BARON. This is a plain case, and I think that I should be doing great injustice if I were to allow the parties to go to trial. If the bill were confined to the claim made as to the legal title, it could not be entertained; but the prayer of it is in the alternative, and it cannot be said that because a part of the bill may be demurrable, the other part must be dismissed, and the plaintiff is to be deprived of all intermediate advantage. Lord Cawdor says that he is entitled to compensation, and that the other party is not entitled to bring his action for mesne profits, and accordingly he prays redress in equity, suitable to the nature of his case. It is remarkable that the defendants admit that Lord Cawdor has an equitable claim to some compensation; but they say that there is no occasion for the plaintiff to come into a Court of equity for relief because they are ready to submit the matter to arbitration. That however is not a sufficient answer to the claim made by the plaintiff, because he is entitled to come into this Court for relief. The admission of the defendants, in fact, puts them out of Court; for if there be such a claim on the part of the plaintiff, which may be referred to arbitration, à fortiori, it may be made the subject of compensation before a Master or a Judge: and how can I tell (the admission being made) that the plaintiffs at law are entitled to sue for mesne profits at all?

It appears that Lord Cawdor was owner of the manor of Kidwelly, and likewise owner of certain lead mines in the neighbourhood; there were also uninclosed lands in the same manor belonging to Lewis, upon which the buildings in question were erected. It seems that Lewis was the confidential agent of Lord Cawdor; and it is to **[433]** me extraordinary that Lord Cawdor, relying upon his agency, should have erected buildings for working lead upon these lands, there being other lands adjacent of which he was himself seised in fee. What necessity was there for Mr. Lewis, during the time he was such agent, to allow Lord Cawdor to erect a smelting-house upon lands belonging to Lewis, which were only divided by an imaginary line from the lands of Lord Cawdor? It is said that Lord Cawdor could not legally lay claim to the buildings erected on Hook Bank; because, in the award and the map, that piece of land is not described as being his property, and he must have known from that, and other circumstances, that it did not belong to him. That observation strikes me as being most extraordinary. True, Lord Cawdor might have known that Hook Bank was not his; but why am I to found any inference upon such a supposition against the strong presumption that he believed the buildings were erected on his own property? It is extraordinary to say that he intended to erect buildings for a permanent object on another person's lands.

It is admitted to be a proper subject for equitable interference, where one party stands by and allows another to spend money upon his lands without giving him notice of his title. A fortiori, a Court of equity relieves against an agent who expends his principal's money upon his own land. Whether the relief be a perpetual injunction, or an allowance by way of compensation, or a lease, must be determined by the result of the hearing. Under these circumstances it would be perfectly idle to allow the action to be tried. In any case, whatever might be the mode of compensation here, a trial for mesne profits would be utterly useless; and if effect can be given to Lord Cawdor's claim only in a Court of equity, why should I allow the other party to go to law and put the money in his pocket? It is stated that no rent was claimed by Mr. **[434]** Lewis of Lord Cawdor; but if there were any agreement that the rent should be set-off against any cross demand of Lord Cawdor, that will not alter the situation of the case, because in an action for mesne profits no set-off is allowed.

Injunction continued to the hearing.

BERRINGTON AND OTHERS *v.* EVANS. June 16th, 1835.—Where a judgment creditor had allowed 20 years to elapse without taking steps to recover his debt, and then ascertained that during the 20 years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in Court available for the payment of the remainder: Held, that he was barred by the Statute of Limitations from proving his debt before the Master, and receiving payment rateably with the other creditors.

[For former proceedings see Younge, 276, and see further, 3 Y. & C. Ex. 384. Distinguished, *Bermingham* v. *Burke*, 1845, 2 Jo. & Lat. 699; 9 Ir. Eq. R. 86. Applied, *Archdall* v. *Anderson*, 1890, 25 L. R. Ir. 433.]

In this case the bill was filed by the plaintiffs on behalf of themselves, and all other the specialty creditors of the late Sir Watkin Lewes, who died intestate, praying the usual relief. By the decree made on the hearing of the cause, on the 9th of December, 1821, it was referred to the Master to take an account of the specialty debts of the intestate, and also of his personal estate: and in case that was not sufficient for payment of those debts, then to take an account of his real estates, &c. And the Master was directed to publish advertisements in the *London Gazette* and other newspapers, for the purpose of giving notice to such specialty creditors to come in before him, and prove their respective debts, by a day to be appointed for that purpose, and in default thereof the said specialty creditors were to be excluded the benefit of the said decree.

The Master, by his report, dated the 21st of June, 1830, certified that he found that the intestate was at the time of his death indebted to sundry persons on judgments and other specialties. That the usual advertisements had been inserted in the *Gazette* and other newspapers, which he mentioned, by which the specialty creditors were required to come in before him and prove their debts by a given day. That the appointed day had expired, and that no person had appeared to prove any such debt, except the persons named in the schedule to his **[435]** report. He therefore did not find that any specialty debts, except those mentioned, remained due to the intestate's estate.

By the decree made on further directions on the 16th of February, 1831, the Master's report was confirmed, and he was directed to tax all parties their costs, to be paid out of the money in Court, and to apportion the balance rateably amongst the specialty creditors. By a further report, dated the 7th of April, 1831, the Master certified that he had pursued these directions.

A petition in the cause, supported by affidavit, was now presented by John Kemp, who had not appeared before the Master, alleging that he was a creditor of Sir Watkin Lewes under a judgment entered up by virtue of a warrant of attorney dated the 2nd of January, 1813. That the debt in question had been also secured by the bond of the daughter of Sir Watkin Lewes, conditioned for payment of the money after her father's death. That she died in the lifetime of her father, whereby the bond became void. That the petitioner, believing that Sir Watkin Lewes had only a life interest in his estates, considered that the debt had been wholly lost, until lately informed by his solicitor of the proceedings which had taken place in the cause. That the petitioner had not seen any of the advertisements which had been published by the Master, and was, until lately, entirely ignorant of his right.

The petition, after alleging that a considerable sum of money on account of the intestate's property had been paid into Court since the report of the 7th of April, 1831, prayed that the petitioner might be at liberty under the decree of the 9th of December, 1821, to go in and prove his debt before the Master, and might be paid his debt rateably with the other creditors, out of the interest and dividends of the money now in Court.

Mr. Spurrier, for the petition. In a suit like the pre-**[436]**-sent, the creditor may at any time after the Master has made his report, come in and prove his debt: *Angel* v. *Haddon* (1 Madd. 529), *Greig* v. *Somerville* (1 Russ. & M. 338). It will be contended that, under the late statute,(*c*) the petitioner is too late in his application; but that

(*c*) Stat. 3 & 4 Will. 4, c. 27, sect. 40. By which it is enacted "that after the 31st day of December, 1833, no action or suit or other proceeding shall be brought,

statute does not alter the rule of relation which has been adopted by Courts of equity in these cases. In *Sterndale* v. *Hankinson* (1 Sim. 393) it was held that where a bill is filed by a creditor on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed; and that, from that moment, time does not run against him. In that case, which was one of simple contract creditors, more than six years elapsed between the filing of the bill and the decree, and the whole argument turned on that circumstance; it being admitted that, if there had been a decree within the time, there would have been no difficulty. Notwithstanding that difficulty, however, the Vice Chancellor allowed the claim of the creditor. In the present case the decree was made in 1821; therefore, not one-half of the twenty years within which the petitioner might make his claim had expired at that time. That being so, if **[437]** he has a right to establish his claim by relation to the time of filing the bill, à fortiori he has the same right by relation to the time of the decree.

Mr. Simpkinson and Mr. Duckworth, for the plaintiffs. In *Sterndale* v. *Hankinson* the creditors adopted the suit and claimed relief under it, and the judgment of the Vice Chancellor turned upon that circumstance; whereas, here the petitioner repudiates the suit, or at least his own laches prevented him from adopting it. Besides, when *Sterndale* v. *Hankinson* was decided, there was no statute which in terms applied to Courts of equity. Those Courts, therefore, thought that they might, when expedient, go out of the statute; though in most cases they adopted it. Now, however, the statute is equally binding on Courts of equity as Courts of law; and there is nothing which can prevent its operation but part payment or a written acknowledgment within the time.

Mr. West, for the heir at law.

Mr. Spurrier, in reply. It cannot be imputed as laches to the petitioner that he did not see the Master's advertisements. In *Angel* v. *Haddon* the merits relied upon were that the creditor was not aware of the decree. In recent cases the funds have been called back after apportionment. With respect to the Statute of Limitations, no doubt it applies to equitable as well as legal proceedings; but it does not alter the question of relation. The Court will not deviate from settled rules, merely because the limitation of time, instead of being fixed by analogy, is fixed by express enactment. The petitioner has still a right to insist that his claim was made when the suit commenced.

The Lord Chief Baron. It appears to me that, if **[438]** the argument for the petitioner be adopted, it will lead to this consequence that at any period after the present, the claim of any creditor might be put in operation, so long as any portion of the estate remains undivided. That brings me, then, to this question—whether, for the purpose of forcing a construction to take a particular case out of the statute, by holding that a suit, though unknown by a man to have existed, shall be deemed his suit—whether, notwithstanding, too, the old principles of Courts of equity relative to stale demands, a creditor, under these circumstances, shall be allowed to enforce his claim at any period of time, even, perhaps, when the cause is dismissed? The argument which has been urged is ingenious; but, if I were to allow it to go the length contended for, no Judge, under any circumstances, could resist a demand of this sort. It is urged that a bill filed by one creditor on behalf of himself and all others is a bill filed by all, and consequently that if it be filed before the Statute of Limitations has attached to the debt of any creditor, it is good to keep that creditor's claim alive, and, therefore, that any creditor who never has heard of the suit may come at the end of fifty years and insist upon being let in. That is the extent of the

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to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

argument, and that is made to depend only on the case of *Sterndale* v. *Hankinson*. If I were forced by any thing that appears in that case to carry it to the extent contended for, I should feel bound to yield to its authority. But upon looking at that case, I think that I should not be justified in pressing it to that length. There the intestate died in June, 1810, the bill was filed in 1812, and the decree was made in 1818, which was the first period when any other creditor than the plaintiff could take advantage of the suit. The decree being made, the creditor whose claim was disputed came before the Master, and in effect made this statement: "I was aware of the suit, but I considered the bill to be filed on my behalf. It was filed with my knowledge and my consent, and, **[439]** therefore, I took no steps. I could not in this suit have made my claim at any other time, and if I am barred of my relief, the consequence will be that every creditor will be barred unless he files his bill or brings his action and puts the estate to the expense of a number of suits." Now, as the Statute of Limitations was a bar to claims at law, but not to claims in equity (Courts of equity only acting in general by analogy to the proceedings at law), it often became the duty of the Judge in equity to consider whether the statute might be rendered applicable to equitable proceedings. The Judge in equity had a right to look to the facts of the case to see whether the time limited by the statute having elapsed, the statute should be allowed to operate, or whether circumstances did not qualify its operation so as to do away with the rule drawn from analogy. Now, in the case in question, the Judge considered that the facts qualified the rule.

If I were obliged to consider the effect of that decision as establishing a general rule, under all circumstances, that the filing a bill by one creditor of A. on behalf of himself and all others, lets in the claims of all the other creditors, it is clear that the new statute would have no application to this case, because this would then be the suit of Kemp as well as Berrington, and the bill having been filed within the twenty years, Kemp's interest could not be affected by the new statute. But I own I cannot conceive that the case goes the length of deciding that time could, under no circumstances, be a bar in such a suit, either on the statute analogy, or any other. That being so, let us see how the case is affected by the new statute.

At law, even before the statute, the petitioner could not have enforced his judgment after twenty years. The new statute fixes the time for bringing an action on the judgment at law. The statute was also intended to put an end altogether to the discretion of Courts of equity, in those cases where they had before acted by analogy to **[440]** the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the statute. The words of the statute are that, after a certain day, no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, at law or in equity, but within twenty years after the right shall have accrued. Now I am not prepared to say whether, if I could be satisfied that the bill was filed with Kemp's consent, and he meditated, like Berrington, to prosecute his claim under that bill—whether, under those circumstances, I should arrive at a different conclusion. Even then, I apprehend, he would have to give a satisfactory reason for remaining so long without calling in the aid of this Court in his own person. But supposing that he never knew of the filing of the bill, or of the progress of the suit, and that twenty-five years after the right had accrued, upon a new discovery of the suit having been instituted and of funds being in Court, he petitions to be allowed to go before the Master and make his claim, can I say that his petition is not a proceeding in equity within the statute? The statute says that such a claim shall not be made after twenty years, unless in the mean time some part of the money, either principal or interest thereon, shall have been paid, or some acknowledgment shall have been given in writing. These are the only exceptions mentioned in the act. Nothing is said of the case of a bill being filed by one creditor for the benefit of the rest; and I cannot engraft another exception on the act of Parliament. Considering, therefore, that this is a proceeding in equity to recover money upon a judgment upon which twenty years have run, and that it comes within none of the exceptions of the statute, I am of opinion that the claim is barred.

Petition dismissed.

[441] PRICE *v.* ASSHETON. July 11, 13, 1835.—Bill for specific performance of an agreement to renew a lease dismissed; the agreement being too vague and uncertain to be executed by the Court.—The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease.—Certified copies of the schedule, &c., may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors.

This cause (see ante, p. 82) coming on for hearing, was argued by Mr. Simpkinson and Mr. Rogers, for the plaintiff; and Mr. Twiss, Mr. James, and Mr. Stuart, for the defendant.

For the plaintiff, the various authorities were cited which were brought to the attention of the Court on the application for the injunction. It was also contended that, although Reeve was dead, who was the witness to the interview which took place between the parties before the letter of June 11th, 1823; yet there was sufficient on the face of the letters to raise an implication that the parties intended to renew the lease for twenty-one years. And it was urged that, even if the Court were not entirely satisfied on that point, a reference ought, nevertheless, to be directed to the Master to ascertain what was the term the parties had agreed upon.

On the other side it was contended that the plaintiff must stand or fall by the two letters written by the defendant; and that the intermediate letter written by the plaintiff could not be taken to form part of the agreement. That by an agreement to renew a lease, it was not necessarily intended that the new lease should be of the same duration as the old, otherwise the same doctrine might be applied, which it never was, to a bill of exchange. Moreover, that the plaintiff's insolvency was sufficient to deprive him of the relief sought by the bill.

As evidence of the plaintiff's insolvency, the defendants tendered certified copies of the schedule, assignment, &c., under the Insolvent Act; which evidence was objected to on the part of the plaintiff, as not being warranted by the provisions of the 76th section of that act (7 Geo. 4, c. 57); and in sup-**[442]**-port of the objection, *Nicholls* v. *Downes* (4 Car. & P. 330; 1 Moody & Rob. 13) was cited. The Court, however, overruled the objection.

At the close of the argument judgment was given by

ALDERSON, B. Several points have been made in the course of the argument upon the question whether or not a specific performance ought to be granted of what is called by the plaintiff in this suit an agreement for renewing a lease. It is not my intention to go through all the objections which have been raised against the plaintiff's claim; but it seems to me that, upon two of them, I ought not to make a decree for specific performance in this case. In order to lay a foundation for such a decree, some definite agreement must be proved to the satisfaction of the Court. Agreements of this sort are certainly not treated in the same manner in equity as at law, so far as regards the evidence required to shew what is or what is not a breach of them; as, for instance, in the case where time is not considered of the essence of the contract in equity, it being always considered so at law. But here, as it appears to me, the difficulty is to find out what was the definite agreement between the parties; and if I do not find upon the pleadings or the evidence some agreement to be executed, I cannot decree a specific performance. Now in this case there is a total failure of any parol evidence. In consequence of the death of one of the witnesses, the plaintiff is not able to give evidence of the arrangement between the parties to which the letter of the 11th of June is supposed to have reference. The Court, therefore, can only look at the letters to ascertain the terms of the agreement.

Now it appears from the letter of the 11th of June, that there had been a previous conference between the parties, which probably was for the purpose of allowing the lessee **[443]** to make alterations in the property which otherwise he would not be permitted to make. The defendant then states that the proposed alterations would cost not less than 280l. or 300l.; and then he says, "under that supposition I wish you to understand that at the expiration of the lease granted to Mr. Atkinson, I shall not demand a higher rent of you than is at present paid." The agreement, therefore, upon that point simply is that if the alterations were made by the lessee within the term, the lessor would permit him to occupy the premises afterwards, without demand-

ing additional rent; that he would not, in short, on account of those alterations, raise the market price of a lease of the premises.

The defendant then says, "If at that time it should be considered upon a fair valuation that the premises are not worth the rent they now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." This is that part of the letter which is supposed to discover an agreement between the parties for a fresh lease; and this I am to suppose to be for twenty-one years, at a reduced rent, to be ascertained from various calculations, which the Court is to make the subject of a decree. It seems to me that this is infinitely too vague for the Court to act upon. I doubt whether the calculation could be made. The existing lease would not expire till ten years after the letter was written, and all that the defendant appears to say is this: "If you trust me, I will not hurt you; and at the end of the term, I will, under certain circumstances, allow you to remain, and will not raise the rent, if you are a good tenant in the interim." That is not an agreement of which the specific performance can be decreed. If there is not a distinct contract between the parties that one shall do certain acts on his part on condition that the other shall do certain acts on his part, the Court cannot make a decree for specific performance.

[444] Then follows the letter of the plaintiff, dated the 13th of June, and the answer to that letter leaves the understanding between the parties still more vague; at all events, it seems to me to leave the parties exactly where they were. The defendant, in effect, says, "You may safely lay out your money in the premises; you are in the hands of a safe man, and I shall not disturb you if you conduct yourself as a good tenant in the meantime." In fact, the parties made their agreement without reference to all the circumstances that might happen: the agreement also refers to future circumstances. If it be considered that their real intention was that the renewal of the lease should depend upon the subsequent conduct of Price, of which Assheton was to be the judge, the arrangement between them becomes more intelligible. But how is the Court to execute an agreement in which no time and no rent are stipulated for; but, on the contrary, where time and rent are left to future regulation?

The other objection which has been raised to the plaintiff's claim is his insolvency. It is admitted to be discretionary with the Court, whether it will accede to an application of this sort made by an insolvent debtor; and that the Court will not compel a landlord to take an insolvent party as his lessee. It appears to me that the insolvency of the plaintiff is well made out, and that the copies of the documents which have been produced are sufficient evidence of that fact under the 19th section of the statute, without reference to the 76th. The bill must be dismissed, with costs.

MEMORANDUM.

In the course of Trinity Term, his Majesty was pleased to appoint Basil Montagu, of Gray's Inn, Esq., to be one of his counsel learned in the law.

[445] JESUS COLLEGE, OXFORD *v.* GIBBS AND OTHERS. June 8, 15, July 13, 1835. —Where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining statute of 13 Eliz.: Held, upon a re-hearing, that the allegation as to the real composition was not shaped as stating a fact in the alternative, but only as introducing an argument, and therefore might be rejected as surplusage; and that the defendants, under the circumstances of the case, were entitled to an issue as to the modus.

[S. C. 4 L. J. Ex. Eq. 42.]

This cause (ante, p. 145) came on for re-hearing and was argued at great length. The defendants' counsel contended that there was no rule in equity compelling a defendant to reduce his defence to a single point. That at law duplicity of pleading was not allowable; but that the inconvenience of this rule had been felt, and statutes had been passed to remedy the defect. That, although the defendants suggested the

possibility of a real composition, yet they did not abandon their defence by way of modus. That what was said in the answer as to the real composition was urged as an argument only, and was not stated as a fact; being, in truth, but a mere suggestion as to what conclusion of law the Court should draw from the previous passage; that it was a bad argument, no doubt, but might therefore be rejected as surplusage. That, after all, a composition real and a modus were substantially the same, although there was some difference in the proof. That here, however, the composition suggested by the defendants was not distinguishable from a modus, inasmuch as it was not alleged to have been made since the time of legal memory, but only by consent of all parties whose consent was necessary, and before the restraining statute of Elizabeth. That this was not a case where the defendants, having failed in the first defence, were resorting to a second; but, having succeeded in the first defence, were willing to repudiate the second. In addition to the authorities produced on the former occasion, the following cases were cited and commented upon:—*Strutt* v. *Baker* (2 Ves. jun. 625; 2 E. & Y. 421), *Hughes* v. *Davies* (5 Sim. 331), *Wilmot* v. *Hellaby* (5 Price, 355; 3 E. & Y. 887), *Bishop* **[446]** *of Landaff* v. *Key* (4 Wood, 228), *Ferrars* v. *Pellatt* (id. 334), *Fryer* v. *Sims* (4 Gwill. 1356; 3 E. & Y. 1368), *Leathes* v. *Newitt* (4 Price, 355; 3 E. & Y. 841), *Warden and Minor Canons of St. Paul's* v. *Bishop of Lincoln* (id. 65; 3 E. & Y. 809), *Stokes* v. *Edmeades* (3 E. & Y. 1191), *Norton* v. *Hammond* (1 Y. & J. 24), *Bree* v. *Beck* (1 Younge, 211), *Bennett* v. *Peart* (4 Wood, 286), *Thomas* v. *Hughes* (id. 332), *Bennett* v. *Read* (Gwill. 1272; 3 E. & Y. 1338), *Hawes* v. *Swaine* (4 Wood, 313), *Clarke* v. *Jennings* (4 Gwill. 1424; 2 E. & Y. 416), *Pope* v. *Farthing* (1 Younge, 263), *Cockburne* v. *Hughes* (3 Price, 408; 3 E. & Y. 783), *Mallock* v. *Browse* (Ambl. 423; 2 E. & Y. 497), *Rudge* v. *Chapman* (2 Wood, 407), *Knight* v. *Walker* (id. 415), *Twells* v. *Welby* (4 Wood, 133; 3 E. & Y. 1286), *Baker* v. *Warner* (3 E. & Y. 1387), *Baker* v. *Athill* (4 Gwill. 1423; 2 E. & Y. 415), *Attorney-General* v. *Eardly* (8 Price, 39; 3 E. & Y. 986), *Archbishop of York* v. *Duke of Newcastle* (1 Wood, 446; 1 E. & Y. 661), *Downes* v. *Moorman* (2 Wood, 238; 1 E. & Y. 803), *Benson* v. *Humphries* (1 Wood, 155), *Wood* v. *Strickland* (2 Ves. & B. 150; 2 E. & Y. 674), *Williamson* v. *Lord Lonsdale* (5 Price, 25; 3 E. & Y. 870), *Cart* v. *Hodgkin* (3 Swanst. 160, n.; 3 E. & Y. 1240), *Bourke* v. *Isaac* (2 Price, 299; 3 E. & Y. 737), *Clanricarde* v. *Denton* (1 Gwill. 360; 1 E. & Y. 306), *Jennings* v. *Lettis* (3 Gwill. 952; 2 E. & Y. 129), *Warden and Minor Canons of St. Paul's* v. *Morris* (9 Ves. 155; 2 E. & Y. 516), *Foxcroft* v. *Parris* (5 Ves. 221; 2 E. & Y. 487).

The counsel for the plaintiffs relied on the case of **[447]** *Leach* v. *Bailey* (6 Price, 504; 3 E. & Y. 953); and, after commenting on the various authorities produced on the other side, they contended that the answer set up inconsistent defences; and that it was clear that the defendants intended, if they failed in the first defence, to take advantage of the second.

July 13th.—ALDERSON, B. In these cases I have fully considered the arguments addressed to me on the re-hearing. I retain the opinion I expressed before as to the principle which ought to govern me in the decision of the case. I still think, and for the reasons I have before expressed and which I shall not again repeat, that where an answer states inconsistent defences it ought not to be allowed. But, on the question whether this answer, specially framed as it is, does set up inconsistent defences, or whether the latter statement is not put rather by way of argument to the Court than as a fact inconsistent with the former part of the answer, I entertain, upon the re-hearing, considerable doubt. The authorities cited, since the last decision, are strong to shew that much latitude has been allowed in these cases. I think, therefore, that I ought to permit the defendants to try the merits of the case upon an issue, as to the modus set up by them; a course which, but for the formal objection, I should have adopted. It seems to me that, by reserving the question of costs, I shall be enabled hereafter to do full justice to the parties as to this objection, in case that should ever become material to be considered, and that I was wrong in applying the precedent of the case before Chief Baron Richards to the present suit.

On the subject of a re-hearing, I hope I shall always adopt the language of Lord Hardwicke (2 Atk. 439), that "it is a greater reproach to a Judge to continue in his error than to retract it."

Decree accordingly.

[448] BECHER *v.* CLAYE AND OTHERS. July 1, 3, 13, 1835.—The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish.

The bill stated that the chapter of the collegiate church of St. Mary, of Southwell, in the county of Nottingham, for a long time past had been, and were at the time of filing the bill, seised and entitled to them and their successors of and unto all and singular the small tithes yearly arising, &c., within and throughout the town and soke of Southwell aforesaid; and, being so seised and entitled, the said chapter, by a certain indenture of lease, bearing date the 22nd of January, 1795, and whereupon livery of seisin was duly had, demised unto George Kirkland, his heirs and assigns, amongst other hereditaments, all those their minute tithes, called the white tithes, yearly from time to time renewing, chancing, and increasing within the town and soke of Southwell aforesaid (tithes of geese, pigs, and eggs reserved and excepted), to hold the same unto the said George Kirkland, his heirs and assigns, during the lives of the three persons named in the indenture, and the life of the survivor of them.

The bill then stated that the chapter were in the habit of granting separate leases of the tithes of wool and lambs of the town and soke of Southwell; and that by the terms "minute tithes, called the white tithes," mentioned in the lease, were meant all the small tithes, except the tithes of wool and lamb, of the said town and soke.

The bill then set forth the title of the plaintiff, derived under George Kirkland, to the tithes comprised in the indenture of lease. It also alleged that he was entitled to have, receive, and take all and singular the small tithes, except the tithes of wool and lamb, and the tithes of pigs, geese, and eggs, yearly arising, &c. in and throughout the town and soke of Southwell, and the titheable places thereof, and prayed an account of those tithes, so far as **[449]** related to the occupation of the defendants within one of the parishes of soke, namely that of Southwell.

The defendants by their answers contended that by the words "minute tithes, called white tithes," were meant only small tithes of trifling value, in respect of which ancient compositions, in white money, were paid and payable by the occupiers of lands within the town and soke; and they denied the right of the plaintiff to receive all the small tithes within the soke, except as in the bill mentioned. They admitted that some payments, in lieu of the tithes of hops, had been made to some of the plaintiff's predecessors; but they alleged that this had been done by mistake. They stated that there had been certain immemorial customary payments made in each year to the chapter by the occupiers within the town and soke of Southwell, which they believed to be the tithes demised by the lease, namely, 1½d. for each milch cow, and sundry small sums for orchards, gardens, and dovecotes. They stated that the chapter of Southwell were not seised either of the rectory or vicarage of Southwell, but were merely portionists of certain specific tithes within the town and soke.

To shew the ancient ecclesiastical jurisdiction of the collegiate church of Southwell the plaintiff gave in evidence extracts from Domesday-book, a bull of Pope Alexander 3, Pope Nicholas' Taxation, and the Nonæ Rolls. In support of his case it was likewise proved that the collegiate church had for 150 years usually made leases of the tithes of wool and lamb, and of minute or white tithes within the soke of Southwell. It was also proved or admitted that the vicar of Southwell received the small tithes of one farm only in that parish; and that throughout the rest of the parish the plaintiff and his predecessors, as lessees of the white tithes, had received the tithes of gardens, orchards, dovecotes, cows, flax, carraway seeds, and rape; and that one of his predecessors had for **[450]** twenty years received the tithes of hops. The plaintiff's witnesses, with the exception of the chapter clerk, deposed to their belief that there was no difference, or reputed difference, between the tithes generally known by the name of white tithes, and the small tithes arising within the soke.

Mr. Boteler and Mr. Duckworth, for the plaintiff. Under the words "white tithes," the plaintiff is entitled to all the small tithes within the parish of Southwell with the exceptions mentioned in the bill. Those words are not to be confined to mere trifling money payments. They may possibly mean small tithes compounded for by money, but more probably they refer to all the small tithes reserved at Whitsuntide, that feast having been always very strictly observed at Southwell. A

receipt of small tithes, as general and extensive as that which has been proved in this case, has been held to carry all the small tithes: *Manby* v. *Curtis* (2 Price, 284; 3 E. & Y. 733), *Manby* v. *Lodge* (9 Price, 231; 3 E. & Y. 1052), *Byam* v. *Booth* (2 Price, 231; 3 E. & Y. 716), *Dent* v. *Robb* (ante, p. 1).

Mr. Simpkinson (with whom was Mr. Lowndes), for the defendants, contended that by the words "white tithes" were meant mere trifling money payments and not small tithes generally; and, in support of his argument, he cited from the fifth volume of the Valor Ecclesiasticus, p. 100, ad nom. Osbaldwyk; 158, Basiforde; 159, Tiversall; 161, Bulwell; 167, Torlaston; 168, Granby; 181, West Redforde; 186, Wynthorp; 199, Edyngley, N. Tiverton; 279, Kyrkanders; 294, Crosby; 295, Newbygyng.

July 13th.—ALDERSON, B. In this case the plaintiff claims, as lessee of the collegiate church of Southwell, the small tithes, **[451]** with some exceptions, arising within the parish of Southwell; and the question is ultimately reduced to this short point, viz. what are the tithes included under the description in the plaintiff's lease, by the words "all the minute tithes, called white tithes, within the town and soke of Southwell, except the tithes of pigs, eggs, and geese?"

It appears that, for a very long period of time, going back as far as 1633, the chapter of Southwell have demised these tithes, and by the same description, to lessees, and have received the profits arising under such leases. Concurrently with these leases, they have also been in the habit, for as long a period, of granting separate leases of the tithes of wool and lamb arising within the town and soke of Southwell.

Now, laying out of consideration the extracts from Domesday-book, the Parliamentary Survey, and other documents of that description, which seem to me to be introduced rather for the purpose of gracing the cause than as being of any use to the parties, I apprehend it cannot be doubted that the fact of enjoyment for so long a period, as is proved by the production of these leases, is abundant proof of title to these minute or white tithes in the chapter of Southwell, and, by consequence, on the additional proof of the lease to the present plaintiff from them, of the plaintiff's title to the same tithes.

The only remaining question, then, is, what are these minute or white tithes? I am fully satisfied by the argument of Mr. Simpkinson, and the passages cited by him from the Ecclesiastical Survey, that the expression white tithes has no particular or definite meaning, but that it means one thing in one parish, and another thing in another parish. The only criterion, therefore, as it seems to me, is the usage in the particular parish. In the first place, the exception shews that they include tithes of pigs, eggs, and geese, for otherwise such exception would be useless. Then what have been the tithes actually col-**[452]**-lected and paid to the person entitled to those white tithes? If we can ascertain that, in the parish of Southwell, we shall, as it seems to me, solve this problem.

In this view of the case, therefore, I exclude any usage in the other parishes within the soke. For, as the question depends on usage, and the meaning of the expression varies in each parish, we cannot reasonably transfer the usage in one parish as an argument for the construction of those words in another.

Now, in Southwell parish, the usage has been not to collect under this description of tithes wool and lamb, nor the small tithes of the estates belonging to the vicar, nor the excepted tithes of pigs, eggs, and geese; but the lessor has always collected tithes of gardens, orchards, dovecotes, cows, flax, carraway seeds, and rape. This is the evidence; and then we have the additional and important fact that the tithe of hops also has been collected by him for upwards of twenty years. It is said that this last has been by mistake; but I see no ground for that supposition. The tithe is not claimed even now by any one else; and, if paid by mistake, one would naturally expect that the person so paying it would now be able to tell us who ought to receive it, and for whom he has mistaken the plaintiff.

But in truth there is no such person, for the vicar collects none, except from the estates belonging to him, the rector none at all, and the lessee of the tithe of wool and lamb is clearly not entitled. It seems to me, therefore, that the tithe of hops fell to the lessee of the white tithes, because the white tithes included all the small tithes not specifically apportioned to other persons; and that the continued receipt of this tithe is very strong, to prove that white tithes in this parish have that extensive signification.

Upon the whole, therefore, it seems to me clear that I ought to decree in favour of the plaintiff for the amount he claims, and with costs.

Decree accordingly.

[453] JOSEPH BALDWIN, *Plaintiff;* NATHANIEL WILLIAM PEACH AND CHARLOTTE ATKYNS, *Defendants.* June 3, 4, 1835.—To a bill filed for payment of a rent-charge, one of the defendants pleaded twenty-six years possession without accounting for or paying over to the plaintiff any part of the rents and profits. Plea allowed; but, under the circumstances, ordered to stand over till a co-defendant had answered, pleaded, or demurred.—Although a bill contain a charge that the defendant has in his custody divers deeds, papers, and documents, by which the truth of the several matters in the bill contained would appear; yet, if it contain no specific allegation to which the charge will apply, the charge need not be answered.—Courts of equity will presume a release within the same limits of time, within which juries will be directed to presume it; whether any Statute of Limitations is applicable to the case or not.

[Referred to, *Clayton* v. *Earl of Winchelsea*, 1839, 3 Y. & C. Ex. 430.]

The bill, which was filed the 18th February, 1835, stated that the defendant, Mrs. Atkyns, being seised in fee of the manor, impropriate rectory, and advowson of Ketteringham, and various messuages and estates in that manor and elsewhere in the county of Norfolk, did, by an indenture dated the 10th of October, 1807, and in consideration of 1200l., grant, for the term of her life, to William Thompson, his executors, &c., an annuity or clear yearly rent-charge of 200l., to be issuing out of and chargeable upon the said manor and premises, with the usual powers of distress; but subject to a power of re-purchase. That as a further security for the due payment of such annuity, Mrs. Atkyns executed to the grantee a bond in the penalty of 2000l., and also a warrant of attorney to confess judgment against her for the like sum, both which securities were of even date with the annuity-deed.

The bill further stated that Thompson died in November, 1830, leaving the plaintiff his executor; that at his death the annuity was greatly in arrear; that Mrs. Atkyns had for many years been out of the jurisdiction of the Court; and that the defendant Peach claimed to be a purchaser of the property comprised in the annuity-deed: and was, at the time of filing the bill, in possession of the premises and in receipt of the rents and profits. That the plaintiff being unable to obtain payment from Mrs. Atkyns, had distrained upon the premises; but that it had been subsequently arranged between the plaintiff and Peach that the distress should extend no further than **[454]** might be sufficient to enable the latter to try the plaintiff's right in an action of replevin. That, notwithstanding this arrangement, the defendant Peach had given notice to the under-sheriff not to extend the property by elegit at the suit of any creditor of Mrs. Atkyns, the property not being extendible by elegit, the legal estate being outstanding in trustees to protect mortgages. That both before and since the said notice, the plaintiff, as executor of William Thompson, had made various applications both to Mrs. Atkyns and Peach for payment of all sums of money due in respect of the annuity, but without success.

The bill charged that if the defendant Peach was a purchaser of the manor and premises for a valuable consideration, he had by himself or his attorney notice of the annuity. That the consideration which he gave (if any) consisted either wholly or in part of a rent-charge or annuity to be paid to the defendant Mrs. Atkyns; and, further, that if he purchased the premises for a valuable consideration, and without notice of the annuity (which, however, the plaintiff did not admit), the said last-mentioned annuity or rent-charge, and all arrears thereof now due from the said defendant Peach, ought to be paid to the plaintiff as such executor as aforesaid, in discharge of the said annuity of 200l., and the arrears thereof.

The bill contained a general charge that the defendants or their solicitors had in their possession divers deeds, abstracts, accounts, letters, papers, and writings relating to the several matters aforesaid or some of them, and whereby, if produced, the truth of such matters would appear.

The bill prayed for an account of the arrears of the annuity of 200l., and that the same might be raised by sale or mortgage of the premises; that a receiver of the rents

might be appointed; and that the defendant Peach might be restrained by injunction from receiving the same. But **[455]** if the plaintiff were not entitled to that relief, then that the arrears might be paid to the plaintiff out of the annual sum payable by the defendant Peach to the defendant Mrs. Atkyns; that the future payment of the said annuity of 200l. might be secured to the plaintiff; and that, in the mean time, Peach might be restrained by injunction from making any further payment to the defendant Mrs. Atkyns in respect of the annual sum payable to her as aforesaid.

To this bill the defendant Peach pleaded as follows:—

This defendant, by protestation, &c., as to all the relief prayed in and by the said bill, and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover whether he is not now in the possession of the messuages, lands, hereditaments, and premises in the said bill mentioned and of the rents and profits thereof, doth plead in bar, and for plea saith, that he and those under whom he claims to be entitled to the said estates have been in the lawful and uninterrupted possession thereof to his and their own use and benefit for twenty-six years last past and upwards; that is to say, from the year 1806 down to the present time, without ever having paid over or accounted for all or any part of the rents and profits thereof to or with the said plaintiff, or the said testator William Thompson in the said bill named; and without having paid to or accounted with the said plaintiff or the said testator William Thompson for any sum or sums of money in respect of the annuity or rent-charge of 200l. in the said bill mentioned (if any such there was) during the whole of that period, nor hath this defendant, or, to the belief of this defendant, have or hath any other persons or person under whom he claims to be entitled to the said estate, ever acknowledged or admitted to the said plaintiff or the said testator, or any person or persons on their or either of their behalf, that any money was due and owing to them or any or either of them for **[456]** or in respect of the said annuity or rent-charge of 200l.; and, therefore, that it is to be presumed that such annuity or yearly rent-charge as in the said bill mentioned (if such annuity was ever granted), hath been long since released, or the said estate otherwise discharged therefrom; all which matters and things &c.

Mr. Boteler and Mr. Lynch, for the plea. After twenty years' possession, a plea of adverse possession is good: Mitford, Pl. 3rd ed. 320; Beames, Pl. 247. The present plea is formed on that in *Blewitt* v. *Thomas* (2 Ves. jun. 669), and the circumstances of the two cases are very similar. The charge in the bill that the purchase was made with notice is covered by the plea, supposing the purchase to have been made more than twenty years before the filing of the bill. The charge that the defendant Mrs. Atkyns had been paid either in the whole or in part by an annuity granted by Peach, is met by that part of the plea which alleges that Peach, and those under whom he claims, have been in possession twenty-six years, without accounting with the plaintiff or his testator. This is a mere legal demand, and the bill might have been demurred to but for the statement of the notice served upon the under-sheriff. By coming here, the plaintiff ought not to be in a better situation than he would have been in at law. At law, he could not have recovered after twenty-six years without proof of any payment or acknowledgment of the annuity within that time. In *The Mayor of Hull* v. *Horner* (Cowp. 102) a Court of law held that a grant might be presumed, though within legal memory. [The Lord Chief Baron. Lord Kenyon said he would presume an act of Parliament to corroborate an usage for forty years.] In this respect, as well as in others, equity follows the law: *Bond* v. *Hopkins* (1 Sch. & L. 429), *Hovenden* v. *Lord Annesley* (2 Sch. & L. 607). **[457]** The decision in *Blewitt* v. *Thomas* was preceded by several of the same nature relating to mortgages: *Aggas* v. *Pickerell* (3 Atk. 225), *Clapham* v. *Bowyer* (1 Ch. Rep. 206), *Frazer* v. *Moor* (Bunb. 54), *Peacock* v. *Neale* (Rep. temp. Finch, 266). These, no doubt, were cases of mortgages,(*e*) and not rent charges; but the same principles must apply. In *Cholmondeley* v. *Clinton* (2 Jac. & W. 191; 4 Bligh, 1) Lord Eldon said that he could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate, where the holder had undertaken no duty for the party against whom he pleaded the adverse possession.

(*e*) See the cases upon this subject collected in Matthews on Presumption, p. 329, 330.

Here the long adverse possession would authorize a Judge to direct a jury to presume that the annuity had been discharged; and, consequently, a Judge in equity is bound to make that presumption: *Emery* v. *Grocock* (6 Madd. 57).

Independently of other considerations, the plaintiff's right is barred by the statute 2 & 3 Will. 4, c. 27, s. 2, which, if it does not apply expressly to Courts of equity, will nevertheless guide their proceedings.(*h*) The possession being adverse, the plaintiff cannot bring himself within the protection of the 15th section.

The case of *Hardman* v. *Ellames*(*i*) will be relied upon on the other side. That was a bill brought for the recovery of an estate, and the defendant pleaded adverse possession, but did not inform the plaintiff of the nature of his adverse possession or how he had acquired it; and the plea was overruled. This is not a bill brought for the recovery of an estate, but to enforce a demand upon it; and the plea here is non-payment for more than twenty **[458]** years. It must be admitted that in that case there was an allegation that the defendants had in their custody certain deeds and documents by which the truth of the matters alleged in the bill would appear; and the Vice-Chancellor considered that that allegation ought to have been met by answer, and on that ground also he overruled the plea. But then it was also expressly alleged that the defendant had been let into possession and receipt of the rents and profits in the year 1815 (within twenty years before the filing of the bill), and clearly the deeds and documents might explain that fact. Besides, the charge there was, in other respects, more explicit than it is in this case. The Vice-Chancellor did not decide that a general and vague allegation as to deeds and documents requires an answer. In *Macgregor* v. *The East India Company* (2 Sim. 452) he decided the contrary. *Thring* v. *Edgar* (2 Sim. & Stu. 274) also supports that decision.

Mr. Twiss and Mr. Hayter, for the bill. The authorities cited on the other side are not sought to be impeached. If the Statutes of Limitations were applicable, the 15th section of 3 & 4 Will. 4, c. 27, would protect the plaintiff; because that applies to cases where the receipt of rent has not been adverse to the claimant's title. Here there is no pretence for saying that there has been an adverse possession of rent. An adverse possession of A.'s rent would arise if the terre-tenant were to pay it over to B.; but that is not the case here. No person has had the adverse possession of the rent here claimed. The Statutes of Limitations do not apply to this case. The only case in which Courts of equity have acted by analogy to those statutes is in the case of the statute of James (stat. 21 Jac. 1, c. 16). **[459]** That statute is not applicable here. The statute 32 Hen. 8, c. 2, s. 3, gives fifty years to the claimant of a quit rent; but, with respect to a rent-charge, even that statute has been held inapplicable: *Foster's case* (8 Rep. 64), *Collins* v. *Goodall* (2 Vern. 235). [The Lord Chief Baron. At the time *Foster's case* was decided, the notion was you could not plead a deed without making a profert; afterwards it became allowable to plead that the deed had been lost by time and accident; and the Judge directed the jury that if they thought there was a reasonable ground to presume there was a release, they should find a verdict for the party who so pleaded. When this first became the practice, Lord Eldon made many questions about it, but at last acceded to it. Suppose that in this case (there being no trust) you had distrained; that the goods had been replevied; that an action of replevin had been brought, and an avowry made by reason of the rent-charge in arrear: and suppose the plaintiff in replevin had put in a plea in which he stated that true it was that by the deed mentioned in the avowry such a rent-charge was granted, but soon afterwards the annuity was redeemed; and that by another deed, lost by time and accident, and to which the annuitant was a party, the estate was altogether released: in such a case the plaintiff would not be bound to make profert of the deed of release, but would give evidence that for twenty-six years there had been no payment under it; and would not the Judge direct the jury to presume a release? I am not sure whether this modern improvement in pleading might not have put an end to writs of right without the aid of the legislature.] At all events *Foster's case* takes a claim of this nature out of the Statutes of Limitations: Selwyn, N. P. title "Replevin." Upon the mere statutes the defendants are out of Court. Then, if **[460]** they rely on length of time, independently of the statutes,

(*h*) And see section 40.

(*i*) 5 Sim. 640. The report of this case, on appeal, has since been published. See 2 Myl. & K. 732.

they ought to allege special circumstances, giving length of time its effect. They must shew that something has occurred beyond the mere lapse of time required by the statutes. The Court will not create what is equivalent to an equitable bar. [The Lord Chief Baron. Supposing a person had granted a lease for fifty years, and had never received rent for that time, would not a Judge direct a jury to presume a release of it? Or, suppose, after twenty-four or twenty-five years, a landlord never having received any rent at all, had brought ejectment against his tenant, would not length of possession have been a bar to that action? The term of twenty years for barring these demands has been adopted from the statute both by Courts of law and of equity. In a late case (*a*) a bill was brought to recover a legacy which had been left by a testator more than twenty years before; and Lord Brougham held that the legacy must be presumed to have been satisfied. I do not say whether, under all the circumstances of that case, I should have agreed with the decision; but I should say that, upon the general principle, his Lordship was right.] There is no adverse possession of the rent-charge in this case; and, therefore, the only statute from which any analogy can be raised is the 32 Hen. 8, c. 32. But in *Eldridge* v. *Knott* (Cowp. 214) it was held under that statute, that mere length of time, short of the fifty years, unaccompanied with circumstances, was insufficient to raise a presumption of release. In *Smith* v. *Clay* (Ambl. 645; 3 Bro. C. C. 639) Lord Camden said that the time of limitation could not be defined, but must be governed by circumstances. In *Cholmondeley* v. *Clinton* (4 Bligh, 1) the statute on which Lord Eldon founded his judgment was applicable to the nature of the case. **[461]** *Busby* v. *Lord Salisbury* (Rep. temp. Finch, 256), *Deloraine* v. *Brown* (3 Bro. C. C. 633). If mere length of time were sufficient for the defendant, he could have demurred; but that is not allowed: Mitford, Pl. 214, 4th ed.

There are other material objections. The bill alleges that the defendant Peach was a purchaser for a valuable consideration without notice; and that not being denied, the plea must be overruled: *Wynn* v. *Williams* (5 Ves. 130). Besides, the plaintiff is entitled to the discovery of the annuity alleged to be paid by Peach to Mrs. Atkyns. The plea ought to extend to the acts of Mrs. Atkyns as well as of Peach himself: *Jones* v. *Davis* (16 Ves. 262). It ought to rebut every circumstance from which it may possibly be inferred that the annuity remains. Now, it is said that the defendant Peach, and those under whom he claims, have been in the lawful and uninterrupted possession for twenty-six years, without having paid or accounted for any part of the rents and profits to the plaintiff. That, however, is not a complete defence; because payment may have been made without their being in possession. Payments may have been made by Mrs. Atkyns since her possession. In *Blewitt* v. *Thomas* the defendant or his ancestors were in possession the whole time. [The Lord Chief Baron. No doubt it is sufficient for the mortgagor to say that he has been many years in possession without accounting to the mortgagee. On the other hand, in this case of an annuity, the money might be paid voluntarily, and not out of the rents and profits. So far, therefore, the plea is open to ambiguity, because payments might have been made while the parties were out of possession. But then it goes on thus—"And without having paid to or accounted with the plaintiff for any sum or sums of money in respect of the said annuity." Now, to make out **[462]** the plea to be bad, you have to satisfy me that those words are only referable to the period of time when the defendants were in possession.] Those words are governed by the preceding sentence. They occur in *Blewitt* v. *Thomas* precisely as they do here, and refer exclusively to the possession.

That part of the plea is insufficient which states the defendant's belief that those under whom he claims have not made any acknowledgments of any money due on the rent-charge. With respect to the defendant Atkyns, presumption of payment cannot be raised in her favour; the bill alleging that she has been for years out of the jurisdiction: *Newman* v. *Newman* (1 Stark. 101). [The Lord Chief Baron. It is not alleged that she was the whole time out of the jurisdiction. Besides, the plaintiff had his remedy against the estate.]

Lastly, the defendant should have answered the charge as to the books, papers, and documents: *Hardman* v. *Ellames* (5 Sim. 640). We say that if he had produced those letters, it would have appeared that he had notice of this annuity, and that he

(*a*) *Campbell* v. *Graham*, 1 Russ. & Myl. 453.

now pays an annuity to Mrs. Atkyns. [The Lord Chief Baron. The words "several matters aforesaid" contained in the charge, must mean the several matters stated in the bill. But the bill states them very loosely. There is no statement that Peach bought the estate subject to the rent-charge, though there is an allegation that he had notice of the incumbrance. Having notice is one thing; buying the estate subject to the rent-charge is another. If there had been an allegation that he had bought subject to the rent-charge, I should have said the plea was no answer to the bill.]

Mr. Boteler, in reply. The only question is, whether the defendant has sufficiently shewn by his plea that **[463]** nothing has been paid in respect of the annuity within twenty-six years. It is said that it ought to have been alleged that nothing was paid within that time by Mrs. Atkyns. *Blewitt* v. *Thomas* is precisely this case. The mortgagor bequeathed the mortgaged property to his wife for life; and, after her death, to his children. The claim was made against the children, and they pleaded nonpayment by them or their ancestors. Now, payments might have been made by the widow in her lifetime and by her administrator de bonis non. It was, therefore, quite as necessary to state that payment was not made by the personal representative of the mortgagor, as it is necessary to state here that there was no payment by Mrs. Atkyns. Supposing, however, such an allegation to be necessary, there is sufficient matter in the plea to answer that purpose. Granting that the express statement of nonpayment is to be confined to the period of possession, what will be said of the allegation that no acknowledgment was ever made of the annuity? If there was no acknowledgment, there was no payment. [The Lord Chief Baron. Suppose Mrs. Atkyns had paid the annuity within the last fifteen years, would not that bind Peach? You only deny that as to your belief.] They might take issue on that fact, though the plea were allowed in law. Where a plea is put in on oath, some circumstances must be stated on belief. The corresponding part of the plea in *Blewitt* v. *Thomas* rests on belief only.

THE LORD CHIEF BARON was of opinion that the plea must be allowed in point of law; but, inasmuch as the averments in it were not positive as to the acts of Mrs. Atkyns, he ordered that it should stand over, and that the defendant Peach should be restrained by injunction from paying any thing to Mrs. Atkyns till she had appeared and answered, pleaded, or demurred.

[464] In consequence of this decision the defendant, Mrs. Atkyns, put in a plea in substance the same as that of the defendant Peach. This having been submitted to by the plaintiff, and he having obtained an order to amend his bill,

Mr. Simpkinson and Mr. Bichner, for the defendant Mrs. Atkyns, now moved to dissolve the injunction.

Mr. Twiss and Mr. Hayter, for the plaintiff, opposed the motion.

THE LORD CHIEF BARON. I cannot take notice of the amendments now. The object of the injunction was to make Mrs. Atkyns put in a plea or answer. It would not have been granted if she had in the first instance pleaded the same plea as the defendant Peach. She has now pleaded; and it is admitted that it does not appear by that plea that she was liable. Therefore, discharge the order of June so far as relates to the injunction.

Injunction dissolved.

BOWLES *v.* ORR AND OTHERS. June 12, 16, 1835.—A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud. Therefore, where a bill was brought against a banker by his customer for an account, and for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, and it appeared by specific allegations in the bill that, notwithstanding the judgment, the balance of accounts was in favour of the customer: Held, that the case made by the bill was primâ facie a case of fraud in the banker, which he was bound to answer; and, consequently, his demurrer was overruled without reference to the question whether the bill was sustainable for the account.—A bill for an account will lie against a banker by his customer.—A mere general charge that accounts are intricate and cannot be taken without the assistance of a Court of equity is not sufficient to sustain a bill for an account, unless the bill state circumstances from which it may fairly be presumed that the charge

is true.—Upon the overruling of the demurrer of two defendants, who were out of the jurisdiction, the plaintiff obtained the common injunction against them for want of an answer; and the Court, upon the application of the third defendant, who had answered, refused to grant an order nisi to dissolve the injunction.

The bill stated that in October, 1829, the plaintiff, being resident in France, opened a banking account with the three defendants, who were bankers at Paris; and that, from that time till May, 1831, they received from **[465]** the plaintiff and other persons on his account various bills of exchange drawn on England and elsewhere; and also other securities for money, and also cash and money to a very large amount. That the defendants discounted or sold at Paris the said several bills of exchange and other securities, and received the produce thereof for or on account of the plaintiff. That the plaintiff at different times between the 26th of October, 1829, and 25th of May, 1830, drew out of the hands of the defendants various sums of money; and that the defendants, at different times, paid several sums of money on account of the plaintiff pursuant to his written orders; and also made other payments to a considerable amount for or on account of the plaintiff. That, during the whole of the period aforesaid, an open unsettled account to a very large amount, consisting of numerous items on both sides, existed between the plaintiff and the defendants.

The bill further stated that the defendants never rendered to the plaintiff any full account of their receipts and payments on his behalf; and that, if such an account were taken, it would appear that there is now due and owing to the plaintiff, from the defendants, on the balance of accounts, the sum of 150,000 francs and upwards, which sum is of the value of 6000l.

The bill then set forth an account delivered by the defendants to the plaintiff in May, 1830, by which the plaintiff appeared to be their creditor to the amount of 55,000 francs. The bill then charged that this account was in many respects false and fraudulent. That, besides other pretended payments, the defendants allege that some of the sums charged in the said account were paid in satisfaction of losses incurred in making certain purchases or sales of stock in the public funds of France on account of the plaintiff; whereas, if any such purchases or sales of stock were ever made, they were made without **[466]** the plaintiff's authority, and were not real purchases, but merely time bargains made by the defendants on their own account; and that time bargains in the public funds are prohibited by the laws of France.

The bill further charged that notwithstanding a sum of 150,000 francs, or 6000l. and upwards, is now due to the plaintiff from the defendants upon a balance of accounts, the defendants have lately commenced an action in the Court of Common Pleas to recover from the plaintiff the sum of £ , which they allege is due to them from the plaintiff upon a judgment obtained by them against the plaintiff in a Court of judicature called the Tribunal of Commerce of the Department of the Seine at Paris; and also upon the balance of account between them and the plaintiff. That the said defendants intend to proceed in the action unless restrained, &c. That nothing whatever is due from the plaintiff to the defendants upon the said judgment, the same having been wrongfully and fraudulently obtained against him. That, even if the judgment was properly obtained against the plaintiff, still that, upon a balance of accounts, not only there is nothing whatever due from the plaintiff to the defendants, but there is, in fact, a balance of 150,000 francs or 6000l. and upwards due from the defendants to the plaintiff; and that such balance greatly exceeds the amount due upon the said judgment.

The bill contained an allegation that the accounts between the plaintiff and defendants are long and intricate, and consist of numerous items of receipts and payments by the defendants for or on account of the plaintiff, and can only be taken in a Court of equity.

The bill prayed for a general account of the dealings and transactions referred to in the bill, and for an injunction to restrain the action brought on the judgment.

To this bill two of the defendants, Orr and Goldsmid, demurred generally for want of equity.

[467] Mr. Stuart, for the demurrer. Unless a bill for an account can be sustained by a customer against his banker, the demurrer must be allowed. Though it is said that Courts of law and equity have a concurrent jurisdiction in matters of account; yet it is certain that bills of this sort have repeatedly failed. The mere relation of

principal and agent is no ground for an account in equity: *Dinwiddie* v. *Bailey* (6 Ves. 136), *King* v. *Rossett* (2 Y. & J. 33); though where there is a trust or confidence between the parties, as in *Mackenzie* v. *Johnston* (4 Madd. 373), a bill will lie.

Admitting that the bill might have been sustained if the plaintiff had confined himself to seeking a discovery, he has no right to come into a Court of equity for an account. He seeks a general account; alleging that there is an open unsettled account; and yet sets forth in his bill an account which has been rendered to him by the defendants, which extends over a few months only, and of which he impeaches certain items. That might have been done at law. He alleges that the accounts between himself and the defendants are intricate, but that is contradicted by the account set out in his bill. In *Dinwiddie* v. *Bailey* Lord Eldon says, "It is not to be said that in every case where the defendant owes more to the plaintiff, that is a ground for a bill. There must be mutual demands." [The Lord Chief Baron. That is quite true of an insurance broker, for he is the accountant for the insured; and there the bill was filed by the broker against the insured. But does the same thing necessarily apply to the case of a bill filed by a party against his banker?] There is no authority for the proposition that a bill may be maintained in equity to recover the balance of a banker's account.

The statement that improper items have been included **[468]** in the account does not bring the case within the jurisdiction of a Court of equity. There is a general charge of losses incurred by the defendants by time bargains, and that time bargains are illegal in France; but no specific act of fraud is charged. Then it is stated that a judgment was unduly obtained by the defendants; but in what the fraud consisted does not appear. Fraud is an intendment of law from certain facts pleaded. General charges of fraud, without specific facts corroborating those charges, are not sufficient. Here no specific fact is stated shewing that the judgment was obtained by fraud. The plaintiff endeavours to remedy that difficulty by further charging that, even if the judgment was properly obtained, still that a sum exceeding the amount of the judgment remains due to the plaintiff on a balance of the accounts. That allegation, however, is too loose and general to induce the Court to support this bill. This case is by no means so favourable to the plaintiff as *King* v. *Rossett:* yet there the demurrer was allowed both to the discovery and the relief. [The Lord Chief Baron. As the bill does not state under what circumstances the judgment was recovered, I must presume it was in respect of the matters contained in the bill. Then, if so, it will be conclusive against the account sought, unless the bill contains other charges which remove that difficulty. According to modern decisions, a foreign judgment is as conclusive against the debtor as an English one can be.] *Martin* v. *Nicholls* (3 Sim. 458) is an authority to shew that the foreign judgment is conclusive against the plaintiff.

Mr. G. Richards and Mr. Sharpe, for the bill. The difficulty to which your Lordship adverts is entirely removed by the charge that, upon the accounts being taken, there would appear to be a balance due to the plaintiff **[469]** exceeding the amount of the judgment. When a judgment is recovered at law upon an insulated part of an account, the defendant at law has a clear right to come here for an account, alleging that, notwithstanding the judgment, a balance is, in fact, due to him.

It is admitted, by the demurrer, that a balance is due to the plaintiff; but the defendants say that he might prove it at law. Before your Lordship will say this, you will look at the relative situation of the parties. The defendants were not only the plaintiff's bankers, but his agents, to receive, pay, and invest money, and to appropriate and apply the different bills of exchange put into their hands. There is no authority to shew that a customer cannot file a bill against his banker. A steward is only a minor description of agent, yet a bill will lie against him. A banker is trusted to a far greater extent. In France, however, the bankers are not deposit bankers; they deal not in cash or cheques, but in bills of exchange; they are in the situation of accountable agents or stewards, receiving money from other persons on behalf of their customers. Unless, therefore, they were compellable to account in equity, there would be no mode of calling them to account. The reasoning of Lord Eldon, in *Dinwiddie* v. *Bailey* (6 Ves. 136), does not apply to this case, which is that of a bill filed by a principal against his agent. There the bill was filed by a broker against the insured; and Lord Eldon said that, as the plaintiff had evidence in his possession sufficient to support his case at law, he ought not to have come into equity.

In *King* v. *Rossett* (2 Y. & J. 33) Alexander, C. B., held that the bare relation of principal and agent was not sufficient to bring parties into a Court of equity, if they had their remedy at law. But there the question related only to one item, namely, 400,000l. stock. His Lordship did not determine that, **[470]** where a series of items in an account between a banker and his customer is in dispute, the principal cannot come into this Court for redress. 1 Eq. Abr. 5, pl. (1), and Mitf. Pl. 4th ed. 159, are authorities in favour of the plaintiff. *Mackenzie* v. *Johnston* (4 Madd. 373) was no more a case of trust or confidence than the present. Here the breach of confidence alleged and admitted is that the defendants attempted to debit the plaintiff with losses from time bargains. [The Lord Chief Baron. They could not charge him at law with that, because they must prove their authority in each particular case.] Supposing even that they could prove their authority for each item, the accumulation of items alone would give the Court jurisdiction: *Freshfield* v. *Lee* (not reported). Each transaction involves a question of account. Besides, by demurring, they admit the allegation in the bill that the accounts are intricate, and can only be taken in a Court of equity.

Mr. Stuart, in reply. There is nothing to change the jurisdiction from law to equity. In matters of account Courts of law and equity having concurrent jurisdiction, it is not usual that, after proceedings have been had in one Court, and it has fairly possessed itself of the subject in dispute, another Court should be called upon to interfere. That has been repeatedly held as between Courts of equity and the ecclesiastical Courts, in relation to testamentary matters: *Nicholas* v. *Nicholas* (Pre. Cha. 546). Can it be said that a Court of law cannot adjudicate between these parties? It is childish to say that general allegations, as to the intricacy of the accounts, and others of the like nature, will bring the case within the jurisdiction of this Court. Besides, general allegations are controlled by particular **[471]** statements; and here the account set forth in the bill contains but a few items, and contradicts the allegation of intricacy. Assumpsit will lie to recover the balance of a banking account: *Tomkins* v. *Wiltshire* (1 Marshall, 115). The plaintiff, therefore, should have shaped his case for discovery and not relief: *Frietas* v. *Dos Santos* (1 Y. & J. 574).

The Lord Chief Baron. My opinion is that the demurrer must be disallowed. If this were a bill filed merely in respect of a single item, of course it would be absurd to suppose that a Court of equity would exercise its jurisdiction in relation to that one item, and the case would come within the principle of *King* v. *Rossett*. There the plaintiff in equity intrusted his stockbrokers with a sum of 40,000l. stock for sale. The stock was sold and afterwards repurchased; and, according to the statement in the bill, the amount of the sale and purchase was finally closed, and a balance claimed by the defendant. Now it is quite obvious that, if the defendant had brought his action for that balance, his stated account might have been negatived at law. At all events he could not have established that balance without shewing either a discharge of sums due from him, or a settled account. Under these circumstances the Chief Baron thought that the facts of the case did not require the interference of a Court of equity.

Again, in *Frietas* v. *Dos Santos*, the action was brought by principals living abroad, to recover the produce of specie consigned to their factors in England for sale, and the factors filed a bill against their principals for an account and an injunction, alleging that the parties had had various dealings, and that mutual accounts subsisted between them. The Chief Baron's judgment in **[472]** that case does indeed appear to shew that, if an account had been alleged to exist requiring settlement, the bill would have been allowed. But, after adverting to the difficulty he had as to how far the general charges in that bill entitled the plaintiff to relief, he says, "Now, without laying down any general rule, I think the facts charged in the present bill are too loose and vague to support it; not even stating that there are unsettled accounts, or that a balance is due to either party." Now what is the meaning of that? I am glad to find an authority for the opinion I entertain upon this point. I consider a general charge as nothing more than a general charge. A mere general charge of intricate accounts is not to be received as admitted. The demurrer is no more an admission of such accounts than it is of general combination and conspiracy. No facts are admitted by it but those expressly stated. The judgment of the Chief Baron was right, and had the effect of preventing the farther interposition of delay, which, from the nature of the case, the factors might have had their account in creating.

In *Dinwiddie* v. *Bailey* (6 Ves. 136) an insurance broker filed his bill against the

insured, stating in a general way the several transactions on which the bill was founded, and praying an account. Those who look at the relation of the parties, will see that the bill, under the particular facts of that case, could only have been filed for delay. What is an insurance broker's duty? While he effects policies, he gives the underwriters credit for their premiums, and charges losses against them, and keeps the accounts. Now, though there may be very proper reasons for filing a bill against the person who keeps the account, what right has he to ask the underwriters for an account?

But this case goes farther. A fact is stated in the bill which requires a very explicit answer. It is this—it is first stated that no account has ever been de-**[473]**-livered to the plaintiff, except that account, upon the face of which it appeared that 55,000 francs were due to him. Secondly, it is stated that no account has since been rendered to him, and then that a judgment was obtained by the defendants against him at Paris, for the balance alleged to be due to them. What, then, is admitted by the demurrer? It is admitted that, after an account stated had been delivered to the plaintiff, in which they had made the plaintiff a creditor, a judgment was obtained by them against the plaintiff upon an alleged balance, and that the object of the action is to enforce that balance.

Under these circumstances an important consideration arises. A judgment obtained by a creditor abroad has been held to be conclusive in this country; therefore, like any other security available in this country, it will be affected by fraud. Perhaps it might be said that, upon shewing a strong case, the party might defeat the judgment, even at law; but was it ever doubted that a bill might be filed in equity to be relieved against a judgment, or any other security, obtained by fraud? Now, here, is it not stated to have been obtained when the persons who obtained it were the debtors? It may turn out otherwise; but the record shews a primâ facie case of fraud, which it would be difficult to unravel at law. The demurrer having admitted that, it goes far towards solving the question, whether the principal on the one side, or the agent on the other, is under present circumstances entitled to be relieved in this Court.

I do not lay down the general proposition that every account involving various items, and requiring explanation, may or ought to be the subject of inquiry in a Court of equity; but I apprehend that this is a fit case for such inquiry; and I own I was surprised to hear it stated that no relief could be had in this Court in respect of a banker's account. No authority was produced for that state-**[474]**-ment. It appears to me that a customer who trusts his banker with a fund, is justly entitled to call on his banker for an account of it; and that the banker, by receiving it, becomes his agent, and accountable to him for it. However, the particular case before me does not give rise to the application of any such principle, because here the specific facts alleged and admitted by the demurrer are of such a nature as, in my opinion, to entitle the party to relief in equity.

Demurrer overruled.

July 16th.—The demurrer having been overruled, the plaintiff obtained the common injunction, for want of an answer, against the defendants Orr and Goldsmid.

The other defendant, Fladgate, who was within the jurisdiction, having put in his answer,

Mr. Twiss and Mr. Stuart now moved, on his behalf, for an order nisi, to dissolve the injunction obtained against the other two defendants, contending that the defendants having been bankrupts at Paris, though now reinstated by concordat,(*a*) the action, which was brought for the benefit of their creditors at large, must be brought in their joint names. In support of the motion they cited *Joseph* v. *Doubleday* (1 Ves. & B. 497), *Kilby* v. *Stanton* (2 Y. & J. 75), and *The Imperial Gas Company* v. *Clarke* (1 Younge, 580).

Mr. G. Richards and Mr. Sharpe, contrà. The demurrer was overruled upon the equity raised by the bill. The plaintiff has a right to a discovery from these two defendants. Their demurring to the bill is a mere man-**[475]**-œuvre to avoid our answer, it being admitted that they could give a better account than Fladgate. *Prince* v. *Haydin* (3 Y. & J. 190) is an authority against the present motion. [The Lord Chief Baron. If the decision there is right, it is a very strong case.]

Mr. Twiss, in reply.

(*a*) See *Orr* v. *Browne*, 5 C. & P. 414.

THE LORD CHIEF BARON. The demurrer looks like anxiety on the part of the two defendants to avoid discovery; and yet I am asked to consider the case so conclusive that no discovery is necessary. I cannot accede to that. Besides, there is great danger in deviating from the general practice. If this motion be allowed, how do I know that on future occasions it will not be argued that in all cases where the defendants in equity are abroad, they may be allowed to proceed in their action at law? On the other hand, I feel the force of the observation, that where a bill is filed against several defendants, and some of them are abroad, a Court of equity will not on that account continue an injunction in favour of a plaintiff who has no equity whatever. I am free to say I do not go the length of Chief Baron Alexander in this respect. I think the decision in *Prince* v. *Haydin* very questionable.

No order was made.

[476] TREDWELL *v.* BYRCH. June 12th, 1835.—A suit instituted for the purpose of regulating and apportioning a rate levied on the inhabitants of a parish under an act of Parliament, ought to be by information and bill, and not by bill only; therefore, a person who had filed a bill for this purpose on behalf of himself and all other the rated inhabitants of the parish, upon affidavits being made of his insolvency, was ordered to give security for costs.

[See 4 Y. & C. Ex. 566.]

An act of Parliament passed in the fifth year of his late Majesty, for paving, cleansing, lighting, watching, regulating, and improving the borough of Evesham, and for repairing, improving, and maintaining the bridge over the river Avon. The act, after reciting that the borough of Evesham consisted of the parishes of All Saints, St. Lawrence, and Bengeworth, and that there were within the parishes of All Saints and St. Lawrence several pieces of common and waste lands, and that it had been agreed that the same should be sold, and that the monies to arise from such sale should be applied in aid of the sums necessary to be raised for the purposes of the act, empowered certain commissioners therein named, when and so often as they should think necessary, to make one or more rate or rates, assessment or assessments, in every year, upon the tenants or occupiers of dwelling-houses, &c., within the borough, such rate or rates, assessment or assessments, not to exceed in any one year the several sums therein particularly mentioned. Provided always, that it should be lawful for the commissioners, and they were thereby required, to apportion the rates to be from time to time assessed and imposed by virtue of the act on the several parishes in the borough, so as that each parish might bear an equal share of such rates and assessments, in proportion to the extent of improvements necessary. And it was further enacted that the several common lands in the parishes of All Saints and St. Lawrence, specified in the schedule to the act, should be and were thereby vested in the commissioners, who were authorized to sell the same in manner directed by the act, and to receive the purchase monies. And it was further enacted that the commissioners, after deducting from the purchase-monies a sufficient sum for defraying the expenses of the act, should **[477]** invest the surplus in the public funds, in the names of the mayor &c. of the borough, in trust to pay the dividends thereof to the commissioners, to be applied by them from time to time, and at all times after such investment, in aid of the rates and assessments to be made and levied by virtue of the act in the respective parishes of All Saints and St. Lawrence only.

The bill, which, under a provision in the act, was filed against the clerk of the commissioners only, alleged that the plaintiff was an inhabitant of the parish of All Saints, and as such had been rated and assessed to the annual rates and assessments made by the act, and had paid all rates which had become due from him. It then charged various acts of misconduct on the part of the commissioners; and, amongst others, that the bill of costs for procuring the act of Parliament was too high, and had never been taxed; and that one of the commissioners was himself the solicitor who made out and received the amount of the bill. It likewise charged that the commissioners had not invested the purchase-monies in the manner directed by the act, and that they had applied part of such monies for the benefit of the parish of Bengeworth, which parish was not entitled to the benefit thereof.

The bill prayed an account of the purchase-monies received, or which ought to

have been received, by the commissioners or their clerk; that the bill of costs for procuring the act of Parliament might be taxed; and that the overplus of the purchase-monies, after payment of such bill, might be ascertained and invested pursuant to the act of Parliament, &c.

A motion was now made, on the part of the defendant, to stay all proceedings in the cause until the plaintiff should find security for costs, upon affidavits shewing the plaintiff's insolvency, and that he was the mere tool of the attorney who professed to conduct the suit for him.

[478] The plaintiff, by his affidavit, stated that the suit was instituted on behalf of all the occupiers of premises liable to be assessed for rates under the act of Parliament within the parishes of All Saints and St. Lawrence.

Mr. Temple and Mr. Wilcock, for the motion. The plaintiff has no right to file such a bill as this. It would have been demurred to, but that the defendant, by so doing, would have been too late to ask for security for costs. The suit is framed in this manner because, in fact, the plaintiff is a pauper, and the mere creature of the attorney. No doubt the general rule is, that the insolvency of the plaintiff is not of itself a sufficient ground to move for security for costs. But this is a peculiar case. By the present mode of proceeding, the defendant is placed in a worse situation than he need be. The plaintiff ought to have filed an information and bill, in which case there would have been a relator, who would have been answerable for the costs of the suit. [The Lord Chief Baron. There is some difficulty in that, unless he did it on behalf of all the parishioners, because he might die.] *The Attorney-General* v. *Heelis* (2 S. & S. 67) applies to that point. In that case an information was filed on behalf of all the inhabitants of a parish, for purposes similar to those of the present bill; and it was held that the funds which were there required to be administered constituted a public charity, and that the frame of the suit was proper. Here, the plaintiff not having adopted that mode of proceeding, must give security for the costs. Such a security is sometimes given in similar cases. In a suit by a bankrupt, the assignees may be called upon to give security; so also may the next friend of a married woman: *Pennington* v. *Alvin* (1 S. & S. 264).

[479] Mr. Parker, contrà. This is the first application of this nature that has been made. The case of the defendant was made out only through those who are directly interested in defending the suit. The plaintiff is a poor man, and has been oppressed in regard to the rates by the acts of the defendant. On a bare charge of insolvency, and after he has deprived himself of the right of demurrer, the defendant comes here to stop the progress of the suit. In *Pennington* v. *Alvin* the Court reprobated the conduct of the next friend, who was the paramour of the wife. In this case, all the inhabitants are interested, though one takes upon himself the onus of the suit; but it is not, therefore, less perfect in its frame, nor has the legislature required that all the inhabitants should be parties. It has long been established that the mere insolvency of the plaintiff will not warrant an application that he should give security for costs: *Turner* v. *Turner* (2 P. W. 297), *Squirrel* v. *Squirrel* (id. note), *Anon.* (2 Taunt. 61), *Baddeley* v. *Harding* (6 Madd. 214).

Mr. Temple, in reply, was stopped by the Court.

THE LORD CHIEF BARON. All the arguments of Mr. Parker would apply with irresistible force in cases where individuals are suing in their own right. This case is analogous to that of an information by the Attorney-General, acting on behalf of various persons. When he files an information under such circumstances, he does not give security for costs; but the persons who are really interested are obliged to find relators, who are answerable in that respect. This is nearly that case, and ought to be governed by the same principles. The plaintiff is a pa-**[480]**-rishioner and insolvent, and he institutes a suit on behalf of all the parishioners, in order to obtain a common benefit. If they succeed, they can get no costs; and if they fail, the defendants, as the suit now stands, will be deprived of their costs. The suit, therefore, in its present shape, cannot be entertained, and the motion must be granted.

What would have been the effect of a discussion upon the demurrer I do not know. At present my impression is that this case falls within the principles of *The Attorney-General* v. *Heelis*. It may possibly be a fit case to be brought before the Court, but the plaintiff must apply to the Attorney-General for that purpose.

Motion granted.

Nov. 17th.—The order made in pursuance of the above motion, and dated June

12th, not having been obeyed by the plaintiff, Mr. Temple now moved that the plaintiff might within ten days from the date of the order to be made upon the present motion, give the requisite security for costs, or that the bill might be dismissed. He cited *Camac* v. *Grant* (1 Sim. 348).

Upon the production of an affidavit of service of notice of this motion upon the plaintiff's clerk in court, the Lord Chief Baron made the order as prayed.

[481] WILLIAM PROSSER the Younger, AND JOHN HENRY HOWARD, *Plaintiffs;* RICHARD EDMONDS, RICHARD HUGHES, AND ROBERT TODD, *Defendants.* July 4th, Dec. 17th, 1835.—An assignment of a bare right to file a bill in equity for a fraud committed on the assignor, is contrary to sound policy, and void: therefore, where A., who was entitled to certain property under his father's will, for a valuable consideration, assigned the whole of that property (except a reversionary interest in the funds) to B., his father's executor, and afterwards assigned the whole of his interest under his father's will (including, therefore, the reversionary interest to C.: Held, that C. could not maintain a bill to set aside the first assignment, on the ground of fraud committed by B. against A., the latter refusing to join as plaintiff in the suit.—A chose in action, not coupled with any partial interest in possession, and which cannot be reduced into possession without a suit, is not assignable in equity.—Courts of equity will give no encouragement to contracts which savour of maintenance or champerty, though such contracts may not be within the strict legal limits assigned to those offences. To a bill filed for carrying the trusts of a creditor's deed into execution, the scheduled creditors, who have not executed the deed, need not be parties.—After a plea submitted to, and bill amended, a demurrer may lie to the whole amended bill.

[Distinguished, *Wilson* v. *Short*, 1848, 6 Hare, 366. Not applied, *Dickinson* v. *Burrell*, 1866, L. R. 1 Eq. 351. Applied, *Robb* v. *Dorrian*, 1877, Ir. R. 11 C. L. 307; *Keogh* v. *M'Grath*, 1880, 5 L. R. Ir. 516. Referred to, *Bradlaugh* v. *Newdegate*, 1883, 11 Q. B. D. 12; *Alabaster* v. *Harness*, [1894] 2 Q. B. 897; [1895] 1 Q. B. 344; *Dawson* v. *Great Northern and City Railway*, [1905] 1 K. B. 271; *Fitzroy* v. *Cave*, [1905] 2 K. B. 369; *British Cash and Parcel Conveyors, Limited* v. *Lamson Store Service Company, Limited*, [1908] 1 K. B. 1020; *Defries* v. *Milne*, [1913] 1 Ch. 109. See also 4 Y. & C. Ex. 566.]

Thomas Todd, by his will, after bequeathing certain annuities to various persons, directed that, upon the respective deaths of those persons, the funds, which should have been set apart to answer the annuities, should be disposed of by his trustees and executors thereinafter named, in the same manner as the residue of his real and personal estate. The testator, then, after mentioning that he had in his lifetime advanced considerable sums of money to his two sons, and, therefore, intended to give his daughter a larger sum than he would otherwise have done—gave, devised, and bequeathed to the defendant, R. Edmonds (the husband of his daughter), and Richard Hughes, their heirs &c., all his real and personal estate, not thereinbefore disposed of upon trust, to sell the real estates, and to convert into money so much of the personal as should not consist of money, and divide the proceeds into three equal parts, one third part thereof, and also 10,000l. out of the two other third parts, to be paid to his daughter Catherine Edmonds, for her absolute use and benefit; and the residue of those two third parts to be paid to the testator's two sons, William and Robert Todd, and their respective executors, administrators, and assigns. The testator then directed that his son William should have the right of pre-emption of his real estates at **[482]** Poplar, at a fair valuation. That Robert should have a similar right in regard to his estates at Benhill; and that it should be lawful for the trustees to allow any of his children the pre-emption of any other parts of his property which he or she might desire, at a fair valuation; but that the trustees should not be prevented from disposing of his property by reason of such pre-emption longer than twelve calendar months after the testator's decease. The testator then appointed Thomas Edmonds and Richard Hughes to be the executors of his will.

Upon the testator's death, the executors proceeded to execute the trusts of the testator's will, and to administer his estate; and they set apart 11,600l. consolidated

Bank Annuities, for the purpose of paying the annuities bequeathed by the will. In August, 1828, they delivered their final account as such trustees and executors, to William and Robert Todd, who thereupon signed the account, and gave releases to the executors.

In March, 1829, William Todd, by an indenture, assigned his reversionary one-third share in the sum of 11,600l. consols, to the defendant Edmonds, subject to a power for the repurchase of the same within ten years. In June of the same year he, by an indenture, assigned to his brother Robert Todd his one-third share in the testator's residuary personal estate; and also his power of repurchase reserved to him by the last-mentioned indenture. He made no actual conveyance to Robert Todd of his interest in the real estate; but it was alleged by the bill that this indenture of assignment was intended to have that effect.

By virtue of several indentures, dated in June, 1729, and April, 1830, and executed between Robert Todd and the defendant Edmonds, the whole of the interest in the testator's property which Robert Todd had purchased of his brother, and also his own one-third share in the testator's residuary estate, became vested in Edmonds, Robert [483] Todd retaining only his reversionary one-third share in the 11,600l. consols.

In March, 1833, Robert Todd having opened a banking account with Messrs. Williams, Deacon & Co., executed to them a conditional assignment of his reversionary interest in the 11,600l. consols, as a security for all monies advanced or to be advanced to him by that firm. As a further security to Messrs. Williams & Co., Robert Todd, in the following month, executed to them a similar assignment of all his interest in the property devised and bequeathed by the testator, whether present, expectant, reversionary, contingent, or otherwise, and to which he or any person or persons in trust for him might be entitled in any manner howsoever, or might recover by virtue of any suit or action to be commenced or prosecuted against the executors or trustees of the said will.

Again, in June 1834, Robert Todd being indebted to Messrs. Gramolt in a sum of 300l., as a security for that debt, executed to them a conditional assignment of all his interest under his father's will, and all his interest in William Todd's share, subject to the prior incumbrances.

In consequence of the two assignments made by Robert Todd, of his interest in his father's residuary estate, first to Edmonds, and secondly to Williams & Co., these several parties entered into an arrangement, the consequence of which was an indenture dated the 12th of May, 1834, and made between Williams & Co. of the first part, Robert Todd of the second part, and Edmonds and Hughes of the third part, by which Williams & Co., at the request of Robert Todd, released to Edmonds and Hughes all claims which they, Williams & Co., might have upon the testator's estate, except as to the reversionary interest of Robert Todd in the annuity fund.

Lastly, by indentures of lease, and assignment and release, dated respectively the 4th and 5th of September, 1834, and made between Robert Todd of the first part, [484] Herbert George Jones of the second part, and the plaintiffs of the third part, reciting that Robert Todd was indebted to Jones in the sum of 1600l., and to the plaintiff Howard in 500l., and to the several persons named in the schedule to the assignment in the several sums annexed to their names; and reciting that an arrangement had been made at the instance and request of Robert Todd, by which the plaintiffs had become personally responsible for the payment of the said several sums, with interest: it was witnessed that, for these considerations, Robert Todd granted, released &c., to the plaintiffs and their heirs, certain real estates therein specified (which were, in fact, comprised in the testator's will); and also assigned to the plaintiffs, their executors &c., all the stocks, funds, securities, and personal estate to which he was entitled, in possession, remainder, or expectancy, under his father's will, upon trust to sell the real estate, and to convert into money such part of the personal estate as was convertible, and out of the proceeds, upon trust, in the first place to pay certain costs and expenses mentioned in the said deed of assignment; and in the next place, to pay to the plaintiff Howard the said sum of 500l., with interest, and then to retain to themselves, the plaintiffs, the several sums of money which they should have paid, or become responsible to pay, to the said Herbert George Jones, and the several other creditors of Robert Todd, whose names were specified in the schedule thereunder written, with interest as therein mentioned, and to pay the residue (if any) to Robert Todd.

In consequence of this indenture, the debts due from Robert Todd to Messrs. Williams & Co., and to Messrs. Gramolt, together with the securities on which they were invested, and all powers for the recovery of the same, were assigned to the plaintiffs, in consideration of payment by them of the debts due from Todd to those respective parties.

The plaintiffs having brought their bill against the **[485]** executors and Robert Todd (the latter having refused to join as plaintiff) to have the benefit of the foregoing securities, and to set aside the transactions between Robert Todd and the defendant Edmonds, on the ground of fraud; the defendants, the executors, pleaded in bar of the suit the release of May, 1834. This plea was submitted to, and the bill amended, by stating the release, and charging that it was obtained by fraud and duress.

The amended bill also charged that the account delivered by the executors to Robert Todd was erroneous and fraudulent, and that he signed it under the pressure of embarrassed circumstances; that the release which he executed, upon receiving that account, was obtained from him for fraudulent purposes; that it had been tendered to him ready prepared for his execution; and that no time had been allowed to him to consider its effects, or to take advice upon its propriety; that a fair sale had not been made of many parts of the testator's property, both real and personal, but that the defendant Edmonds had retained the same at prices far below their real value.

The bill contained an allegation that the plaintiffs had paid Messrs. Williams & Co., and Messrs. Gramolt, the amount of their respective debts, with interest; and that they had "paid large sums of money in payment of the debt of 1600l. due to the said Herbert George Jones, and the other debts specified in the indenture of September, 1834."

The bill prayed that the plaintiffs might have the benefit of the indenture of September, 1834, and of the several securities given to Messrs. Williams & Co., and Messrs. Gramolt. That the alleged settled account and release might be declared fraudulent and void, as against the plaintiffs, as claiming under Robert Todd; and that the release might be delivered up to be cancelled. That notwithstanding any transactions between Robert Todd and the defendant Edmonds, an account might be taken **[486]** of the testator's real and personal estate, not specifically devised or bequeathed; that the estates remaining unsold, or alleged to have been unsold by Edmonds, might be forthwith sold under the direction of the Court; and that the proportion of the plaintiffs, in the clear residuary estate of the testator, might be ascertained and secured for their benefit &c.

To this bill the defendants, the executors, demurred, on three grounds: first, for general want of equity; secondly, that the creditors of Robert Todd, who were scheduled to the indenture of the 4th September, 1834, were not made parties to the bill; thirdly, because William Todd was not made a party to the bill.

Mr. Simpkinson and Mr. Koe, for the demurrer. The defendants, though they pleaded to the original bill, are entitled to demur to the amended bill: *Robertson* v. *Lord Londonderry* (5 Sim. 226). Even after answer, a plea to an amended bill is admissible: *Ritchie* v. *Aylwin* (15 Ves. 79), *Gambier* v. *Le Hoope* (1 Dick. 42).

Then there are three grounds on which this demurrer will lie: first, this is a purchase by the plaintiffs of a lawsuit. It is the purchase of an interest which has been released, and which can only be made available by a suit in equity. It is not the purchase of a chose in action, or of a vested interest, but of a right to set aside settlements of accounts and releases. It is, therefore, maintenance in the strictest sense of the word. Such a transaction cannot be supported in equity, any more than at law: *Stevens* v. *Bagwell* (15 Ves. 139). [The Lord Chief Baron. There was some portion of Robert Todd's interest which had not been assigned to Edmonds.] That was merely the reversion in the consols, after setting apart sufficient to secure **[487]** the annuities. No relief is sought as to that, because the annuities are still subsisting. Besides, the plaintiffs derive their whole title, under the deeds of September, 1834, which cannot give them a right to institute a suit to set aside these transactions. Robert Todd gives them no authority to do so. The suit is, to a certain extent, for his benefit; and yet he makes no complaint of fraud, and there is an express allegation that he refuses to join in the suit.

Secondly, the scheduled creditors are not parties to the suit. If the deed of

September, 1834, had contained specific trusts for the benefit of the creditors, it is clear that they would have been necessary parties. It is true that, by the terms of this deed, they are not immediately to be paid out of the proceeds, yet substantially they are to be so paid. The plaintiffs are to be reimbursed out of the sales. Suppose they had received the money, and had refused to pay the scheduled creditors, could not those creditors have filed a bill against them to enforce payment? It may possibly be answered, on the authority of *Garrard* v. *Lord Lauderdale* (3 Sim. 1), that, inasmuch as they have not executed the deed, they could not file such a bill. That, however, does not apply to Herbert George Jones. He executed the deed, and they do not allege that they have paid him. He, therefore, remains a creditor, and ought to have been a party to this suit.

Thirdly, William Todd should have been made a party to this suit. He had a right of pre-emption of certain estates specified in the testator's will. Some of those estates have been sold, and the plaintiffs seek to set aside the sale. If the sale were set aside, the parties would be restored to their original situation, and William would have the benefit of that result as well as Robert. It might be otherwise, if he had assigned his right to Robert in **[488]** clear terms, but he has assigned only his interest in the residuary personal estate. At all events he did not assign till after the delivery of the account; and he would be entitled to any benefit arising from the account being set aside.

Mr. S. Girdlestone and Mr. Bethell, for the bill. This is a bill by the assignee of a cestui que trust against his trustee to open transactions by which the trustee has obtained the whole property. Any one fraudulent fact stated in the bill, or any one improper item in the account, is sufficient for that purpose. Here there is no account, properly so called, of the sale of the real estates. What is stated on that subject is comprised in a single item. [The Lord Chief Baron. You say the Todds got an insufficient account, but they do not say so. It is scarcely necessary to labour that point.] The release in 1829 was given under circumstances of fraud, and the plaintiffs have a right to avail themselves of it. It is a mistake to say they derive their whole title from the deeds of September, 1834. They acquired by assignment all the interest which Messrs. Williams & Co. and Gramolt had in the estate of Robert Todd, and that amounted to the whole of his possible interest in his father's property. Here, therefore, were bonâ fide mortgages transferred to the plaintiffs; and they were sufficient, without regard to the former deed, to give them a right to set aside these transactions. The objection on the ground of maintenance will not prevail. There is a portion of the property unaffected by any assignment to Edmonds, and which has become vested in the plaintiffs, through the Gramolts; namely, Robert Todd's reversionary interest in the 11,000l. consols. That circumstance alone is sufficient to sustain the bill, which extends to all the property of Robert Todd. *Stevens* v. *Bagwell* (15 Ves. 139) is distinguishable from the present case; for there **[489]** what was held to be maintenance arose out of an express agreement between the parties.

Secondly, it was not necessary that the scheduled creditors, who were not parties to the deed, should be parties to this bill. It is an indisputable proposition that a deed of assignment to trustees, for the benefit of creditors, no creditor being a party to it, or taking any benefit from it, is a mere voluntary instrument, which the grantor might himself defeat, and of which no creditor can avail himself in a Court of equity: *Garrard* v. *Lord Lauderdale* (3 Sim. 1). But, supposing the law to be otherwise, this is not a deed in trust for creditors. It does not recite that Thomas Todd was desirous of paying his debts, but that the plaintiffs had agreed to do so. If the plaintiffs omit to pay the creditors, what remedy have the latter against them under this deed? It is a trust simply for the benefit of the plaintiffs themselves, namely, that they may reimburse themselves after payment of the creditors. Even if the deed contained a specific trust for the creditors, they would not be necessary parties to a bill brought by the trustees, to carry those trusts into execution.

The objection that William Todd is a necessary party is quite untenable, because the bill alleges, and the demurrer admits, that all the right and interest of William is vested in Robert.

Lastly, the plea to the original bill was an admission by the defendants that, but for the plea, the plaintiffs had a right to sue them. The plea, therefore, having been submitted to, and the bill amended, the plaintiffs have a locus standi in curiâ, and the

defendants cannot demur to the amended bill. Besides, the release could only bar the inquiry as to one portion of the testator's estate to which **[490]** Robert Todd was entitled, not that part which was wilfully and fraudulently concealed from him.

Mr. Simpkinson, in reply. In *Robertson* v. *Lord Londonderry* the defendant Braddyl pleaded the bankruptcy of the plaintiff, and thereby admitted, according to the argument on the other side, that the plaintiff had a right to sue, supposing he had not been made a bankrupt; yet there the demurrer to the amended bill was allowed. Upon the same principle the demurrer is admissible in this case. Then the deed of assignment, of September, 1834, being in general terms, and being invalid for the most part by reason of maintenance, is, in the view of a Court of equity, void in toto. It relates to one transaction—one contract only. But, supposing the assignment to be good as to the reversionary interest, the bill seeks no relief as to that particular portion of the property. Granting that, by the terms of the assignment, the reversionary interest would pass, can the plaintiffs be allowed to fall back upon a supposed equity, which is not insisted upon by their bill, and for which no relief is or can be prayed? Supposing they could sue in respect of the reversionary interest, the bill should have been confined to that interest. But what relief could they seek by such a bill? Could they ask the Court to declare that Robert Todd was entitled to that reversionary interest, a fact which nobody disputed? It is sufficient, however, to say that the plaintiffs making no case in regard to the reversionary interest, their bill cannot be supported.

With respect to the other grounds of demurrer it is clear that one, at least, of the creditors, namely, George Herbert Jones, should have been a party to the bill. He was a party to the deed of assignment, and the Court cannot infer, from the loose allegations contained in the bill, that he has been fully paid and satisfied the whole amount of his debt. Then, as to William Todd, there is **[491]** no clear or satisfactory statement of the conveyance of his interest to his brother. No doubt the demurrer admits facts well pleaded to be true, and deeds well stated to be correct; but it does not admit more than a deed can properly and legally bear. The deed of assignment from William to Robert was inoperative as to the real estate.

THE LORD CHIEF BARON. The point which, in this case, presents the greatest difficulty, is that which relates to the interest which Robert Todd had in the annuity fund, and which he assigned to these plaintiffs. No complaint is made in the bill of the misapplication of that fund, but it is insisted that the plaintiffs have a right to have their interest recognised distinctly in the reversionary portion of that fund. I incline to think that that interest is sufficiently disclosed to make the demurrer to the whole bill bad.

With respect to the question as to the validity of an assignment of a right to file a bill in equity, I must distinguish between this sort of case and the assignment of a chose in action or equity of redemption. It may be said that the assignment of a mortgaged estate is nothing more than an assignment of a right to file a bill in equity. But the equity of redemption arises out of an interest, though only a partial interest. Courts of law and equity treat the mortgage as a mere security, and there is an interest left in the mortgagor, which he may assign. But, in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such a claim would be a question deserving of great consideration. My present impression **[492]** is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud; and I should say that some authority is necessary to shew that a man can assign to another a right to file a bill for a fraud committed upon himself. I own, however, that in the present case there is considerable difficulty arising from the reversionary interest which Robert Todd had to assign; and the question is, whether the bill is so framed as to entitle the plaintiffs to any equity on that subject.

With respect to the other points which have been raised, I think that William Todd, having assigned his interest to his brother, is not a necessary party to this suit. As to Jones, who was a party to the deed of assignment, there is some doubt.

Upon the whole, if I were called upon to decide this case now, I should decide

against the demurrer on the narrow ground that there was, at the time of the assignment to the plaintiffs, a subsisting interest in Robert Todd, which did not pass to Edmonds. But the case deserves further consideration.

Dec. 17th.—THE LORD CHIEF BARON. The testator, after bequeathing certain annuities to various persons, directed that his real and personal estate should be sold by his executors, Edmonds and Hughes, and divided into three parts. His daughter, the wife of Edmonds, was to have one part; and, from the remaining two parts, she was to take 10,000l., and the residue was to be divided between his two sons, Robert and William Todd; and he states, as his reason for giving his daughter a larger portion, that he had made advances to his two sons in his lifetime. He then specifies certain real estates, of which he gives the **[493]** right of pre-emption to William Todd, and other estates, of which he gives the right of pre-emption to Robert Todd; and then he gives his daughter a right of pre-emption of any part of the residue; so that, with the exception of the two parts specifically appropriated to William and Robert Todd, if they chose to purchase them, his daughter had a right, if she chose, to purchase the whole.

The testator soon afterwards died. The two executors proceeded to administer his personal estate, and made sale of the real estate; and Edmonds, in right of his wife, purchased part of the real estate: though what part in particular was purchased by him is not specified; nor does it appear by the bill that he was the purchaser of any part of that of which the sons had a right of pre-emption. There was then a settlement of accounts, and there is a particular account annexed to the bill and referred to; and, upon an inspection of that account, and from the circumstances stated in the bill, it appears that Edmonds had made payments from time to time to Robert and William Todd. These matters were then adjusted, and the balance due to the brothers was paid to them; and, up to that time, they acknowledged that the accounts were fully settled. Afterwards, both brothers executed releases to Edmonds and Hughes, the executors.

There are many conveyances and deeds set forth in the bill, but it is not necessary to particularize all of them, because those on which the question turns are few. The executors set apart a considerable sum of stock to answer the annuities bequeathed by the will, and the bill makes no complaint of that appropriation. They did no more than would be decreed to be done by this Court, or any Court of equity having the disposal of the testator's estate. By the release of 1829, Robert Todd purchased all the interest of his brother, William Todd; and, by other instruments, executed in 1830, his interest stood thus: that, with the exception of the reversionary interest **[494]** which Robert Todd had in those sums which had been invested in the funds for payment of the annuities, he had, in consideration of a certain sum, and further sums which Edmonds had lent him, assigned to Edmonds the whole of his interest in his father's residuary estate, and also the whole interest of William Todd, which he had purchased. The whole of the accounts, therefore, had been settled, and the whole of the interest of Robert and William Todd vested in Edmonds in 1830. Matters remained so until the year 1833. By an instrument executed in that year, Robert Todd, having borrowed a sum of money of Messrs. Williams, the bankers, for securing to them the repayment of that sum, assigned to them the reversionary interest in the one-third part of the annuity fund, to which he had a right. By another deed, executed soon afterwards, it appears that, conceiving he had still an interest in other parts of the property, he assigned to Williams & Co. all his interest in his father's residuary personal estate, upon trust, that what money they should receive should be held for his benefit. The next deed of importance is executed in 1834, to which those bankers and Robert Todd were parties, and also the executors. By this deed Williams & Co., at the request of Robert Todd, released to Edmonds and Hughes that claim in the residuary interest which he had assigned to them; so that it appears that, for the second and last time, in May, 1834, the whole interest of Robert and William Todd was vested in the defendant Edmonds.

The bill states misconduct in the executors in administering the testator's estate. It charges imposition and misrepresentation as made to Todd, to induce him to sign the release, and settle that account. It makes a case, which might be a case for Robert Todd to file a bill to call on the executors to acquit themselves by answer of the representations of fraud and concealment practised upon him. But still he had

nothing but a naked right to file a [495] bill in equity—no legal right—no equitable interest, except a reversionary interest in those sums of money, out of which the annuitants were paid. If he had a right to file a bill at all, it was a naked right not clothed with any possession.

Under these circumstances, the plaintiffs come upon the stage. In September, 1834, a deed was executed by Robert Todd to the plaintiffs. (His Lordship then stated the deed.) The plaintiffs, under colour of this conveyance, have filed the present bill, in which they call on the executors to answer for their proceedings in the administration of the testator's estate—by which they seek of the Court to set aside the deeds of conveyance from Todd to Edmonds—to annul the purchase by Edmonds of any portion of the real property of the testator—and generally for an account; and they ground themselves on representations stated to have been falsely made to Robert Todd, to induce him to enter into these arrangements. All that is material to the question is raised by the bill, to which Robert Todd is made a defendant, who had no complaint to make, and who refused to be a plaintiff.

The defendants, Edmonds and Hughes, have demurred to the bill on three grounds. One ground of demurrer is that the scheduled creditors of Robert Todd are not parties; and another is that William Todd is not a party. I do not find any case from which it appears that the mere circumstance of a creditor being interested in the administration of an estate, makes it necessary that he should be a party to a bill like the present. The mere engagement by a person to pay the creditors, if he gets in the fund, will not make them parties to any contract for their payment; though, no doubt, where the creditors are parties to and interested in a contract of that nature, they must be made parties to a bill for carrying that contract into effect. Therefore, the demurrer would be well if confined to the fact that Jones is not a party; for he [496] was a party to the deed, and entered into an engagement under seal with the plaintiffs, by which it is plain that they are bound. The other creditors are named in the schedule, but there was no contract by which they are parties.

The omission to make William Todd a party is not a ground for allowing the demurrer. He parted with his whole interest to Robert Todd, and there is no imputation of fraud as between those two persons, and no suggestion that William Todd had any ulterior interest whatever. It is not the object of the bill to bring before the Court any question as to the money in the funds; and, therefore, any interest which William Todd has in that is undisturbed. He has no interest in any question here. He is, therefore, not a necessary party.

The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this—whether or not parties who either become purchasers for a valuable consideration, or who take as assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that in order to give the assignee a locus standi in a Court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a reconveyance, when the mortgage-money is paid, is true. But that is a right reserved [497] to himself by the original security; it is a right coupled with possession and receipt of rent; and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a Court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the Court. He purchases nothing but a hostile right to bring parties into a Court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase.

So, where a person takes an assignment of a bond, he has the possession; and, though a Court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a Court of equity to enforce payment of it. So, other cases might be stated to shew that where equity recognises the assignment of an

equitable interest, it is such an interest as is recognised also by third persons, and not merely by the party insisting on them.

What is this but the purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries (*a*)—that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a Court of equity will discourage the practice. Mr. Girdlestone was so obliging as to furnish me with a case, that of *Wood* v. *Downes* (18 Ves. 120), in which it appears to me that **[498]** the principle laid down by Lord Eldon goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances, which it was alleged were obtained by the defendant, in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord Eldon, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good policy. He said, "The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty;" and he accordingly decreed the conveyance to be set aside, on the ground of litigated title.

Here the proceeding is the converse of that in *Wood* v. *Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the present circumstances, Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favour.

But the case does not rest here. There is a short but useful statute, which it is proper to refer to, that of the 32 of Hen. 8, c. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of Courts of law and equity. Under that statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he, as well as the buyer, is liable to the penal consequences of the act. I do not say that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and, therefore, an action **[499]** could not be brought against him on the statute. At the same time, it is to be observed that, from many cases in Anderson and Coke, it appears that Courts of common law were favourable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained.

It has been the opinion of some learned persons, that the old rule of law that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there Courts of equity will allow the assignee to stand in the right of assignor. This is not that case. Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.

The case itself is a strong illustration of the doctrine, that to encourage such transactions as the present is contrary to good policy. I do not know who the plaintiffs are; possibly they are attornies. Suppose, then, that this party having an interest under this will, and having settled all his rights, assigns all his interest for a valuable consideration; if he be at liberty afterwards, by another assignment, to create a new trustee for himself, and can give the trustee a right to bring the matter into litiga-

(*a*) See Voet. Comm. ad Pandect. lib. 41, tit. 1, sect. 38.

tion, if that trustee is an attorney, and the Court of equity entertains the suit, what is the result? That all the funds must be brought into Court; and, as he stands in the situation of trustee, all the expense of litigation must be paid out of the fund; **[500]** so that he receives an advantage out of the litigation itself. This is not the policy of the law, and yet if this assignment be good as regards the plaintiffs, so as to enable them to administer the fund over again, it is equally good if the trustee happens to be an attorney.

Upon these principles it appears to me that this is a case of a purchase of a litigated title. Many cases are to be found to the effect that, where the title actually is in litigation, an agreement to divide the subject of dispute is not available in equity. But the policy of the law is not confined to those cases only.

Demurrer allowed.

BETWEEN JOHN BROOKS, *Plaintiff;* JOHN MACDONNELL, WILLIAM ROBINSON, RICHARD PERCIVAL, SAMUEL TOMKINS, RICHARD PERCIVAL the Younger, RICHARD MACPHERSON, HENRY WILLIS, AND SAMUEL TOMKINS the Younger, *Defendants.* 25th June, 1835.—An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and, after some negotiation, it was arranged that, on payment by the underwriters of 35l. per cent. on the sum insured, the policy should be delivered up to be cancelled. This per-centage was accordingly paid and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian government, the goods were ordered by the latter government to be restored to the owners and compensation made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but Held, that the underwriters having declined the offer of abandonment, the payment of the 35l. per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation.

In the year 1826 the plaintiff carried on the business of a merchant, in partnership with Henry Butterworth, of Manchester, under the firm of Butterworth & Brooks. Henry Butterworth died in May, 1830, and on his death all his interest in the partnership property and effects, including the subject of this suit, became vested in the plaintiff.

In April, 1826, the plaintiff and Henry Butterworth, as such partners, shipped thirty-six bales of printed cottons **[501]** on board a ship called the "Atlantic," bound from Liverpool to Buenos Ayres, the invoice value of which goods was 1915l. 10s.

On the 13th of May, 1826, the plaintiff and his late partner effected an insurance with the defendant John MacDonnell, as the agent for and on behalf of the Patriotic Assurance Company of Ireland, on the thirty-six bales of cotton; and John MacDonnell, as such agent, signed a policy of insurance, dated the 13th of May, 1826, by which the goods, therein described as thirty-six bales of printed cotton, marked ⟨P⟩, were insured by the company from Liverpool to Buenos Ayres for 1440l., each bale being for that purpose valued at 40l., to pay average on each package separately; and a premium of 3l. per cent. on the sum insured was paid to MacDonnell as the agent of the company.

On the 1st of May, 1826, the "Atlantic" sailed from Liverpool on her voyage to Buenos Ayres, and in the course of such voyage, and for an alleged attempted breach of a blockade which the Brazilian government had declared against the port of Buenos Ayres, was captured by the forces of the Brazilian government, and taken into the port of Rio de Janeiro, where the ship, and all the cargo on board, including the thirty-six bales of cotton belonging to the plaintiff and his partner, were condemned. Many other ships of this country, and their cargoes, were about the same time seized and condemned in like manner.

Shortly after the intelligence of the capture of the "Atlantic" and her cargo was received in England, the plaintiff and his partner applied to MacDonnell, as the agent

of the Patriotic Assurance Company, for payment of the 1440l. as for a total loss, and at the same time offered to abandon their interest in the goods. In answer to such application, the defendant, MacDonnell, wrote to the agents of the plaintiff and his partner a letter **[502]** dated the 13th of October, 1826, to the following effect: —"Gentlemen,—I am favoured with yours of the 12th instant, announcing your wish to abandon your interest in the 'Atlantic,' Scott, from Liverpool to Buenos Ayres. In reply, I beg to acquaint you that, on behalf of the company, I decline to accept of this abandonment.—John MacDonnell, the company's agent in London." After some negotiation, and in July, 1828, the defendant MacDonnell, on behalf of the company, agreed to allow 35l. per cent. on the 1440l. for all contingencies, on condition that the policy should be cancelled, and MacDonnell accordingly paid the plaintiff and his partner 504l., being the amount of such per centage; and thereupon the plaintiff and his partner delivered up the policy to MacDonnell, and a memorandum was at the same time indorsed thereon by MacDonnell, in the following words, viz. :—"Settled, a loss by compromise, at 35l. per cent., being in full for all claims hereon, and cancelled this policy. 504l. London, 21st July, 1828." The plaintiff and his partner subsequently, together with other persons, caused representations to be made to the Brazilian government of the losses they had sustained by the aforesaid captures; and, in the commencement of the year 1829, the Brazilian government undertook to liquidate the claims of his Britannic Majesty's subjects in respect of such losses; and on the 5th of May, 1829, a memorandum was entered into and signed at Rio de Janeiro, between the Right Honourable Lord Ponsonby, the minister of his Britannic Majesty at the Brazilian court, and the representative there of the Brazilian government, on behalf of their respective governments, to the following effect:—

"*Brazilian Captures.*—Memorandum entered into between Lord Ponsonby and the Brazilian government, relative to the capture of British ships in 1826 and 1827, signed at Rio de Janeiro, 5th May, 1829. The commission to be composed of four members, to be named by the **[503]** respective governments or ministers. The commissioners to meet for the dispatch of business at least three times every week. The commissioners being met, or if even only one of those named by each of the governments should meet on the days appointed for the dispatch of business, they may proceed to the settlement of such claims as may be before them, and their decision will be as valid as if the whole of the commissioners had been present. Any claim adjusted by a majority of the commissioners, the same to be final. In case a majority of the commissioners should not agree upon the adjustment of any item or items of the claims, the same shall be referred to the Secretary of State for Foreign Affairs of his Imperial Majesty and the Ministers of his Britannic Majesty at this Court, for a final decision. In proceeding to the adjustment of the claims, those for the vessels and cargoes condemned by the decree of the 21st May, 1828, shall have precedence. Eight months to be allowed from the installation of the commission to produce claims, after which period no claim to be received, unless a majority of the commissioners shall agree to extend the time for four months longer; but in cases not yet finally adjudged the term of eight months to be reckoned from the date of the final sentence. The commissioners to decide upon every matter and thing relating to the premises, upon the basis agreed upon; and in case any part of the indemnities is adjudged in Spanish dollars, they are to reduce the same to Brazilian currency, at a fair and reasonable rate of exchange. The following shall be the basis for adjusting the claims for indemnities:—First, the Brazilian government to pay the full value of the vessel and cargoes condemned; also of those vessels restored but found to be unseaworthy, and on that account sold in the state they then were, deducting the net proceeds of the sale. Second, those vessels that have been restored and fitted out for sea to be paid the full amount of such outfit, with every charge thereon. **[504]** Third, all sums of money paid for port charges and anchorage. Fourth, the full amount of freight and passage money payable at the port of discharge, but which, in consequence of the detention, has not been paid. Fifth, losses arising to the vessels for non-fulfilment of charter-parties. Sixth, demurrage from the date of the detention of the respective vessels, until the date of the execution of the respective sentences; the rate of such demurrage to be regulated according to the rates generally paid on English vessels. Seventh, all law charges or commissions in lieu of the same, in defending the vessels

and cargoes, adjusting general averages, &c.; and also the same commissions for recovering the same to the parties. Eighth, the wages and maintenance of the masters and crews remaining in Brazil for the defence and protection of the vessels and cargoes, from the date of their capture to the date of the execution of the sentences or sale of the vessels, with the passage of the masters to England. Ninth, the indemnities for the cargoes generally shall be regulated by the invoices, bills of lading, manifesto, and other documents, which may be presented to the commissioners duly attested by the parties or their agents. Tenth, the indemnities for the cargoes condemned to be regulated according to the invoice cost, and all charges, with 10 per cent. on such amount for loss of market. Eleventh, such part of the cargoes restored as have been embezzled, lost, damaged, perished, deficient, to be paid for upon the same principles as expressed in the last article. Twelfth, those parts of the cargoes restored, and which have been sold in Rio de Janeiro, to be valued at the invoice amount, and charges, with 10 per cent. as above, from which to be deducted the net proceeds of the sales, the difference to be admitted as the loss to be indemnified. Thirteenth, those parts of the cargoes to be restored, and which have been exported, to be indemnified according to the invoice value by such **[505]** per centage on the same as to the commissioners may appear to be fair and reasonable, under all the circumstances of each respective invoice; taking into consideration the state of the market of Rio de Janeiro, the description of the merchandize, and the place to which it has been shipped, together with the amount of general average paid, and all charges on shipment. Fourteenth, the owners of the respective cargoes to be indemnified for all extra charges of warehouse rent, and duties paid, arising from detention. Fifteenth, such cargoes as were shipped for discharge at port or ports on the West coast of South America, the value of the same at such port of discharge to be taken, as far as is practicable, as the basis for estimating the indemnity. Sixteenth, such cargoes as were carried into Monte Video, and offers there made to the captors to give ample security for their value, but which offers were refused, the values to be estimated at the current market price at Monte Video, as the basis for indemnities. Seventeenth, the amount of indemnities being adjusted in Brazilian money, the same shall bear interest as respects the vessels, at the rate of 6l. per cent. per annum, from six months after the date of the capture till payment is made. Eighteenth, interest on the values of the cargoes restored by the decree of the 21st of May, 1828, or by sentences of the tribunal, to be paid at the rate of 1l. per annum from the date of the capture till the execution of the final sentence. Nineteenth, in adjusting the indemnities, the commissioners shall reduce the account from sterling money into Brazilian currency, at the rate of thirty-two pence per milrea. Twentieth, the sums which are to be liquidated shall be realized in equal payments made at this Court, the first being paid at twelve, the second at twenty-four, and the third at thirty-six months, reckoned from the day of the date on which the liquidation of each prize is settled. For this object policies shall be issued by the public treasury, in which the **[506]** name or names of the parties interested shall be inserted in favour of whom they shall be drawn; and these shall be placed at the disposal of his Britannic Majesty's legation at this Court, in order that they may be delivered to those to whom they really appertain.

"Rio de Janeiro, 5th May, 1829."

Commissioners were duly appointed, pursuant to the said memorandum, and on the 27th August, 1829, George Maylor and George Marsh, the two commissioners appointed on behalf of the British government, sent a letter to Thomas Marsh, Esq., the chairman of the Brazilian committee in London, to the effect following:—

"Rio de Janeiro, 27th August, 1829.

"Sir,—Having been appointed by his Britannic Majesty's minister at this Court, and approved of by the Brazilian government, as commissioners for the settlement of the indemnities for British properties seized during the blockade of the river Plata by the Brazilian squadron, we have the honour to transmit to you a memorandum of the form of the oath required to be made to the invoices, and of the documents that will be wanted; having further to advise that, in cases where the owners of goods have been their own underwriters, they will not be allowed to charge the premium in their invoices, and that where part of an invoice has been insured, and the owner of the goods has run the risk on the remainder, it would be well that a declaration on oath

to that effect should accompany the certified policy of insurance, as the latter is demanded chiefly for the purpose of checking the amount of the invoices. We will thank you to cause our present communication to be made as public as possible amongst those concerned in the Brazilian trade, that they may forward their claims in proper form and without delay."

[507] and the letter pointed out the necessary form of oath and the documents to be produced to substantiate the claims of the claimants.

In pursuance of the memorandum and letters, the plaintiff and his partner forwarded their claims, which were duly made, to the commissioners at Rio de Janeiro, who, on the 17th day of May, 1833, awarded them the release of their goods detained as aforesaid, and also a sum of 1488l. 8s. 4d. for compensation for the aforesaid losses. During the time the plaintiff and his partner were substantiating their claims before the commissioners, the Patriotic Assurance Company sent out a claim to the Brazilian government for a proportion of the indemnity claimed by the plaintiff and his partner; but neither the Brazilian government nor the commissioners decided as between the plaintiff and his partner on the one hand, and the insurance company on the other, but left the question as between them to be determined in this country; and thereupon it was agreed between the plaintiff and his partner on the one side, and the company on the other, that the sum of 1488l. 8s. 4d. for the loss should be transmitted by the commissioners to the defendants, Messrs. Percival & Co., the bankers, to be received and retained by them for the benefit of the persons entitled thereto; and the same was accordingly, in or about the month of January, 1834, transmitted to them, with a direction to hold the money in the joint names of Mr. Charles Moss, as agent for Messrs. Butterworth & Brooks, of Manchester, and Mr. MacDonnell, as representing the Patriotic Insurance Company, until the parties agreed as to the appropriation of it.

The bill was filed by William Brooks, as the surviving partner of Henry Butterworth, against MacDonnell as the agent of the Patriotic Insurance Company; William Robinson, the secretary of the company; and against **[508]** Messrs. Percival & Co., the bankers, to whom the compensation had been remitted by the Brazilian commissioners, on account of the parties entitled.

The bill, after stating the facts, charged that MacDonnell and Robinson, as the agent and secretary of the Patriotic Assurance Company, respectively claimed some interest in the money awarded, and insisted that they were entitled to have either the whole or a part thereof paid to them. The bill prayed a declaration to whom the 1488l. 8s. 4d. belonged, and that the defendants, the bankers, might be decreed to pay it to the plaintiff, and be restrained from paying it to the defendant MacDonnell, or any other person.

The answers did not dispute the accuracy of the general statements contained in the bill. The defendant MacDonnell, however, submitted that he was the mere agent of the company in this country, and had no interest in the matter in question, except as such agent, and that he ought not to have been made a party to the suit. The defendant Robinson, as the secretary to the company, submitted, on behalf of the company that, if not entitled to the whole of the 1488l. 3s. 4d., the company was at least entitled to be repaid the 504l., the amount of the 35l. per cent., paid by the company according to the arrangement with the plaintiff and his partner.

The money was paid into Court by the defendants, the bankers, pursuant to an order for that purpose, and was invested in Bank Annuities.

The cause now came on for hearing on admissions.

Mr. Simpkinson and Mr. Stinton, for the plaintiff. The clear effect of the arrangement of 21st July, 1828, was this: the assured agreed to accept 35l. per cent. in lieu of all claims, and agreed to release the company. The company were released from all liability in respect of the goods, on payment of this money. They could have no **[509]** interest in the goods; and, on the other hand, the plaintiff and his partner could have no further claim on the company.

It is quite immaterial whether the plaintiff had a right to abandon or not, because the offer to abandon was rejected by the company. The dealing between the parties was totally different to the case of an abandonment. The nature of the contract between the parties was that the company, in consideration of a sum of money, agreed to indemnify the plaintiff and his partner against all loss. If the loss were a total loss, then the company was to pay according to the value, cent. per cent. The liability,

to a certain extent, was incurred when the offer of abandonment was made. The effect of the contract was the same as if the company had said, if you will release us from the contract, we will pay you so much. If the goods had not been restored by the Brazilian government, the plaintiff would not have had any further demand against the company, though the loss would be at least two-thirds. So, again, supposing the goods had been returned to the plaintiff in specie, the company would not have had any lien on them. The plaintiff and his partner would have been at liberty to have sold the goods, and the company would not have had any lien on any portion of them. The transaction amounted merely to a rescinding of the contract of indemnity entered into by the company. The contract was put an end to by the cancelling of the policy, and the case must be treated in the same manner as if no insurance had ever been effected. The company do not pretend to say that they ever had any claim on the goods.

In *Tunno* v. *Edwards* (12 East, 488), where goods insured upon a valued policy had been seized and confiscated, but the necessary documents to verify the loss had not been re-**[510]**-ceived, and the underwriters agreed to adjust and pay immediately 50*l.* per cent. on account, but no abandonment was made by the assured, and subsequently half the proceeds of the goods were restored, which half amounted to more than the sum at which the whole goods were valued in the policy; it was held that the underwriters were not entitled to recover back the 50*l.* per cent. paid on account, the assured having, in fact, sustained a loss of half the goods, for which he was no more than indemnified by the 50*l.* per cent., there having been no abandonment, and the increased value of the other half of the proceeds arising from the turn of the market, in which the underwriters had no concern. The present case is governed in principle by *Blaauwpot* v. *Da Costa* (1 Eden, 130), in which satisfaction having been made under a commission for distribution of prizes to the insured, such of the insurers as had paid were held entitled to restitution, but not those who had compounded and renounced salvage. The arrangement in this case amounted to a compounding of the liability of the Patriotic Assurance Company, and to a renunciation of any right to salvage.

The defendant, MacDonnell, by his answer, objects that he is erroneously made a party to the suit, being a mere agent, and insists that the bill ought to be dismissed against him. It is true that he is a mere agent, but he is the agent of a quasi foreign company, and has mixed himself up with the whole of the transaction, and made a claim on the part of the company, and the fund was subjected to the order and disposal of MacDonnell.

Mr. Maule and Mr. Griffith Richards, for the defendants MacDonnell and Robinson. The total proceeds are 2552*l.*, on an advance admitted originally to be of the value of 1440*l.* [The Lord Chief Baron. The question of value cannot influence my decision.] It will appear by the **[511]** policy that it was a valued policy. There is no statement as to the price actually paid; nothing more than that the price is the invoice price. [The Lord Chief Baron. Suppose in this case the claim had failed, and the commissioners had not awarded anything, and the goods had been lost, would your client have been liable to pay any thing more?] We are in the situation of persons who have paid as for a total loss. [The Lord Chief Baron. In cases of total loss, the insurers are entitled to the salvage, paying the charges and expenses, but not in the case of partial losses.] There are exceptions to this. Suppose the case of a partial loss to goods occasioned by collision, the underwriters are liable for a partial loss: and suppose, after they have paid such loss, the insured bring an action against the owners of the ship which occasioned the injury, and recover damages, would not the insured be trustees of the damages recovered for the underwriters? [The Lord Chief Baron. I think they would. Actions are very often brought by underwriters in the name of the insured.] This proceeds on the principle that a contract of insurance is a mere contract of indemnity; and if the insured is indemnified for the same injury by two parties, he can only get one indemnity, and is a trustee for the underwriters of the surplus. The only question on the taking of the goods was whether it was or was not a total loss. There was no question whether it was a total or a partial loss. The only question was whether it was a total loss for which the underwriters were liable. The underwriters would probably have been held discharged from their liability in consequence of the ship breaking the blockade, of which the sentence of a foreign Court is sufficient evidence. The sentence, in the present case, shews satisfactorily an intention, at least, to break the blockade. The

claim was, therefore, of a doubtful nature; and, in consequence of such doubt, the arrangement took place. There is no pretence **[512]** for saying that it was not a total loss if it were a loss at all. The arrangement amounted to nothing more than an agreement to put an end to the policy. When a total loss occurs, and is satisfied by payment, the policy is always delivered up to be cancelled; but that does not interfere with the right of the underwriter to say to the insured, you are a trustee for me of the surplus received aliunde. There may, perhaps, be an election in the insured from which quarter he will receive the compensation. The right of the insurer does not arise out of the policy, but on those principles of fairness and equity which enable the underwriter to recover as for money had and received, and which are similar to trusts in equity. [The Lord Chief Baron. If the loss were treated as a total loss, the cancelling of the policy could not in any manner affect the question.] Admitting that the underwriter may sell or relinquish his right to compensation or salvage on a total loss, still such an agreement is not to be implied. In *Blaauwpot* v. *Da Costa* it was laid down by Lord Northington that the compensation in that case was to be considered as a retribution to the underwriters as lessening the loss occasioned by the capture. The same principle was acted upon in *Randal* v. *Cockran* (1 Ves. 98), before Lord Hardwicke, in which it was decided that the insurer, after satisfaction, stands in the place of the assured as to the goods, salvage, and restitution, in proportion to what he paid. In *Tunno* v. *Edwards* the compensation was only in respect of half, not for a total loss; and whether the insured took the other moiety of the goods to a good or a bad market was quite immaterial to the underwriters; the compensation was in respect of one moiety only, and the insured had a right to ascribe it to either moiety. Suppose, in that case, the underwriters had paid cent. per cent. as on one total loss, what answer could have been given to the underwriters' claim? In that case the Dutch government **[513]** gave compensation for half the loss, not for the whole. In the present case, the Brazilian government indemnified the parties for the whole. Suppose that in *Tunno* v. *Edwards* the Dutch government had paid the whole instead of a moiety, could it have been contended that the assured would not have been a trustee of a moiety, or that the underwriters would not have been entitled to have 50l. per cent. returned? Possibly, a distinction may be taken between the case of an accepted and a rejected abandonment. In *Tunno* v. *Edwards*, Lord Ellenborough says that, in order to have made it a total loss, there ought to have been an abandonment, which there had not been, and therefore that there was no ground for the underwriters' claim. What is meant by this is clearly an abandonment and an acceptance of the abandonment. If there had been such an abandonment and acceptance in that case the underwriters would have had to pay, not 50l. per cent. only, but 100l. per cent. In that case there was a clear subsisting right of action for the remaining 50l. per cent. Other circumstances, however, occurred which rendered it unnecessary for the plaintiff to demand the other 50l. per cent. The plaintiff, in the present case, having received 35l. per cent., ought to be treated as a trustee for the underwriters, if not of the whole sum awarded, at least to the extent of the 35l. per cent. Part of the consideration for the arrangement was the chance of getting back a portion of the goods, and which, under the then circumstances, was a very remote chance. If this be not the construction adopted, then the underwriters must be treated as purchasers to the extent of any future compensation, or it must be assumed that the assured thought fit to take in respect of the very matter for which he had already received 35l. per cent., a compensation from the Brazilian government as a trustee for the underwriters. There is nothing in the terms of the memorandum to shew that the underwriters intended to part with their claim to salvage. The defendants are clearly entitled either to **[514]** the whole or a part of the money. If there be nothing in the documents, and which there is not, to deprive the underwriters of salvage, and to give it to the assured, then, according to the rules of law, the underwriters are entitled to it. The underwriters do not claim under, but dehors the policy, and by the rules of law. There is no evidence that the underwriters intended to give up any thing to which they were entitled by law. The policy and the memorandum must be considered with reference to what was then passing before the parties. The present fund could not then, by any possibility, be contemplated by them. If it had been intended that the assured should be entitled to the compensation, it would have been so stated in the memorandum. The right of the underwriters cannot be taken away except by express contract. In *Blaauwpot*

v. *Da Costa*, the company had expressly renounced the salvage. It was so argued by the Attorney-General and the fact was also so stated by the learned Judge. In *Tunno* v. *Edwards* the agreement must have been interpreted to mean that the assured were to be entitled to 50l. per cent. to be paid on account, and not in liquidation of the whole.

Mr. Koe, for the defendants, the bankers.

THE LORD CHIEF BARON (without hearing the reply). Upon full consideration, I entertain no doubt whatever about the case. I certainly did entertain some doubt at one time, but that doubt was entirely removed in the course of the argument; and I will not, therefore, take any time to consider of this case, but will dispose of it at once. I do not, in any manner, dispute any of the general principles laid down in the course of the argument on the part of the defendants in this case. A policy of assurance is clearly only an instrument of indemnity. As a general rule, it cannot be carried further. It is a rule, also, that in all cases of total **[515]** loss, salvage belongs to the underwriter, and he pays all the expenses. It is also clear that, whenever the underwriter adjusts a partial loss, he still remains liable on the policy, and may go on paying partial losses exceeding in the whole cent. per cent., and may ultimately have to pay a total loss of cent. per cent. Such a case is possible. The question is, what is the meaning of the contract in this case? To enable me to resolve this, I must endeavour to judge what was the intention of the parties. Looking at the facts stated on both sides, I can feel no doubt that the assured were entitled to some compensation. No doubt is suggested as to their right to bring an action immediately after the loss was ascertained; but whether they should at that time bring an action or wait the possible restoration of the goods seems to have been matter of doubt. It has been contended on the one side, that I should treat this as a case of a total loss, and that the 35l. per cent. paid by the underwriters must be considered as a payment by them in respect of a composition, that is, as if they had paid 100l. per cent. The necessary consequence of this would be that the underwriters would be entitled to the whole of the money, deducting the expenses of recovering it. The first question is, can I bring the case to that? I think I cannot: because I find that when an abandonment was proposed by the insured, the underwriters rejected it. It is quite clear that they then considered that they might affect their interest if they accepted the abandonment. They must have had some reason for refusing it; and it is not disputed that they did reject it. I cannot now treat it as if one party had insisted on a total loss, and the other had denied it, and had contended that it was a partial loss only. In such a state of circumstances the parties would probably meet, and the underwriters would say, taking this as a partial loss, we are willing to pay all expenses, and to furnish you with the means of recovering the goods; or if you will relinquish all claim on us, we will pay you 35l. per cent. **[516]** One reason why this cannot, as it appears to me, be treated as a case of total loss is that there is no apparent reason why they should not have been entitled to receive 100l. per cent., and there is no evidence for what reason they consented to take less. In the absence of any distinct evidence upon the subject, I think I cannot consider it as a case of total loss. The next question is, how are we to treat it as a case of partial loss? In ordinary cases, the underwriter and broker estimate partial loss at so much per cent., which is paid, and the policy remains as before, and is not in any manner cancelled. I have been a good deal struck by the argument that the policy being only a contract of indemnity, if a partial loss be incurred, and is paid for, and the insured gets indemnified aliunde, the underwriter is entitled to restitution; and it occurred to me, whether it was not probable, in the present case, that the underwriters had calculated the expense which might be incurred in an attempt to recover the goods, and had paid the 35l. per cent. in respect of that expense. The result of that would be that whatever might be the expense incurred would be answered by the 35l. per cent.; but if not incurred, would have come back in reduction of the 100l. per cent. Another result would have been that if the insured had recovered the goods, and the 35l. per cent. besides for expenses, the underwriters would have said, as you have recovered the goods and the expenses, pay us back our 35l. per cent. And in this case, if this had been a mere naked settlement of a partial loss, I should have thought the expenses had been incurred for the benefit of the underwriters. But I cannot treat this as a mere naked partial loss, in which, without going into particulars, a given sum is taken for a partial loss; for it would not be consistent with the terms of the

policy, because the underwriter adjusts a partial loss, on the ground that he continues liable to other partial losses, and also to the entire loss. In the present case it is clear that the loss must have been treated **[517]** as a partial loss; and that the underwriters, by paying the 35l. per cent., purchased an exoneration from all further liability in respect of loss. It cannot be doubted that if the goods had been restored shortly after the arrangement took place, and the ship containing them had been afterwards lost, the assured could not have recovered on the policy. It is quite clear that neither party contemplated the settling of a total loss. I must consider that they intended to effect an arrangement by which the underwriters, representing to the assured that there was fair ground for expecting that their goods would ultimately be returned, though some loss might be incurred by the delay in the sale, said take 35l. per cent. from us, and absolve us from all further claims; and we, on the other hand, will in like manner release you from all further demands. I so interpret the contract; and it appears to me that no other reasonable construction can be put upon it consistently with the conduct of the parties. How can I possibly assume that the assured would be so absurd as to give up 100l. per cent. for 35l. per cent., when the full demand was not in any jeopardy? Or that the underwriters would be absolved from a loss total or partial, without paying some consideration for it? I consider that the underwriters in effect said, we consider this as a partial, and not a total loss. If you will also treat it as such, and will discharge us from all future liability, by putting an end to the policy, we will give you a liberal compensation.

It has been said that the cancelling of the policy does not defeat the right of the underwriters to salvage. This, however, means nothing more than that when a total loss is adjusted, and the policy is delivered up, the underwriters are entitled to salvage, paying the expenses. But the contract is put an end to, by the payment by the underwriters of the cent. per cent. But it is entirely different in the case of a partial loss. If I could consider this as the case of a total loss, then the underwriters would be **[518]** entitled to the whole of the money. I cannot, however, consider it as a total loss, for the reasons I have already stated.

Considering this, therefore, as I am obliged to do, as a contract by which the assured gives up all claim on the underwriters for 35l. per cent., and which the underwriters accordingly pay, I am of opinion that the underwriters cannot establish a claim to any part of the fund in Court. I am inclined to think that the underwriters in this case are more excusable than they are supposed to be in some other cases in the Courts of law. I think that, under the circumstances of this case, there should not be any costs on either side.

WILMOT AND OTHERS *v.* THE CORPORATION OF COVENTRY. July 13th, December 3rd, 1835.—A Court of equity will not compel a corporation to execute a legal assurance of corporate property in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expected legal assurance.—Quære, whether a corporation can borrow money except under seal?

[See 4 Y. & C. Ex. 566.]

Before the passing of the late act for the regulating municipal corporations (5 & 6 Will. 4, c. 76), the affairs of the corporation of Coventry were conducted by certain members of their body called the council, who held monthly meetings at the Guildhall. At these meetings orders, called orders in council, were made, relative to the matters discussed before them; and entries of such orders were made in the books of the corporation; which entries, when they concerned the disposal of property, were in fact the instructions from which legal assurances were prepared by the town clerk.

In the year 1802 Mr. Inge, being then the town clerk, the following entry was made in the minute book:—"3rd August, 1802. Before John Mullis, Esqr., Mayor, &c. (Here followed the names of several aldermen, and amongst them Alderman Williamson.) Whereas Alderman Williamson did, on the first day of January now last past, **[519]** advance and lend to this corporation at interest, after the rate of 5l. per cent. the sum of 500l., and for which no security hath yet been given to him: It is therefore now ordered and agreed that Alderman Williamson shall have a

mortgage security for the same 500l. upon Keresley tithes. And it is further ordered that Inge & Carter do forthwith prepare such mortgage."

From entries made in the books of the treasurer of the corporation, it appeared that interest upon the sum of 500l. had been paid by the corporation to Alderman Williamson from 1802 till 1815; the last entry being made in January, 1816, for the interest due the preceding Michaelmas.

In 1816 Alderman Williamson died, having by his will appointed the plaintiffs his executors; who now brought their bill, insisting that the entry so made in the minute book was, in fact, an agreement by the corporation to mortgage the tithes of Keresley, in consideration of the sum of 500l. lent to them by the testator; alleging, also, that a large sum for principal and interest remained due to them on that security; and praying for an account and payment thereof, or that the corporation might be advised to convey and assure to them the tithes of Kerseley, absolutely freed and discharged of all right of redemption therein, and might deliver up to them all deeds, &c., relating thereto.

The defendants, by their answer, stated that they did not believe that Alderman Williamson had ever lent 500l., or any other sum, to the corporation for their own use; but they believed that, being a very influential man, he in the year 1802 advanced 500l. for election purposes, which advance he prevailed upon the corporation to enter into their books. That Williamson was from October, 1801, to February, 1803, one of the auditors of accounts of the receiver and treasurer of the corporation; and yet such advance did not appear to have been entered in any **[520]** of the accounts. That though interest appeared to have been paid upon that sum, yet the first payment was in May, 1803, and then only for eight months previous to the 25th of March in that year. That no interest appeared to have been paid after January, 1816, though Williamson did not die till the October following.

Mr. Temple and Mr. Elmsley, for the plaintiffs. Though at law a corporation is not bound except by seal, that is not so in equity: *Marshall* v. *Corporation of Queenborough* (1 S. & S. 520). [Alderson, B. There the Vice Chancellor said he was inclined to think that a corporation might be compelled to make a legal grant of their property in pursuance of a regular corporate resolution, if upon the faith of that resolution expenditure had been incurred. Here no expenditure has been incurred in pursuance of the resolution.] There are many other things besides expenditure, which if done or suffered by Williamson in pursuance of the agreement would be sufficient to raise a consideration; as, for instance, a right compromised. Here there was an agreement for a future mortgage; and Williamson, in consideration of that agreement, forbore to sue the parties, though in fact they were personally liable. Besides, the resolution amounts to a distinct admission by one party that the other had done every thing he had to do, and that the admitting party would carry into execution all that was legally required to be done, to complete the contract. Though no further sum was advanced after the agreement, interest was regularly paid.

Mr. Simpkinson and Mr. Koe, for the defendants. The agreement is nearly thirty-five years old, and the bill has been filed nearly twenty years after payment of interest has ceased. There is no evidence of any money having **[521]** been advanced; still less that it was advanced on the faith of a proposed mortgage: therefore, the solitary case cited does not apply. But supposing the entry to be evidence, valeat quantum, of payment of the money, it shews that the original transaction was a mere loan, and not a mortgage. Then the subsequent transaction could not alter the nature of the case. Suppose an individual had said to his debtor, in consideration of 500l. which you have advanced to me, I hereby agree to give you a mortgage: that would not be supported as a contract, in equity. This is a mere nudum pactum, to grant a security to a person who has advanced his money without any security at all. How then is this corporation benefited, or how bound by an entry such as this, which has been made without any consideration? Besides, it is admitted that at law a corporation will not be bound by any agreement not under seal relating to the corporate property. The general rule in equity is the same: *Taylor* v. *Dulwich College* (1 P. W. 656), *Winne* v. *Bampton* (3 Atk. 475). The case which has been cited, notwithstanding the obiter dictum of the Vice Chancellor, is not different from the others in principle.

Mr. Temple, in reply. The bill is filed within the requisite time. The entry, if it be binding, establishes the fact of payment, which need not be proved aliunde. The general rule which has been stated, respecting contracts not under seal made by

corporations, is qualified in Courts of equity. The case of *Taylor* v. *Dulwich College* has been corrected by a later case, mentioned in Mr. Fonblanque's Treatise.(*c*) In *Macher* v. *The Foundling Hospital* (1 Ves. & B. 188) Lord Eldon threw out an opinion that a corporation might, under certain circumstances, be bound by the **[522]** acquiescence of some of its members in a breach of covenant committed by their lessee. [Alderson, B. My difficulty is to ascertain whether or not any act was done by Alderman Williamson, in consequence of this resolution. If upon the faith of a corporate resolution a man were to lay out money, and a Court of equity were to hold that, under such circumstances, the corporation was not bound, that would be enabling them to commit a fraud. But that does not apply where a man, having done all the acts connected with the loan, goes afterwards and gets from them a security.] The transaction is in itself an equitable mortgage, for which the Court would decree a foreclosure. It has the same effect in equity, as if an actual mortgage had been granted at the time of the entry; namely, in August, 1802. If the Court sees clearly that this was an agreement to grant a mortgage, though in consideration of a bygone loan, and that there was regular payment of interest, and that the party lending has not proceeded to enforce payment of the principal, the party who has had the benefit of the forbearance will be decreed to fulfil his contract. If the plaintiffs are not entitled to a mortgage, they are simple contract creditors. [Alderson, B. Can such a corporation as this borrow money except under seal?(*a*)] If the loan were not valid as against the corporation, the individual lenders would be personally responsible. The agreement to mortgage takes away the benefit of the remedy against the individual, and that raises a consideration to have a legal mortgage executed. This is an agreement to mortgage. The entry is only a recognition of an antecedent agreement to lend the money on mortgage. A man would not lend the money without a stipulation for its repayment; and if a corporation are not bound by a loan of money, qua loan, the inference is that, at the time of the original advance, there was an **[523]** agreement to grant a mortgage. That being so, the entry completes the agreement; for, after reciting the loan by Alderman Williamson of the 500l., and that "no security hath yet been given to him," it directs that "he shall have a mortgage security for the same."

Dec. 3rd.—ALDERSON, B. In this case, which I reserved in order that I might have time to examine into the circumstances, I now propose to give the judgment of the Court.

This was a bill filed by the plaintiff, the representative of a deceased Alderman Williamson, to compel the defendants to execute in his favour a security, under their corporate seal, for the sum of 500l. antecedently lent by the deceased to the defendants. The only proof of this loan, or of any agreement respecting it, is to be found in a minute in the corporation books, dated 3rd August 1802; which, after remaining unheard of for many years, nearly twenty at the least, was, it seems, lately discovered by the activity of an inquiry lately instituted for the purpose of improving the state of municipal corporations; and this suit in equity appears to have immediately followed:—a consequence, I am quite sure, never contemplated by those who directed such an inquiry to be made. The memorandum is as follows. [His Lordship then read the minute.] In addition to this, and obtained by the same inquiry, there has been produced evidence of payments apparently of interest; ending, however, in 1816; at which period, it seems, Alderman Williamson died.

It certainly is a remarkable circumstance that at his death no notice of so large a claim on the corporation should have been made by his legal representatives, which would rather lead to an inference that no notice could have been taken of it in his will, or in any statement of his property left behind him. But the Court cannot proceed on this ground; nor does there appear to be any circumstance, in addition to the mere lapse of time, which **[524]** does not amount to twenty years, on which to raise a presumption of payment in this case. If, therefore, the mortgage deed had been duly executed, there is nothing which would have barred the plaintiffs' right to recover under it.

The remaining question then is whether there ever was a contract under which Alderman Williamson, or his representative, could have compelled the corporation of

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(*c*) *Maxwell* v. *Dulwich College.* See Treat. Eq. vol. 1, p. 306.
(*a*) *Broughton* v. *Manchester Waterworks Company*, 3 B. & Ald. 1.

Coventry to execute the mortgage in question. The plaintiff's counsel, in support of their view of the case, principally relied on a dictum of Sir John Leach in *Marshall* v. *The Corporation of Queenborough* (1 Sim. & Stu. 520), in which that learned Judge laid it down that if a regular corporation resolution, passed for granting an interest in a part of the corporation property, and upon the faith of that resolution expenditure was incurred, he was inclined to think that both principal and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution.

It is not at all necessary to question the accuracy of this dictum; which, however, appears to me to depend upon the acknowledged principle on which a Court of equity proceeds, for the prevention of fraud. The Vice Chancellor goes on the ground of the subsequent expense on the faith of the regular corporation resolution; and if it be correct that acquiescence by a corporation would bind them, for which *Macher* v. *The Foundling Hospital* (1 V. & B. 188) is cited as an authority, it would follow, à multo fortiori, that the position above laid down would be correct. But, on the other hand, in the case of *Taylor* v. *Dulwich College* the Lord Chancellor expressly decided that a corporation could not bind itself by contract as to its revenues unless under seal; and this is confirmed by *Winne* v. *Bampton* (3 Atk. 473). Unless, therefore, an equity can be raised **[525]** in this case out of some subsequent acts done or omitted by Williamson, on the faith of this expected mortgage, I do not see how I can decide in favour of the plaintiffs. Now, here it appears from the memorandum, dated August, 1802, that the money had before then been lent to the corporation at interest; and I can see nothing which Williamson does, or undertakes to do, as the consideration for this subsequent agreement on the part of the corporation. He does not undertake to give time for the payment, or to forbear suing them. His situation as to his claim on the corporation was in no degree changed by the agreement. Nor do I see any fair inference to be drawn from the word *yet*, as importing an original agreement for a security, when the money was first advanced.

It therefore appears to me that, according to the authorities, this is not a contract binding the corporation, not being under the corporation seal; and that the other circumstances are not sufficient to raise an equity, such as would have been raised in *Marshall* v. *The Corporation of Queenborough*, in case the facts suggested in that report had been made out to the satisfaction of the Vice Chancellor.

Upon the whole I think that the bill must be dismissed with costs.

Decree accordingly.

MARGARESON *v.* SAXTON. Nov. 7th, 15th, Dec. 3rd, 1835.—A conveyance made to a creditor for a valuable consideration sufficiently strong in itself to influence the debtor to make it is not "voluntary" within the stat. 7 Geo. 4, c. 57, s. 32, for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt.—Semble, that though the bill charges certain facts, and that the defendant knew them, yet if it omit to charge that he admitted that he knew them, evidence of his admissions on that subject cannot be read.

[S. C. 5 L. J. Ex. Eq. 1.]

The plaintiff in this suit obtained a verdict for 9l. 9s. 6d. in an action against one Eaton for goods sold and **[526]** delivered, which action was tried at the Derby Summer Assizes at the beginning of August, 1832; and leave was given to the plaintiff to issue execution on the 16th day of the same month. Soon after the trial the plaintiff received a letter from Turner, Eaton's attorney, dated the 10th of August, requesting the plaintiff to send him the probable amounts of the damages and costs in the action, and expressing a wish that no further expenses might be incurred by taxing costs or otherwise till thep laintiff should hear from him again, as in all probability the matter would be settled.

The plaintiff sent an account of the costs but heard no more from the defendant's attorney; and on the 28th August the sheriff's officer was sent to levy execution on Eaton's effects for the plaintiff's debt; no goods, however, were found on the premises, and it appeared that a sale of Eaton's effects had taken place on the 25th.

Eaton having disappeared, the plaintiff caused search to be made for him, and found him in December 1832 in the Fleet prison, having been arrested at the suit of one Crooks. Eaton soon afterwards petitioned for his discharge under the Insolvent

Act, when his petition was opposed by the plaintiff, and he was remanded. On the following day he, at the instance of Crooks, was discharged out of custody.

In February 1833 Eaton was arrested by the plaintiff; and in May following presented his petition to the Insolvent Court at Derby for his discharge, when the commissioner ordered that he should be discharged after remaining eight months in custody at the suit of one or more of his creditors. In July following all the real and personal estate of the insolvent were conveyed and assigned to the plaintiff as his assignee, upon trust for the creditors.

The plaintiff now brought his bill against the defendant charging that the letter sent by Turner to the plain-**[527]**-tiff was the result of a plan formed by Turner and Eaton to defraud the plaintiff, and to dispose of Eaton's real and personal estate, before the plaintiff should issue execution. That in furtherance of this plan, and with a view to give a fraudulent preference to the defendant, who was fully aware of the plaintiff's verdict, and of Eaton's insolvent circumstances, Eaton, under the advice, and with the assistance of Turner, executed certain indentures of lease and release, bearing date the 14th and 15th of August, 1832, and made between himself of the one part, and the defendant of the other part, whereby, for the consideration therein expressed, he conveyed all his real estate to the defendant in fee. The bill further charged that the estate was sold at an undervalue; that Turner, the attorney employed to defend the action, prepared the conveyance; that he had never been employed before by the defendant; and that before the deeds were executed, no examination of the title took place. The bill prayed that these deeds might be declared fraudulent and void against the plaintiff as assignee of the estate and effects of Eaton.

There was a statement in the bill that on each occasion of Eaton's petitioning to be discharged under the insolvent act, that Court had declared the conveyance in question to be fraudulent and void.

The defendant, by his answer, stated that in January, 1831, he, at the request of Eaton, joined with him in a security for 50l., to Messrs. Parker, Shore & Co., bankers, Sheffield, and took a counter security from Eaton and his brother for that amount. That in November, 1831, Eaton borrowed 5l. of the defendant, and in January following 40l. more. That on the occasion of the last-mentioned loan, the defendant took a note from Eaton alone for 95l., the amount of the three sums, and destroyed the previous note given by Eaton and his brother. That the defendant had no further communication with **[528]** Eaton till August, 1832, when the latter called on the defendant, and said he was in want of more money to pay the expenses of a lawsuit which he had lately lost. That until he received this information, the defendant had no knowledge or reason to believe that the plaintiff had been engaged in any lawsuit; and that he refused to advance any sum of money unless he had some security. That Eaton then said he was willing to sell his lands, at the same time informing the defendant that there was a mortgage upon them for 250l. That, after some negotiation, the defendant agreed to give 380l. for them, out of which the sum of 50l., due to Messrs. Parker & Co., was to be discharged. That the defendant then, at the recommendation of Eaton, employed Turner to prepare the conveyances of the 14th and 15th of August, 1832; which were prepared and executed accordingly, and the consideration money paid.

The defendant stated his ignorance of the proceedings alleged to have taken place in the Insolvent Debtors' Court in London; but he admitted that both he and Eaton were examined at Derby touching the conveyance in question; and that the commissioner expressed an opinion that Eaton had fraudulently, with an intent to give an undue preference, made away with part of his property.

The cause now came on for hearing. On the part of the plaintiff, no documents were put in evidence by which the grounds of the opinion of the Insolvent Debtors' Court could be legally proved. On the part of the defendant, evidence was given to shew that the property was sold at its real value, and also to explain the fact of the title not having been inquired into. This evidence is commented upon in the judgment.

In order to prove that the defendant had notice of the plaintiff's action before he took the conveyance of the insolvent's estate, the counsel for the plaintiff offered evidence of declarations of the defendant to that effect.

[529] It was objected for the defendant that this evidence was inadmissible, on the ground that no admissions or declarations of the defendant to the above effect

were charged in the bill. All that was charged was that the defendant knew of the action at the time stated, not that he admitted having that knowledge.

For the plaintiff, it was contended that the object of the proposed evidence being to rebut the statement made on this subject in the answer, it ought to be received.

Alderson, B., received the evidence de bene esse, observing that there was great doubt of its admissibility, inasmuch as the declarations not having been charged in the bill, the defendant had not had a proper opportunity of explaining them. On the other hand, there was much difficulty in rejecting the evidence altogether.

The cause then proceeded on the merits.

Mr. Twiss and Mr. Hayter, for the plaintiff. The conveyance to this defendant was adjudged to be void by the Insolvent Court, on the ground of fraudulent preference. In *Stuckey* v. *Drewe* (2 Myl. & K. 190) it is laid down by Sir John Leach that if a deed be made with a view to give a fraudulent preference to any creditor, it is a voluntary conveyance within the statute.(*b*) [Alderson, B. The statute **[530]** goes farther than that. A perfectly honest conveyance, if it be voluntary, is within the statute. The principle at law is that the act must be spontaneous, and move from the party making it without any other operating cause. *Arnell* v. *Bean* (8 Bing. 87; 1 M. & Scott, 151).] Here there was not the least pressure for the foregone debt. The defendant saying that he would not advance more money unless security was given does not make the conveyance less voluntary. In *Stuckey* v. *Drewe*, a case very similar to the present, there appears to have been some pressure by the creditor, and yet the deed was held voluntary. [Alderson, B. There the Master of the Rolls appears to proceed on the ground that the debtor ought to have gone to the creditor, who was more pressing. I should doubt whether that was a sufficient ground.] At all events, when the conveyance was made, the defendant had full notice of Eaton's insolvency. The transaction, therefore, is on that account fraudulent and void; and admitting that the full consideration was given for the property, that will make no difference. [Alderson, B. How can fraud be presumed if the full value was given? In bankruptcy there is a technical reason for the avoidance of contracts made by bankrupts; but even there the legislature has mitigated the rule by protecting real transactions in many cases.] The protection in those cases is destroyed by notice of the bankruptcy. The intention of the Insolvent Act was to prevent insolvents dealing with their creditors at all, unless pressed. Here the Court of Insolvent Debtors was of opinion, that the **[531]** conveyance was fraudulent. [Alderson, B. I cannot take notice of that. Saxton's examination should have been put in evidence to shew the grounds on which the Court came to that conclusion.]

Mr. Stuart and Mr. J. Russell, for the defendant. This was no doubt a voluntary conveyance in one sense, namely, that it was the result not of compulsion, but of a contract. This is not a case of voluntary preference. In such a case there is no other contract, except that the creditor shall have the estate conveyed to him. In this case the valuable consideration which was given puts an end to all the law which has been referred to. The plaintiff has failed to shew that the defendant is involved in the fraud which he imputes to the insolvent. Can he then say that if a fraud is concocted by the insolvent and another person, unknown to the purchaser, the latter, dealing bonâ fide for a valuable consideration, is to have his contract vitiated in a

(*b*) 7 Geo. 4, c. 57, s. 32, whereby it is enacted that if any prisoner, who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under the act: provided always that no such conveyance, assignment, transfer, charge, delivery or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act.

Court of equity? The defendant knew nothing of the insolvent circumstances of Eaton. [Alderson, B. Under the act of Parliament, his knowledge is immaterial. If the transaction is bonâ fide, it is not voluntary within the act; otherwise, if it be colourable. Is a conveyance for a valuable consideration voluntary?] The meaning of a voluntary conveyance is a conveyance to a creditor, or some one in trust for him, coming from the party making the conveyance without any consideration, or in consideration of a pre-existing debt. If in addition to that you can shew that the party was insolvent at the time of making the conveyance, and that it was his intention to avail himself of the Insolvent Act, then the transaction is within the act, and void. These circumstances did not all occur in the present case. Not only was the transaction bonâ fide on the part of the defendant, but there is neither allegation nor proof that Eaton was insolvent at the time he executed the deeds. There is no **[532]** evidence of any debt at that time, except the plaintiff's. *Arnell* v. *Bean* (8 Bing. 87; 1 M. & Scott, 151) is clearly in favour of the defendant.

Mr. Twiss, having commenced his reply, was interrupted by the Court.

ALDERSON, B. My difficulty is to decide this question without an examination of the parties. Is there any way in which I could be relieved from that difficulty? Upon the evidence as it stands upon the depositions and documents, it is not a voluntary conveyance. But I cannot shut my eyes to the fact that the Judge, who has had an opportunity of seeing the parties, came to an opposite conclusion. Perhaps, if I had the same means, I should come to the same conclusion. I cannot send such a case as this to a jury; for the sum in dispute would be consumed in the expense of such an inquiry. I will take this opportunity of expressing an opinion which I have already expressed (ante, pp. 139, 140), that I wish I had the power of examining witnesses in this Court. If the parties by consent will give me that power which I wish all Courts of equity had, I will examine them.

It was then arranged that the cause should stand over for the purpose of examining the parties vivâ voce, but this arrangement was afterwards abandoned.

Mr. Twiss was, on a subsequent day, heard in reply. The case of *Arnell* v. *Bean* does not decide the present question, though the Court expressed an opinion that fraud in these cases is a question for the jury, and that there the particular circumstances did not invalidate the conveyance. That was an action of trespass brought to displace the person whom the purchasing creditor had put in possession of the property. The question between **[533]** that creditor and the assignee under the Insolvent Act was left entirely open. That may be done in this case, by leaving the question to a jury: but the fund is too small for that; and *Stuckey* v. *Drew* is an authority for the plaintiff. Eaton's insolvency at the time of the conveyance is proved by his having been arrested for so small a debt; and his intention to take the benefit of the act at that time is shewn by the various facts charged in the bill. The date and registration of the deed on the 16th of August, the day on which the plaintiff's execution might have taken place, the letter from the attorney of the insolvent written to gain time, the sale of his effects, and his imprisonment at the suit of Crooks, are all circumstances shewing that intention. Then whatever, under the bankrupt acts, constitutes fraudulent preference is, under the insolvent acts, evidence of a voluntary conveyance. Now here there was no pressure for the former debt. All that the defendant did was to ask for a security for the new debt. [Alderson, B. Then, if there were a debt of 10*l*., and an advance of 1000*l*., the advance would not be valid.] The onus of shewing the pressure ought to be on the party who sets up the validity of the sale. Here, however, the application of the debtor was sufficiently spontaneous. *Poland* v. *Glyn* (2 D. & R. 310), *Crosby* v. *Crouch* (11 East, 256), *Singleton* v. *Butler* (2 B. & P. 283).

ALDERSON, B. If the case of *Arnell* v. *Bean* was inconsistent with that of *Stuckey* v. *Drewe*, so that the latter case could in no way be reconciled with the former, I should take time to consider this question, because there would be great difficulty, without much and anxious deliberation, in deciding between the conflicting opinions of Judges for whom one is disposed to entertain the greatest respect. But the case of *Stuckey* v. *Drewe* may be supported on its particular **[534]** facts, and may be reconciled with that of *Arnell* v. *Bean*. The Court, in the latter case, laid down a general rule of construction, upon the 32nd section of the Insolvent Act, which is expressed in better terms than I can express it, namely, that "the word 'voluntary' must have some meaning of its own distinguishable from that of fraudulent; in the

first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would have itself declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein mentioned should be deemed, and shall be, fraudulent and void." Now, no doubt, if the conveyance were, ipso facto, fraudulent, it would be unnecessary to say that it shall be deemed so. It is clear, therefore, that the word "voluntary," in this section, has some different meaning from the word fraudulent. Then what is the sense given to it in *Arnell* v. *Bean*? The Court says it is intended to embrace two classes of cases; one where "an assignment is made without such valuable consideration as is sufficient to induce a party acting really and bonâ fide under the influence of such considerations;" and another, where "an assignment is made in favour of a particular creditor spontaneously and without any pressure on his part to obtain it." Now, if the advance of money be made bonâ fide, although there be a pre-existing debt, yet, if the consideration operating on the mind of the party be partly that which constitutes the advance, and partly payment of the debt, I do not see how the conveyance is voluntary, within the 32nd section of the statute; for there is an inducement to do what, except for that consideration bonâ fide operating upon his mind, he would not have done. But, where the party voluntarily comes forward and says to his creditor, let me make you a conveyance, in order to secure to you payment of that debt which I owe you—this being a spontaneous act on **[535]** the part of the debtor, without anything operating on his mind to give the creditor a preference, will make the conveyance voluntary within the statute. On the other hand, if the creditor has pressed for payment of the debt, and can shew that he has taken pains to secure it, that circumstance also will prevent the conveyance from being voluntary. Therefore, the conveyance will not be voluntary within the statute, either if there be a consideration bonâ fide acting on the mind of the party, or if there be circumstances of pressure on the part of the creditor.

In the case of *Arnell* v. *Bean* the Court of Common Pleas gives a plain, simple, and easy construction of the acts of Parliament. In *Stuckey* v. *Drewe* the Master of the Rolls must have decided on the ground that it was a colourable transaction between the parties; and, although there was an advance of 60l., and an anterior debt of only 40l., he must have thought that the additional advance was not a real transaction, but that it was colourable, in order to conceal that which was the real intention of the parties, namely, to give a preference to the insolvent's uncle. The circumstances of the uncle taking the property without making any inquiry whether the nephew had a good title, and when he was in insolvent circumstances, and of the nephew going to pay the uncle, who thereupon made a fresh advance to him, strongly tend to shew that the transaction was colourable. The case of *Stuckey* v. *Drewe*, therefore, is consistent with that of *Arnell* v. *Bean*, for the latter equally recognises those cases where the transaction between the parties being colourable, the conveyance is, on that account, deemed voluntary. But it is not laid down in any case that if the transaction is bonâ fide, the conveyance may nevertheless be voluntary. If it were so laid down, I should, with great deference, be disposed to disagree with that authority.

To apply these principles to the present case. Here an advance of money is made to the insolvent at the time **[536]** the transaction takes place. The question is whether this was a bonâ fide transaction, and whether the moving cause on the part of the insolvent was the advance of the money for the sale of the equity of redemption of these premises. The property consisted of seven houses, and inconsiderable allotments made under an inclosure act. The seven houses had been mortgaged to the trustees of a society. The mortgagees had made inquiry as to the title, and, being satisfied on that head, had advanced 250l. on that security. That, therefore, was a charge upon the property, and all the insolvent could sell was the equity of redemption. It is said that it was let at 31l. per annum, which, after the necessary deductions for rates and taxes, left only 27l. per annum. Now I find, upon calculation, that the principal, which gives 27l., at 7l. per cent., is about 375l. Here the property was valued only at 355l., and was sold for 380l. We might, further, take into account the necessary expenses of preparing the conveyance, amounting to 16l. 16s., and which, in this case, if not included in the purchase-money, would increase the whole sum given to about 396l. If it were necessary, it would be reasonable to take that sum into consideration; but it is not necessary, for there is no evidence of a sale

of the property for less than its fair value. Then, if not, what are the other circumstances of fraud?

It appears that Saxton was under an engagement to pay a debt of 50l., which had before been incurred by Eaton, and for which he had given his promissory note, Saxton joining as surety. Saxton had afterwards advanced to Eaton 45l. in monies numbered. The amount of these sums was 95l., and the mortgage debt in the property was 250l.; so that the purchase money being 380l., left 35l. for the sale of the equity of redemption. It appears, therefore, that 95l. was the debt due to Saxton, or for which he was in fact responsible; and he was to pay, in addition, 35l.; and, if the statement of the attorney is to **[537]** be believed, he thought that the sum of 35l. was to be given in payment of the sum due to Margareson, for the debt and costs in the action. Then, what is there in the circumstances of this case to shew me that it was fraudulent on the part of Eaton and Saxton, or that it was not conducted according to the rules which govern persons in ordinary transactions? The evidence is that Eaton was in embarrassed circumstances, and wanted a fresh advance of money; and, upon Saxton being applied to, he refused to make a fresh advance unless some security was given for it; and then Eaton said, "I had better sell you the property I have, which you can take as a security both for the former debt and for the money you are about to advance;" to which terms Saxton agreed.

I cannot say, on this documentary evidence alone, without seeing the witnesses, that it is to be inferred that the operating cause, which induced Eaton to make the conveyance in question, was not the 35l. which he so gained, and the undertaking, on the part of Saxton, that he would pay the 50l., for which he was not really responsible. It does not appear to me that I am, from these circumstances, to infer fraud, or to say that the persons who swear to their belief that the operating cause was the one above stated, have made a false statement. Besides, what evidence is there that Eaton was insolvent at the time of this transaction? No doubt there were circumstances of suspicion, but fraud must be proved expressly. I am not to infer fraud, because it may come across my imagination that there are circumstances of suspicion in the case which I should have been better pleased had not existed.

Upon the whole I am of opinion that the plaintiff has failed to make out that this conveyance was voluntary within the meaning of the act, or that it was made by a party who was at the time in insolvent circumstances. At the same time there are circumstances of suspicion; and, if the matter in dispute had been greater, I should have **[538]** directed an issue. The bill, therefore, must be dismissed, but without costs.

Decree accordingly.(*a*)

BARRY *v.* WOODHAM. Nov. 10th, 1835.—Where husband and wife, who were living apart, had put in separate answers and appeared by different solicitors, separate costs were allowed, there being no evidence in the cause of the grounds of their separation.

[S. C. 5 L. J. Ex. Eq. 20.]

The bill was filed to carry into execution the trusts of a will, under which the wife of one Corsbie was entitled to a legacy and a share of the residue, to her separate use. Corsbie and his wife, living apart, put in separate answers, and appeared by different solicitors; and the question was whether they were entitled to two sets of costs, or only such costs as would have been incurred if they had only put in one answer.

THE LORD CHIEF BARON. I cannot go into the merits of the separation, which form no part of this case; nor can I impute blame to the husband, in the absence of any evidence on that subject. The parties must have their costs. Mr. Spranger tells me that in one case, where trustees had severed in their answers, Lord Alvanley, under the special circumstances, allowed them their separate costs.

(*a*) See *Davies* v. *Acocks*, 2 C. M. & R. 461.

STORY *v.* JOHNSON. Nov. 19th, 1835.—Where commissioners of partition are directed to divide lands equally between the parties entitled, it is their duty, after dividing the lands into proportions of equal value in the market, to assign them to those parties respectively to whom they would be of most value, with reference to their respective situations in relation to the property before the partition took place. Therefore, where commissioners were directed to divide lands equally between A., B., and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, upon which he had expended money in improvements, and adjoining to which he had purchased property for the purposes of his occupation: Held that the adjudication of the commissioners was wrong, and that a commission should be directed to new commissioners, to be approved of by the Master.—Gross error in judgment, without positive proof of impartiality, is sufficient to enable the Court to set aside an adjudication made by commissioners of partition.

[S. C. 5 L. J. Ex. Eq. 9. See further, 2 Y. & C. Ex. 586.]

Under the will of Robert Hall, Esq., Richard Hall was tenant for life of a freehold estate, including an inn **[539]** called the George Inn, situate in Ifield, in the county of Sussex, with certain remainders over, which never took effect; with remainder to Elizabeth Linkon for her life, with remainder to all and every the children and child of Elizabeth Linkon, as tenants in common in fee.

Upon the death of the testator, Richard Hall entered and took possession of the devised property. During his lifetime, Elizabeth Linkon died, having married one Edward Jones, by whom she had three children, Edward, William Standard, and Richard.

In November, 1820, Richard Hall demised the George Inn with several closes and tenements, forming part of the above estate, to Joseph Johnston, the father of the defendant Johnson, for twenty-one years. This lease was afterwards confirmed by two of the remainder-men; namely, Edward and Richard Jones. About the same time, Richard Hall demised other parts of the estate, for the same term, to James Gardner. In April, 1824, Edward Jones conveyed his reversionary one-third share of the property to the plaintiff Story, in fee. In 1825 Richard Hall, the tenant for life, died; and in June, 1826, Richard Jones conveyed his one third share of the George Inn and the premises adjoining, occupied by Johnson, to Johnson in fee; and, about the same time, he conveyed his one-third part of the residue of the property to James Gardner in fee.

In consequence of these various events, when the present suit was instituted, Story was interested in one third of the property in fee, W. S. Jones in another third in fee (subject however to a mortgage to Johnson for 600l.,) and Johnson and Gardner in the remaining third part in fee; and Johnson and Gardner were likewise in possession of the premises comprised in their respective leases.

The original bill was filed by John Story, W. S. Jones, and other parties, against Johnson and Gardner, praying for a partition of the Ifield estate; and for an account of the **[540]** rents and profits received by them since the death of Richard Hall. Johnson and Gardner, having both died, the suit was revived against their real representatives.

The cause coming on to be heard before Lord Lyndhurst, at the sittings after Trinity Term, 1833; his Lordship ordered that a commission should issue, directed to certain commissioners to be named by the several parties; namely, two by the plaintiff, John Story; two by the plaintiff, W. S. Jones; and two by the defendants, the representatives of Johnson and Gardner; that the commissioners should divide the estate in question in three equal parts, and allot one part to each of the three parties. That all parties should produce before the commissioners the deeds and writings in their possession relating to the estate; and that the commissioners should examine witnesses as the matters in question, by interrogatories, or otherwise as they should think fit.

At the meeting of the commissioners in pursuance of this decree, it was determined by the four commissioners chosen by the plaintiff, in opposition to the opinion of the other two, that Lot 1, which included the George Inn, should be given to the plaintiff

Story; Lot 2, to the plaintiff W. S. Jones; and Lot 3, which included the premises lately held by Gardner, to the defendants; and they made their return accordingly.

A motion was now made on behalf of the defendants, that the return or certificate so made might be quashed, or that a new commission might be issued directed to new commissioners to divide and separate the estate as directed by the decree; or that the said return or certificate might be varied as the Court should think fit.

The substance of the affidavits, which were read in support of the motion, were as follows:—That the late defendant Johnson had been in the tenure or occupation of the George Inn for forty years previous to his death; and that, since his death, the inn had been occupied by the **[541]** defendant, his son. That Johnson, the father, had from time to time laid out considerable sums of money upon the inn and premises; that he had also built near it, upon his own freehold land, an hotel which contained only sitting and sleeping apartments, and was not adapted for an inn, except in connexion with the George Inn; and that, being an extensive coach proprietor, he had also built near the inn, upon his own freehold land, stables for fifty horses. That the defendant Johnson, the son, had also purchased a laundry, and a lodging-house for servants, for the use of the inn, which were comparatively of small value if unconnected with the inn. That the foregoing facts were stated to the commissioners by the defendants' solicitors, and were urged as a ground for awarding Lot 1 to their clients. That it was at the same time represented to the commissioners, that if Johnson were turned out of the George Inn, the consequences to him would be most serious, and that he would be placed in a situation of having money extorted from him by other parties, for the sake of being reinstated in his present occupation; and that, nevertheless, the four commissioners chosen by the plaintiffs, refused to make the required allotment: one of them alleging that, in doing so, they should act partially towards Johnson. That the plaintiff Story, who was present, proposed to have the lots disposed of by ballot, which was approved of by the four commissioners, but objected to by the others. That, as the ballot was objected to on the part of the defendants, Story then insisted upon having Lot 1, which was accordingly awarded to him by the four commissioners, the others dissenting from this allotment. That, during the whole of the proceedings, Story interfered in person, both on account of himself and W. S. Jones, and that the same solicitor acted for both of them.

The four commissioners, by their affidavits, did not deny in substance any of the foregoing facts, but alleged as a reason for awarding Lot 1 to Story, that he was en-**[542]**-titled to an entire one-third of the whole estate; that the defendants, on the other hand, were entitled only to one-third amongst them; and that the George Inn being a property of an indivisible nature, the allotment of it to more than one person would have led to much litigation, and would have given one defendant an opportunity of making an excessive demand on the other, for his indivisible fraction therein. They stated that they had valued the George Inn without reference to the adjoining hotel, and that they had omitted to take into their consideration any existing lease of the premises, conceiving themselves not authorized to do so by the decree.

They further stated that the ballot was first proposed by the solicitor of the plaintiffs, to which they immediately assented; but that, upon its being objected to, the same solicitor proposed that Lot 1 should be awarded to W. S. Jones, whereupon Story observed that it might as well be allotted to him. They added many strong asseverations as to the impartiality of their motives and conduct.

Mr. Simpkinson, Mr. Ching, and Mr. Bichner, for the motion. Johnson had no interest whatever in Lot 3, and yet the commissioners thought it consistent with justice to compel him to take that lot instead of Lot 1, in which he had an interest, and upon which he had expended large sums of money. They appear to have thought it necessary to divide the lands into shares of equal value. It is not, however, necessary to adopt that mode of division, if, in other respects, it be inconvenient. In such cases, it is the practice to divide the land unequally; and the party taking the lesser share receives a rent or some other satisfaction by way of owelty of partition. Having, however, chosen to divide the estate into three shares of equal value, they were in the next place bound to consider the situation of the parties. [The Lord Chief Baron. If the lots were equal in value, laying aside the hotel, it **[543]** follows as a matter of justice, that they should allot the inn to Johnson. They seem to have said, if we give the inn to Johnson, it will be of more value to him than to the others; therefore, to make it equal to all, we will allot it otherwise. Whether that is a sound

argument or not, is the question. In inclosure acts, the commissioners are directed to make the allotments as convenient as they can to the proprietors of the old lands.] They allege that if they had given Lot 1 to Johnson and the other defendants, it might have led to litigation; but the other defendants, including Gardner's representatives, concur in the arrangement. Then they say they have not regarded the leases; but they were bound to do so, or else the direction in the decree, relative to the production of deeds before them, is useless.

Mr. Temple and Mr. Phillimore, contrà. This is an application to the Court against an officer of the Court, chosen by the parties themselves. [The Lord Chief Baron. Omitting all other considerations, except the fact that Johnson had a freehold property contiguous to the George Inn which gave it in his hands additional value, suppose, on the partition of the estate, the commissioners thought fit to allot to him that part which was farthest from his property, and therefore most inconvenient to him; would that be a case, though the allotments might be of equal value inter se, in which they had executed a sound discretion? Is there any authority to shew that the Court would not interfere in such a case?] Where an inconvenient allotment only is made, the Court will not interfere. But the bill prays nothing, and states nothing with regard to the particular interest of Johnson; and the commissioners could not look to his rights in particular. They were bound only to look at Johnson's and Gardner's rights jointly; not to attend to all the subordinate interests comprised in that one-third. Two of the parties interested in it are married women, who cannot compromise **[544]** their rights. They are entitled to have an estate allotted to them, which shall be capable of a further division between them. The commissioners were bound to attend to that, but they had no power to determine Johnson's legal rights. His right of occupation in the inn is matter of great doubt. It will be a matter to be decided at law, or when he comes here to have his lease confirmed. The decree does not declare the lease to be binding, by reason of the confirmations of Edward and Richard Jones; on the other hand, it declares it not to be binding as regards William Standard Jones. Then, as the validity of the lease is not determined by the decree, and as the commissioners could not go out of the decree, was there anything calling upon them to allot a particular part of the property to a particular individual? [The Lord Chief Baron. I should say that in justice there was.] Upon that principle Story might claim an equal advantage with Johnson, as he might sell it at a profit. [The Lord Chief Baron. That would be to raise the value of one man's interest and to depreciate that of another, under colour of equally dividing the estate. The proper mode is to consider what would be the value, if the estate were put up to auction, and the parties interested were not allowed to buy. That being done, the commissioners ought to look to the circumstances of the parties.] Admitting that the commissioners have erred in the last respect, that is not a ground for the interference of the Court. The commissioners are arbitrators chosen by the parties to adjust their respective claims; *Jones* v. *Totty* (1 Sim. 136): and the Court will never interfere with their judgment, except in cases of clear improper motive, or clear miscalculation in point of valuation. A contrary course of practice would lead to innumerable cases, arising out of alleged miscarriages on the part of the commissioners. In *Manners* v. *Charlesworth* (1 Myl. & K. 330), Lord **[545]** Brougham took great pains to consider the duties and powers of commissioners of partition, and in that case his Lordship refused to interfere, though partiality was alleged against the commissioners. [The Lord Chief Baron. I dare say I should agree with that decision, if the facts of the case were before me. I agree generally with the law as there laid down, except as to one point regarding the non-interference of the Court upon mere evidence of inequality. Surely there may be inequality so gross as to authorize the Court to interfere.] There is great difficulty as to the manner of interference. The only mode that can be suggested is to send back the return with a special direction founded on affidavits. But that is contrary to all practice. There is no instance of a special direction on a commission of partition.

Mr. Simpkinson, in reply. No doubt there must be a strong case to induce the Court to quash the return of commissioners of partition. Not that they are strictly arbitrators. They are officers of the Court, though in part chosen by the parties. This is a strong case; the circumstance that two or three cottages, which were in Gardner's occupation, have been thrown into Lot 1, is not a reason for depriving

Johnson altogether of the inn which he had so long occupied, and which formed the other part of that lot. Though bound by the terms of the commission to make a fair, impartial, and just division, they awarded to this person property in which he never had an interest. Such an adjudication cannot be sustained. The Court will not delegate its power of judging to commissioners of partition, any more than it will to the Master. It is said that there is no case where the Court will interfere with commissioners of partition on the ground of mistake alone; but in *Dacre* v. *Gorges* (2 S. & S. 454) the Court interfered, not **[546]** merely after the return, but after the matter had been apparently settled. [Mr. Temple. There the commissioners had miscarried altogether, by including in their return an estate over which they had no jurisdiction.]

THE LORD CHIEF BARON. I do not propose in this case to go into the history of the jurisdiction of Courts of equity, for the purpose of shewing that they have power to correct the errors of commissioners appointed under their authority. That would be a useless parade. The powers of the Courts in this respect are understood by every lawyer. The only question upon which I had any anxiety was whether or no any case had so modified the principles on which Courts of equity act in matters of this nature as to fetter my hand. It appears to me that no argument has been used, and no authority shewn, to prevent the Court from interfering, in cases when interference becomes necessary. The question then is whether or no interference is necessary in this case.

It is admitted on all sides that in a case of partial judgment on the part of the commissioners, there will be ground for the interference of the Court; and it is, I think, but feebly contested that in a case of very erroneous judgment, leading to a very unjust conclusion, the Court will have the same jurisdiction. I see no reason why it should not be so. I see no reason why, when commissioners have made a grievous error in judgment, which would make the whole decree vicious, the Court has not the same right to correct their proceedings as to interfere with the Master's report. I have been turning in my own mind, in what light to place the conduct of the commissioners; and I must say, as I am put to state my sentiments on the subject, that I am far from thinking the case free from a strong suspicion of partiality. Supposing that the commissioners had power to look at the situation of the parties, for the purpose of determining to whom they **[547]** should make the respective allotments, the question is whether they assign a just reason for not exercising that power. For clearly they have not exercised it, in refusing to listen to the reasons urged for allotting to Johnson that share of the property which was contiguous to that which he had purchased. What is the state of the case? It is admitted on all sides that the division without reference to external circumstances was fairly made; that if put up to auction, without taking into consideration any adjacent property, the lots were of equal value: upon that all are agreed. Then it is a very remarkable circumstance, if this were a matter of perfect indifference to those who had no property belonging to them adjacent to this property, that the only person to whom the possession of a particular part of the property might be important, and the only person who presses to have a choice of the lots, is refused that choice. If it were a matter of indifference to Story and W. S. Jones, why did not the commissioners say to Johnson, since it is of no consequence to the others, we give it to you? They do not do that; but I find that the attorney of Story and W. S. Jones is the person to propose to give it to W. S. Jones. Then why was it not given to W. S. Jones? It is impossible to avoid the suspicion that Story and W. S. Jones were swimming in one boat, guided by one man at the helm, who was their solicitor. It is true that they proposed the ballot, but it was safe enough to propose the ballot when it was known that it would be objected to. It appears to me, therefore, under these circumstances, when the fact is considered that the four commissioners in Story's interest concurred in the award in question against the opinion of the other two, that the Court ought to interfere. I do not say that the Court would interfere merely because the four were opposed to the two, if that stood alone; but I say that, if one of those two had happened to have been chosen on the one side, and the other on the other side, it would have altered my **[548]** impression as to the partiality of the commissioners. It has by no means been pressed upon the Court more than it ought that they did not act with impartiality.

As to the oaths which the commissioners have taken of the fairness of their intentions, I hold them unworthy of consideration: a man must be base and wicked indeed,

if he means to act partially in the execution of a trust. I do not, therefore, regard their affidavits on this point. Their swearing to their own virtues is nothing. The facts alone must determine the judgment of a Court of equity. Looking at the facts of this case, by an extraordinary accident, the commissioners appointed by Story, because appointed by his solicitor, have given him one of these lots in a case in which he is stated to be indifferent, but in which another party was not indifferent. The test of his indifference is found in the further proceedings. If he were really so, why has he put the parties to the expense of this litigation, instead of offering to exchange the lots? I cannot entertain a doubt that Story had a strong interest to possess this lot, I do not say as of intrinsically more value than any other lot, but as of some peculiar value to himself; and that peculiar value might consist in making a better bargain with Johnson. I should say, therefore, if I had to decide the question finally, that I was not satisfied, but much dissatisfied, with the judgment of the commissioners; even assuming that each portion in the division was of perfectly equal value. I see no reason why they should not have assigned to Johnson's representatives that portion of the property, which they, with the consent of Gardner's representatives, desired to possess. I think, therefore, that this commission cannot stand.

Ordered that a commission do issue directed to new commissioners upon the terms of the original decree, with this addition, that they be approved of by the Master.

[549] DE BEAUFORT *v.* ARCHDEACON. Nov. 23rd, 1835.—Where, by a decree made thirty years ago, an account had been directed of a testator's personal estate and of his debts and testamentary expenses, and an injunction had been granted to restrain the bank from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to the petitioners, without carrying the suit any further.

[S. C. 5 L. J. Ex. Eq. 72.]

Under the will of William Archdeacon, his widow, Rosalie Archdeacon, was entitled to the interest of certain stock for her life; and, upon her death, which occurred some years since, the testator's daughter, Rosalie, the wife of Henry de Beaufort, became entitled to the principal.

In 1803 a bill was filled by Mr. and Mrs. De Beaufort, and Rosalie Archdeacon, against Peter Archdeacon, the executor of the testator, and against the Bank of England, praying the usual accounts; and for an injunction to restrain the transfer of certain stock.

The cause came on for hearing in November, 1805, when a decree was made, by which it was referred to the Deputy Remembrancer to take an account of the personal estate of the testator possessed by the defendant, Peter Archdeacon, and also an account of the testator's debts, legacies, and funeral expenses: and an injunction nisi was granted to restrain the bank from permitting a transfer of a sum of 48l. stock, standing in the name of Peter Archdeacon, and admitted by him to belong to the testator's estate. By a decree, dated in January, 1806, the foregoing decree was made absolute.

No further proceedings were had in the cause.

Peter Archdeacon survived Rosalie Archdeacon, and died in 1811 intestate.

Mr. and Mrs. De Beaufort now presented their petition, alleging that the testator's debts and testamentary expenses had been long since paid, and all his estate administered, except the 48l. stock, which, with its accumulated dividends, had been carried to the account of the Commissioners of the National Debt. They also stated that the commissioners were ready to re-transfer the stock into the name of Peter Archdeacon, if the same **[550]** could in such event be received by his personal representative.

The petition prayed that the bank might be directed to permit such a re-transfer of the stock as they would have permitted in case the decrees of November, 1805, and January, 1806, had not been made.

Mr. Wilcock, for the petitioners, observed that the ordinary course would have been to have obtained the Master's report, followed up by further directions, and an

order for payment of the money, the Master reporting no debts due from the testator's estate. Considering, however, the small amount of the stock, the length of time (thirty years) since any proceeding had been had, and the circumstance that the petitioners were the only parties now interested, he submitted that the Court would dispense with these proceedings. If the injunction were dissolved, the personal representative of the testator would be placed in the same situation as if there were no suit; and he was willing to pay the money as the petitioners might direct.

The Court, after observing upon the special circumstances of the case, made the order as prayed.

LEE *v.* OKEY. Nov. 27th, 1835.—Testator bequeathed a sum of money to his executors, upon trust, to pay the interest to his niece A. for life; and, after her decease, to pay the principal to her son, or to any of the testator's relations, in such shares and proportions as the executors, or the survivor of them, might think fit. By a deed-poll, reciting the will, the surviving executor appointed the principal sum in certain shares to the son of A. and two nephews of the testator: Held, that the appointment was valid.

[S. C. 5 L. J. Ex. Eq. 44.]

James Lee, Esq., by his will, bequeathed to his executors, Thomas Okey and Samuel Jones Horseman, the sum of 1600l., upon trust, that they, and the survivor of them, his heirs, executors, and administrators, should, as **[551]** to 500l., part thereof, pay the interest to the testator's niece, Ann Dyke, for her life; and, from and after her decease, pay and apply the said principal sum of 500l. to her son, or to any of his, the testator's, relations, and in such parts, shares, and proportions as they, the said Okey and Horseman, and the survivor of them, his heirs, executors, or administrators should think fit. The testator bequeathed the residue of his personal estate to his nephew, Richard Lee.

In 1814 the present suit was instituted by Richard Lee against the executors, for the purpose of having the accounts of the testator's property taken, and the residuary estate ascertained. In the course of the suit an order was made that 500l., part of the testator's assets, should be carried by the Accountant-General to the account of Ann Dyke's legacy, and invested in the funds, the dividends thereof to be paid to Ann Dyke during her life, with liberty for any person interested in the principal to apply to the Court touching the same at her death. The sum of 500l. was accordingly applied as directed by this order.

Samuel James Horseman survived his co-executor, Thomas Okey, and died in November, 1828, having, by a deed-poll, reciting the discretionary powers given him by the testator's will, directed that, after the death of Ann Dyke, the principal sum of 500l. whereof she took the interest for her life, should be paid to the several persons and in the several parts or proportions following, that is to say, the sum of 150l., part thereof, to ——— Dyke, the son of Ann Dyke; the sum of 175l., further part thereof, to Richard Lee; and the sum 175l., residue thereof, to John Taylor, another nephew of the testator.

Ann Dyke had only one son, Thomas Dyke. He died in December, 1834, intestate and unmarried, leaving his mother his sole next of kin. She died in July, 1835, having appointed William Gibbs her executor, who both proved **[552]** her will and procured letters of administration of the effects of Thomas Dyke.

A petition was now presented by John Taylor and William Gibbs suggesting that they were respectively entitled to such proportion of the stock purchased with the 500l., as the sums of 175l. and 150l. respectively bore to the whole sum of 500l., and praying that their shares of the stock might be transferred to them accordingly.

Mr. Wood, for the petitioners. Upon the execution of the power, the property, which was the subject of it, became vested in the three persons named in the power. One of them was the son of Ann Dyke, the other two were nephews and next of kin of the testator, and therefore came under the description of his "relations": *Harding* v. *Glyn* (1 Atk. 469). Although the power of appointment was to the son of Ann Dyke, or to any of the testator's relations, yet it was not void for uncertainty by reason of the discretionary power vested in the trustee. A bequest to A. or B. is void; but a bequest to A. or B., at the discretion of C., is good, for he may divide it

between them: *Longmore* v. *Brown* (7 Ves. 128). Here, therefore, as well as in the case cited, "or" may be construed "and."

Mr. Wilbraham, for Richard Lee, the residuary legatee, observed that if the Court thought the power void, his client was entitled to the whole stock; but if the Court thought otherwise, he would ask for a transfer of his share of the stock under the appointment.

THE LORD CHIEF BARON made the order as prayed, with the addition that Richard Lee, the residuary legatee, should be paid his share under the appointment.

[553] EX PARTE ONSLOW. IN THE MATTER OF THE LONDON AND BIRMINGHAM RAILWAY ACT. Nov. 27th, 1835.—Where, by a railway act, it was enacted that the monies paid into Court by the company for lands purchased by them should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses, and, in the meantime, should, by an order similarly obtained, be invested in the funds; and it was further enacted that the Court might order the expenses of such purchases, and of the investment of the purchase-money in land "or other disposition of the same," to be paid by the company: Held, that the company were liable to pay the expenses of the interim investment of the money in the funds.

[S. C. 5 L. J. Ex. Eq. 85.]

Under the stat. 4 & 5 Will. 4, c. lxxxviii., for making a railway from London to Birmingham, the company are empowered to contract with corporations, tenants for life, tenants in tail, and other incapacitated persons, for the purchase of lands required for the purposes of the company.

By the 53rd section it is, in substance, enacted that the money agreed or awarded to be paid for the purchase of any lands to be taken or used by virtue of the powers or under the authority of this act shall, if it exceed 200l., be paid into the Bank of England, in the name of the Accountant-General of the Court of Exchequer, to his account, "Ex parte the London and Southampton Railway Company," there to remain till the same shall, by order of the Court, upon the petition of the party who would have been entitled to the rents and profits of the lands sold, be applied in the redemption of land-tax, or in discharge of other incumbrances on the same lands, or any lands settled therewith, or in the purchase of other lands, to be settled to the like uses to which the lands to be purchased stood settled or limited; and that, in the meantime, and until such purchase can be made, the money so paid may, by order of the Court, upon application made thereto, be invested by the Accountant-General, in his name, in the 3l. per cent. consols, or in government or real securities, the dividends thereof, in the meantime, to be paid under a like order of the Court to the party who would have been entitled to the rents.

The 56th section enacts as follows:—"That where, by reason of any disability or incapacity of any party entitled to any lands, to be taken or used, or in respect of which any compensation or satisfaction shall be payable **[554]** under the authority of this act, the purchase-money for the same, or the money paid for such compensation or satisfaction, shall be required to be paid into the Bank of England, to be applied in the purchase of other lands to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court to order the reasonable expenses of all such purchases, and of the re-investment of the purchase-money in land or other disposition of the same, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be paid by the said company out of the monies to be received by virtue of this act; and the said company shall, from time to time, pay such sums of money for such purposes as the said Court shall direct."

The company having purchased of Lord Onslow certain lands in Surrey of which his lordship was tenant for life, and having paid the purchase-money into the Bank in the manner directed by the 53rd section of the act, his lordship now presented his petition, praying to have the purchase-money invested in the 3l. per cent. consols, and to be paid the dividends as they should become due. The only question was, by whom the costs of the present application and of investing the money in the funds should be paid?

Mr. Hayter, for the petitioner, referred to the 56th section. [The Lord Chief Baron.

The question is, whether the words "or other disposition of the same" may not be read "and any disposition of the same," in which case the costs would be borne by the company.]

Mr. Heathfield, for the company, contended that the words "or other disposition of the same" only applied to cases where the money, instead of being invested in the purchase of other lands, was employed in the redemption of land-tax or other incumbrances; and he referred to *Ex* **[555]** *parte Northwick* (ante, p. 166). He said that the proposed construction would be a great hardship on the company.

THE LORD CHIEF BARON. The 53rd section of the act directs that the money paid by the company for the purchase of lands shall, by an order of the Court made upon the petition of the party interested, be invested in other lands, to be settled to the like uses as the lands so purchased by the company; but that, in the meantime, the money may, upon a like order, be invested by the Accountant-General in the funds, and the dividends paid to the party making the application. Under that section the Court is now called upon to order an investment of the money in the funds, until it shall be employed in the purchase of lands; and the question is, whether the 56th section, relating to expenses incurred under the act, applies to this case? If it does not, the effect will be, that Lord Onslow, unless he put himself to the personal expense of investing this money in the funds, will lose the benefit of his life estate to that extent, until a proper investment in land can be found. This case, however, is not like those where the acts give no power to the Court to direct the payment of expenses, except upon an actual investment in land. This is an investment of the purchase-money in land, "or other disposition thereof;" and, by the 56th section of the act, the company may be ordered to pay the expenses of that disposition. Why, then, should the company not bear those expenses? I am not informed that any rule of practice has been established to the contrary. Therefore, as I consider this to be res integra on this act of Parliament, and as I think it reasonable that the company should pay those expenses, an order must be made to that effect.

Order accordingly.

[556] HALL *v.* STORER. Nov. 27th, 1835.—Where a person is appointed guardian, under a will not duly executed for that purpose, the Court will appoint him without a reference.

[S. C. nomine *Hall* v. *Stork*, 5 L. J. Ex. Eq. 97.]

Robert Hall, by his will, appointed his wife, Elizabeth Hall, to be his sole executrix and the guardian of his child or children by her, if more than one, during their minority; but, if his wife should die during the minority of any of his children, then he appointed his brother, William Hall, to be their guardian.

By a codicil the testator, after stating the death of his wife, requested his brother, William Hall, and the Rev. W. M. Tucker, to act as trustees for his three infant children; and, by a subsequent codicil, he appointed William Hall and Mr. Tucker, and two other persons, to be his executors.

Upon the death of the testator in October, 1829, the will and codicils were proved by two of the executors, William Hall being one. Tucker and the remaining executor renounced probate. Neither the will nor the codicils were attested by two witnesses, as required by the stat. 2 Car. 2, c. 24.

John Peter Hall, one of the infant children of the testator, who had been maintained by William Hall since the testator's death, now presented his petition, praying a reference to the Master to settle a proper sum for maintenance for the time past and to come; and, if necessary, to approve of a proper person to be his guardian. The fortune of the petitioner consisted only of the sum of 2127*l.* consols.

Mr. Bird, for the petitioner, submitted that, under the circumstances, the Court would appoint William Hall to be guardian, without a reference to the Master. He mentioned *Chatteris* v. *Young* (1 Jac. & W. 106).

[557] THE LORD CHIEF BARON thought it reasonable that the Court should comply with the intention of the testator, though the will did not operate as a valid appointment of a guardian. His Lordship therefore ordered that William Hall should be appointed guardian of the infant, without a reference to the Master for that purpose, but he directed a reference to the Master as to past and future maintenance.

ARGENT *v.* THE BANK OF ENGLAND. Nov. 27th, 1835.—A party, who had purchased a reversionary share in certain stock, caused a distringas to be laid upon it, and afterwards filed a bill in Chancery to have his interest in the stock ascertained, alleging conflicting claims; the distringas, not having been followed by any suit in this Court, was discharged with costs.

[S. C. 5 L. J. Ex. Eq. 94.]

In June, 1833, the plaintiff caused a distringas to issue out of this Court, directed to the Governor and Company of the Bank of England, for the purpose of restraining them from transferring a certain sum of stock, standing in the joint names of Robert Jones and George Pocock, who were trustees of that stock.

No bill, pursuant to the distringas, was filed in this Court; but in Hilary Term, 1835, the plaintiff filed his bill in the Court of Chancery, stating that he was the assignee, for a valuable consideration, of a reversionary share in that stock; stating, also, that a claim had been made upon the same share by Robert Jones, in respect of monies alleged to have been previously advanced by him to the assignor; and praying that his, the plaintiff's, interest in that stock might be ascertained and secured for his benefit.

Mr. O. Anderdon now moved, on the part of the trustees, that the distringas might be discharged with costs. He cited *Scott* v. *Bank of England* (2 Y. & J. 327); and added, that in *Fellows* v. *Bank of England* (1 Younge, 385), the plaintiffs pressed **[558]** Lord Lyndhurst to make it a term in the order that the distringas should remain in force till a cause in Chancery, in the same matter, had been determined; but his Lordship, nevertheless, set aside the distringas with costs, although the plaintiffs had a good equitable case, and although the decree was ultimately made according to the equity of the bill; the simple ground of his decision being that they had not followed up their proceedings here, but had gone into another Court. It might be said that, in this case, the parties had gone into Chancery upon a point entirely distinct from that which they intended to litigate here. That argument, however, could not prevail, because the Court would never interfere to restrain the transfer, except in the case of misconduct on the part of the trustees.

Mr. Teed, contrà. If no attempt be made to sell the stock, what necessity is there for an application to a Court of equity for protection? The effect of a distringas is a protection to the cestui que trust against any attempt to abuse the trust. The cases in which the Court has set aside a distringas have been where the process has been used fraudulently or vexatiously: fraudulently, where the party applying has no interest; or vexatiously, where the object is only to gain time in order to file a bill in Chancery. Now here the parties moving are mere trustees. [The Lord Chief Baron. One of them claims an interest beneficially.] At all events the bill filed in Chancery is not for the purpose of carrying on the trusts, but merely to ascertain the plaintiff's interest in a particular part of the fund. That is not such a bill as would prevent the instituting a suit in this Court to administer the trust generally; and, consequently, the fact of its having been filed affords no ground for granting the present motion. As to the plaintiff's intention respecting further proceedings in this Court, his affidavit expressly **[559]** states that a bill will be filed here, if rendered necessary by the conduct of the trustees.

Mr. Anderdon, in reply.

THE LORD CHIEF BARON. I have no hesitation in discharging this distringas. It appears to me that the party who has obtained it had no right to file an ineffectual bill of this sort. He does not state that he had no notice of Robert Jones's claim till after he had filed his bill. If he had notice before he filed his bill, he had no right to issue the distringas.

Distringas discharged with costs.

HIS MAJESTY'S ATTORNEY-GENERAL AND THE COMMISSIONERS OF WOODS AND FORESTS, *Plaintiffs*; SIR GEORGE SITWELL, BART., *Defendant*. Dec. 3, 4, 5, 1835.—The Commissioners of Woods and Forests, having power, under the stat. 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging

to the Crown, within the ordering and survey of the Exchequer, contracted for the sale of the crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereunto belonging:" Held, that this being in effect a contract for sale by the Crown, the advowson of E., which was appendant to the manor, did not pass under the contract, and, consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. —Semble, that if the contract had been between subject and subject, the advowson would have passed; although, at the time of the contract, it was not known by either party to be appendant to the manor, and therefore the sale of it was not in their contemplation.—Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies or does not admit that it was not in his contemplation at the time of the purchase; semble, that the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, and carried into execution.—Quære, whether, consistently with the Statute of Frauds, the Court can entertain a bill for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the answer.—Under the statutes 57 Geo. 3, c. 97, and 10 Geo. 4, c. 50, the issuing of a special warrant from the Treasury to the Commissioners of Woods and Forests is not a condition precedent to the making of any contract between the commissioners and the purchasers of crown lands; it is sufficient if a special warrant be obtained before certificates of sale are granted to the purchaser.

[S. C. 5 L. J. Ex. Eq. 86.]

By the stat. 57 Geo. 3, c. 97 (which has since been repealed), the Commissioners of His Majesty's Woods and Forests were empowered to purchase lands on behalf of **[560]** the Crown, lying adjacent to the royal forests, or to other extensive properties of the Crown.

In order to provide a fund for the payment of the purchase-monies for such estates, the commissioners were, by the fourth section of the act, authorized and empowered from time to time to contract for the sale, and absolutely to make sale of any part or parts of the possessions or land revenues of the Crown within the ordering and survey of the Exchequer in England, which should consist of any royalties, honours, hundreds, manors, lordships, or franchises, or any rights, members, or appurtenances thereof, or thereto belonging or appertaining, or any fines, issues, amerciaments, profits, dues, or monies arising therefrom, or incident to, or receivable in respect thereof; or any messuages, lands, tithes, rents, mines, minerals, collieries, woods, wood grounds, fens, marshes, waste lands, or any other tenements or hereditaments whatsoever, or any other revenues belonging to the Crown, within the ordering and survey aforesaid, which should, in their judgment, be desirable to be sold, for the best prices or considerations in money which the Commissioners for the time being of His Majesty's Woods and Forests should, under the direction and with the approbation of the Lord High Treasurer or Commissioners of the Treasury for the time being, or any three or more of them, be able to procure for the same.

By the fifth section of the act it was enacted that no contract for the purchase or sale of any estate or estates should be made under the authority of this act, unless by special warrant to be issued for that purpose by the Lord High Treasurer or the Commissioners of the Treasury, or any three or more of them for the time being.

By the sixth section it was enacted that whenever the commissioners should have entered into any contract for the sale of any of the crown property thereby authorized to be sold, they should grant to the purchaser or pur-**[561]**-chasers a certificate, describing the premises to be sold, and the amount of the purchase-money; which certificate, upon payment of the purchase-money within thirty-one days after its date, was to be signed or indorsed with a receipt by the cashier of the Bank of England, and was to be enrolled in manner directed by the act. And it was further enacted that, from and after such enrolment, the respective purchasers, their heirs or successors, should be adjudged and taken to be in the actual seisin and possession of the premises purchased, and should hold and enjoy the same peaceably and quietly, freed and discharged from all claims and demands of his Majesty, his heirs and successors, or of

any person or persons claiming under him or them, as fully and amply to all intents and purposes as his Majesty, his heirs and successors, might or could have held and enjoyed the same, if such sale had not taken place.

The eighth section enacted, that whenever any of such possessions or land revenues of the Crown should be sold by the Commissioners of His Majesty's Woods and Forests, under the authority of this act, with the approbation and under the authority of a warrant from the Commissioners of the Treasury issued for that purpose, the purchaser or purchasers thereof should not be bound or required to make any further inquiry whether the same were saleable under the authority of the act, or into the powers of the commissioners in making such sale; but every such purchaser or purchasers having ascertained the same to have been sold under the authority of a warrant, and having obtained such certificate, and paid the purchase-money, and procured the receipt of the cashiers of the Bank of England, and having enrolled the certificate and receipt, should hold the premises so purchased, and should have free, quiet, and peaceable possession thereof, and should not be liable to be thereafter disturbed under any pretences whatsoever.

[562] In pursuance of this act, the Commissioners of Woods and Forests, in May, 1828, caused the manor of Eckington, in the county of Derby, together with divers lands and tenements situate at Eckington, belonging to the Crown, to be put up to public sale in 96 lots. The commissioners, however, omitted to obtain a special warrant from the Treasury previous to the sale, as required by the fifth section of the act. The warrant obtained by them for the purposes of this sale was not dated till the 16th of August following. The auction took place, but part only of the lots were sold; and the defendant, being desirous of purchasing by private contract several of the lots which remained unsold, a written memorandum of the contract for such purpose was drawn up, dated the 10th of June, 1828, and signed by Messrs. Drivers on the part of the commissioners, and by Mr. Humble on the part of the defendant. The general purport of the contract was, that the defendant agreed to purchase seven specified lots of the above estate, as described in the printed particulars of sale used at the auction, at the price of 34,000l., subject, with some few exceptions, to the printed conditions of sale used at the auction; that he was to pay 1000l. by way of deposit, and the purchase-money by instalments. The first instalment, 10,000l., to be paid on the 29th of September following, and the remainder of the purchase-money in April, 1829. Upon failure of payment of the first instalment at the time specified, interest to be paid on the whole purchase-money at the rate of 5l. per cent.

One of the lots, upon which the main question in this cause depended, was described in the particulars of sale as "the valuable manor of Eckington, extending over about 6900 acres, of which about 3000 acres are copyhold, with numerous messuages and homesteads held of the said manor, subject to the payment of a fixed fine, upon alienation, of 6d. for each acre, or for any portion **[563]** less than an acre, and the like sum for each messuage or scite; the quit or chief rents payable to the manor, amounting to 43l. 2s. 7d. a year; and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and all other rights, members, emoluments, and appurtenances whatsoever thereunto belonging, except the coals and minerals under lot 1, &c."

The ninth condition was, that if any mistake were made in the description of the premises, or any other error whatsoever should appear in the particulars of the estate, excepting as regarded the quantities or boundaries thereinafter provided for, such error or mistake should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require.

When the above contract was entered into, it was not known either to the commissioners or the defendant that the advowson of Eckington was appendant or appurtenant to the manor of Eckington. The King had, from time to time, exercised the right of presentation; but the advowson, being considered an advowson in gross, was not deemed by either party to be included in the contract.

After the contract had been signed and the defendant let into possession, but before the purchase-money had been paid, it was ascertained that the advowson in question was appendant to the manor of Eckington, and the defendant refused to complete his purchase unless the advowson were conveyed to him with the rest of the property; contending that the manor in all its integrity was included in the contract. The present information and bill was therefore filed, praying for a specific

performance of the agreement, a declaration that the defendant was not entitled to have the advowson conveyed to him with the manor, and that he might be decreed to accept a conveyance of the manor without the advowson, or with an exception of the advowson.

[564] The defendant by his answer made various objections to the relief prayed; but he principally contended, first, that at the time of the contract, the commissioners had not any special warrant or authority from the Lords Commissioners of the Treasury for making sale; secondly, that he was entitled to have the advowson conveyed to him, or to be released from the contract altogether. With respect to the latter point, he admitted that he agreed to purchase the manor without any reference whatever to the advowson, and without knowing or believing that the advowson formed part thereof. That, at the time of the contract, the existence of the advowson was not present to his mind; and that, had he known that the advowson was to pass with the manor, he would have offered a larger price for the lot in which it was included. He submitted, however, that under the circumstances, if the the contract were enforced against him, it ought to be deemed to include the advowson.

The Solicitor-General and Mr. Reynolds, for the plaintiffs. The defendant admits that, when the contract was made, the advowson never entered into his imagination. He now objects, first, that the commissioners had no authority to sell; and, secondly, that if they had authority, they cannot make a good title. His first objection is founded on the circumstance that the warrant which they received from the Lords of the Treasury was signed on a day subsequent to the contract. Perhaps, in strictness, the act requires that the warrant should be signed in the first instance. But the act must receive a rational construction. Why should it be so construed as to render it impossible that any proceeding should take place under it? The practice is for the commissioners to negotiate generally, and as any particular contract is entered into they receive a warrant from the Treasury. The purchaser has, in fact, nothing to do with the arrangement. It is a **[565]** matter entirely between the Treasury and the Board of Woods and Forests. The object of the act was, that the purchaser should be involved in no question over which he had no control. The sixth section points out the course to be pursued by the purchaser; the last words of that section are sufficient to give him a good title to the property as against the Crown; and, if so, there is no other party who can object to the title.

Then supposing this objection to have been answered, the main question is, whether the plaintiffs are entitled to force the defendant to take the manor with the exception of the advowson. That depends on two questions: one as between subject and subject, the other as between the Crown and a subject. Even if the question were between subject and subject, it is clear, both upon principle and authority, that the plaintiff would be so entitled. It is possible that the defendant may say—admitting, for the purpose of the argument, that you, the plaintiff, did not mean to sell, that might be a reason, if I were seeking specific performance of the agreement at your hands, for the Court not to interfere; but it is a different proposition to say that the Court at your instance will compel me to take the manor without the advowson. Now that argument cannot stand. The Court will so compel him. The plain reason for that is, that he has agreed to purchase what the plaintiffs meant to sell, namely, the manor without the advowson; and, if anything has been signed contrary to that meaning, the Court will say that it has been signed by mistake. The Court can rectify mere mistake: it can, therefore, rectify an agreement made in language which did not express the meaning of the parties. Here it is clear that the advowson was not intended to be sold. Suppose, instead of the present bill, the plaintiff had filed a bill to have the memorandum of the 10th of June rectified, so as to shew the actual intention of the parties better than it does at present. Good sense would suggest that such a bill might **[566]** be filed; and good sense in this instance is borne out by the authorities. In *The Marquess of Townshend* v. *Stangroom* (6 Ves. 328) it appeared that Stangroom was tenant of Lord Townshend from year to year, and a negotiation was entered into with him that he should become tenant for a term of years, and for that purpose a written agreement was entered into, which stated the farm to be "in the occupation of Christopher Stangroom," and the land to consist of 425 acres more or less. Now, in fact, the farm in his occupation contained more than 425 acres, but it had been contemplated to take away from it a certain number of acres, and to give Stangroom a portion of another farm. Lord Townshend,

therefore, refused to demise to him more than 425 acres, and filed his bill against him to compel the performance of that agreement. Stangroom, on the other hand, filed his cross bill to compel the performance of the contract, giving him the whole. This being the state of facts, the question was, whether parol evidence could be admitted to shew what was the real contract. Lord Eldon finally determined that he could give relief to no party; but, in the course of his judgment, he said: "I will not say that, upon the evidence without the answer, I should not have had so much doubt whether I ought not to rectify the agreement as to take more time to consider whether the bill should be dismissed; but the evidence must be taken, due regard being had to the answer." Lord Eldon, therefore, in effect said, that if the defendant had not so positively denied the agreement, as varied, he would at least have considered whether he would not have listened to evidence on the subject. Lord Eldon, in his judgment, took great notice of the case of *Rich* v. *Jackson* (4 Bro. C. C. 514; 6 Ves. 334, n.). The question there originally came on in a Court of law, where it was held that you could not go out of the written agreement. The result at law was **[567]** the result in equity; but why? Because in the teeth of the answer, denying any other agreement; and, with impeachable evidence, the Court would not interfere against the legal rights of the party insisting on that agreement. It may be conceded that to enable the Court to interfere on the ground of mistake there must be evidence that shall leave no doubt; but here there is the strongest possible evidence —the admission of the defendant. In *Lord Irnham* v. *Child* (1 Bro. C. C. 92) Lord Thurlow said, "Suppose it was a very clear thing that one agreement was intended, and that by accident it was extended further—but there is no such case in the books. If admitted to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity dehors the deed." The principal, therefore, is clear that if the mistake is distinctly made out, and, à fortiori, if admitted, the Court has jurisdiction to correct it. [Alderson, B. There might be some difficulty in that under the Statute of Frauds.] Where both parties are agreed that there is a mistake they are not within the statute. Lord Thurlow, however, said that cases of fraud and mistake in agreements must always clash with the statute; and it is clear that he was of opinion that the Court might relieve upon evidence of mistake, even though not admitted by the defendant. Then, upon the Statute of Frauds, there can be no difference between enforcing a contract as rectified, and rectifying what has been done upon it afterwards. There is authority to this effect, that if a party conveying an estate include in the conveyance something which can be proved not to have been the intention of the parties to include, the Court will set that right, and make the parties re-convey: *Thomas* v. *Davis* (1 Dick. 301), Sug. V. & P. c. 3, s. 4. There is no distinction in principle between cases of that nature and the present. If that be so, how can the defendant **[568]** say give me the land, because, though a Court of equity has means enough to compel me to return it, yet it cannot prevent my having it in the first instance? The principle is that a Court of equity will not reform an agreement, unless it also carry it into execution: *Cock* v. *Richards* (10 Ves. 441). Here there are grounds to reform the agreement, and the execution of it is a necessary consequence.

Upon the subject of reforming written instruments in equity by the admission of parol evidence of mistake, there are many authorities in favour of the plaintiff: *Henkle* v. *Royal Exchange Assurance Company* (1 Ves. sen. 317), *Calverley* v. *Williams* (1 Ves. 210), *Ball* v. *Storie* (1 S. & S. 210), *Young* v. *Young* (1 Dick. 295, cited). Here it is very clear that by the word manor the parties must have meant the manor without the advowson. They must have known that the Commissioners of Woods and Forests were selling under the act alone. We do not say that there are not words in the act which might, under circumstances, include the advowson, but it is at least doubtful what the commissioners were authorized to sell. The act says "any part of the possessions or land revenues of the Crown within the ordering and survey of the Exchequer." That must mean productive revenues; and it is observable that the various things which are afterwards enumerated all point distinctly to matters of revenue and profit. It may be admitted that under the word "hereditaments," an advowson, if it otherwise come within the scope of the act, may be included; but, looking at the sort of property, the sale of which was contemplated, can any one help doubting whether it was ever meant to be included? And, if so, can it be said that the parties meant to include the advowson in the contract?

This brings us to the consideration of the question as **[569]** between the Crown and the subject. Upon a grant from the Crown itself of the manor, though with the appurtenances, the advowson would not pass: Stat. De Prerogativâ Regis (17 Ed. 2, stat. 1, c. 15); Bac. Abr. Prærog. (F.) 2; Hargr. Co. Litt. 121 b., note 2. It will be said that this is a mere statutory conveyance by commissioners; and that on the authority of *Doe d. Watts* v. *Morris* (2 Bing. N. C. 189) prerogative rights have no application here. That case, however, is distinguishable from the present. There certain parties had been in possession of an encroachment on a crown manor for more than twenty-three years. The manor was afterwards conveyed by the Commissioners of Woods and Forests to a purchaser under the 57 Geo. 3, c. 97 The purchaser brought ejectment for the encroachment, and it was contended on his behalf that, as the Crown could assign a chose in action, it could also assign a right of entry; and consequently that the commissioners, when they sold the manor, must be considered as having assigned the right of entry with the manor. The Court, however, were of opinion, first, that the right of entry did not pass under the conveyance, and, secondly, that the prerogative law did not apply, because, under the statute, the commissioners could not take or dispose of any interest not in possession. The result of that decision only was that the right of entry in such cases remains in the Crown, Here prerogative law is applicable; for, inasmuch as by that law a manor does not include an advowson appendant, it follows that the 57 Geo. 3, c. 97, authorizing the sale of manors by the commissioners, does not authorize the sale of advowsons. The framers of the statute must have meant to use words in the manner in which they are generally intended as between the Crown and a subject. It cannot be said that the manor passes under the general **[570]** words of the statute; *Archbishop of Canterbury's case* (2 Rep. 46 a., 1st Resol.); nor can the King be deceived in his grant, or supposed to have granted what he has not assented to. Besides, it is worthy of remark that the Judges in *Doe d. Watts* v. *Morris* considered the statute 57 Geo. 3, c. 97, as explained by the subsequent statute of 10 Geo. 4, c. 50. Now the latter statute expressly excludes advowsons from its operation, and, by the third section, empowers the commissioners to complete, under its provisions, any contract commenced previously to its enactment. Here the contract was commenced under a former act, and was in fieri when this act passed.

Lastly, the defendant must be considered as having waived all objections under the act of Parliament. Soon after he took possession a proper certificate of purchase was sent to him, which he returned on the 4th of October, 1828. From that time he has been in possession of the conveyance and of the act of Parliament, and several letters have passed as to the form of the conveyance. He continued for a long time in possession without stating any objection or any reason why he did not complete the conveyance, and he sent no written objections till January, 1830. Not having objected earlier he must be compelled to take the title at all hazards: *Colton* v. *Wilson* (3 P. W. 190), *Fleetwood* v. *Green* (15 Ves. 594). [Alderson, B. It was not shewn in *Colton* v. *Wilson* that the heir could have resisted the contract. I should have thought the acceptance of an abstract only waives objections in the abstract.] A party may by his acts waive his right to take any title whatever: *Margravine of Anspach* v. *Noel* (1 Madd. 310). After delay a vendor is not bound to give the purchaser a better title than that of which he has given him notice. [Alderson, B. Suppose it comes out that the title is bad, you cannot make **[571]** him take the title. Is there any case which goes so far as to shew that where a defendant, by affirmative evidence, proves the title absolutely bad, the contract is nevertheless enforced? In *Shepherd* v. *Keatley* (1 C. M. & R. 117; 4 Tyr. 571) the Court of Exchequer differed from the Court of King's Bench upon a point of that nature.] At all events the defendant would have as much notice of a public act of Parliament as if it were in the abstract.

Mr. Boteler, Mr. Wigram, and Mr. Lowndes, for the defendants. The stat. 57 Geo. 3, c. 97, was intended to give to the Lords of the Treasury, and not to the Commissioners of Woods and Forests, the discretion of choosing the estates which were to be sold under the provisions of the act. It was necessary, therefore, to have the sanction of the former by their formal warrant, and no certificate of contract, as provided under the sixth section, could be good, unless the warrant had previously issued. Now it was of the utmost importance to the purchaser that the certificate should be good. A very large sum of money was at stake. The 10 Geo. 4, c. 50, has so far relaxed the provisions of the former act, that in small purchases, under

100l., the purchase-money may be paid at once to the commissioners. Here the first instalment of purchase-money amounted to no less a sum than 10,000l.; and no money could be paid, nor could any estate vest in the purchaser without the certificate. The only authority which the cashier of the Bank would have had to receive the money would have been the certificate. Suppose the money had been paid into the Bank without a certificate, and lost, the purchaser would have been the sufferer. The Court, therefore, will not suffer any deviation from the act without looking to the safety of the public. It is not a mere case between party and party. A loose mode **[572]** of proceeding under the act will be attended with the most serious consequences. The estate agreed to be purchased in these cases is, legally speaking, in the same situation as an estate agreed to be purchased under a power, in which case every circumstance required by the power must be strictly attended to and literally performed: Sugd. Powers, p. 214, 5th ed. Here, in the same manner, if the express conditions of the act have not been complied with, the vendor can give no good title. What are the conditions? That the warrant should precede the contract. The general purport of the fifth section of the statute, as well as the words "issued for that purpose," are clear upon this point; and, if any aid is to be gathered from the late act of 10 Geo. 4, c. 50, the word "previously," in the 60th section, is conclusive. Then, under these circumstances, can the purchaser be compelled to take a doubtful title? It was said that the Court would give a reasonable construction to the act. If a case were to arise in which the Court being called on to construe a statute, should find that it had reference to a pre-existing state of things; and that certain words in it, although they might bear a construction which would destroy the intention of the legislature, might yet bear a different construction—it is not to be said that the latter construction might not be given. But here the state of circumstances arises solely from the act of Parliament, and not from any thing existing prior to the act. There is a class of cases in which a bond, which is joint at law, has been held to be joint and several in equity; but in *Sumner* v. *Powell* (2 Mer. 30), Sir William Grant took this distinction; that though, where there were pre-existing circumstances authorizing such a construction, you may, in equity, construe a joint bond to be joint and several; yet, where the bond itself is the origin of the transaction, you must construe it literally in equity as well **[573]** as at law. The same reasoning is applicable in this case. Here the contract has arisen solely from the act of Parliament, and must depend in every respect upon a literal construction of the act. But suppose it is a reasonable construction to say that the warrant is equally available either before or after the contract, can the Court so look at the question if there be a bare possibility that the thing sold was the thing intended to be sold? It is said that a strict construction of the act would lead to great inconvenience. Why cannot the Commissioners of Woods and Forests, upon learning that there is certain property which it might be proper to sell, apply to the Lords of the Treasury for their sanction? [Alderson, B. The question is whether the contract is not such as a special warrant will ratify. Suppose the defendant accepts the special warrant, and takes possession of the land, is not that an acceptance of the contract under the special warrant?] Upon that supposition the contract would not be complete till a special warrant had been had. The commissioners would go down into the country authorized to treat, but not to bind the vendor. The contract would only be binding on one side, which would be pernicious, for the sale is always injured where the agent has no power to bind the principal. [Alderson, B. That may be the case, where the contract is between private parties, but not where the sale takes place under the Crown. This is something like the case where merchants, living in different places, contract by letter; and the last letter is the completion of the contract. *Adams* v. *Lindsell* (1 B. & Ald. 681). So here the warrant may be considered the completion of the contract. All the circumstances between the signing the contract and the ratification of it by the special warrant may be considered as the same identical offer, and, when the warrant is obtained, the contract is finished.] The legislature intended that **[574]** the Lords of the Treasury should be the substantial parties to contract; if it were not so, what would be the consequence in case the Commissioners of Woods and Forests made what the Treasury might deem an improvident sale? But, even assuming the warrant to be part of the contract, it is like those contracts which cannot be completed, unless A. B. shall approve. When a fortune is given to a person upon condition that he marry with the approbation of

A. B., the condition will not be fulfilled by A. B.'s approbation after the marriage has taken place. Here, upon the same principle, the approbation of the Treasury must be given previously, not subsequently, to the contract: 10 Geo. 4, c. 56, s. 60. [Alderson, B. "Previous authority" there means "previous general authority."] If there be any question on the construction of the act, your Lordship cannot compel the defendant to take this title. But the construction here is similar to that which has been put upon a clause in the Bankrupt Act. The 6 Geo. 4, c. 16, s. 88, enacts that the assignees shall be indemnified for what they shall do under that section, and that no suit in equity shall be commenced by them without the consent of the major part of the creditors who shall have proved under the commission. Now, it has been argued upon that clause that the consent of creditors might as well come after as before the institution of the suit, for that the clause was only intended as an indemnity to the assignees against the claims of creditors. That argument, however, has been overruled by many decisions: *Ocklestone* v. *Benson* (2 S. & S. 265), *Bozon* v. *Williams* (2 Y. & J. 475), *King* v. *Tullock* (2 Sim. 469). It is true that in *Piercy* v. *Roberts* (1 M. & K. 4) Sir John Leach recanted his former opinion given in *Ocklestone* v. *Benson*: and, in *Jones* v. *Yates* (see 2 Sim. 470, n.), Sir William Alexander said that he had consulted with the Master of the Rolls and **[575]** the present Vice-Chancellor, and they were of opinion that the decision in *Ocklestone* v. *Benson* was wrong. But, on the 8th of November, 1833, upon the argument of a plea of this section of the statute to a bill filed by the assignees, the Vice-Chancellor observed that he had no recollection of any conversation with Sir William Alexander on the subject, and he was of opinion that the decision in question was right. These conflicting decisions shew the degree of doubt which existed on that clause of the Bankrupt Act. Here the defendant's title depends on the construction of an act of Parliament, which is open to the same doubt; and that circumstance alone ought to prevent his being compelled to take this title.

Then comes the important point as regards the advowson. We contend that the words of the agreement were sufficient to carry the advowson as between subject and subject. If there were any mistake in the agreement, which we deny, the cases cited, where contracts have been rectified on the ground of mistake, are not applicable. All those contracts were executed, not executory, and the Court from necessity admitted parol evidence to explain them. It was the only way in which relief could be given. Those cases are not disputed, nor is it disputed that, upon a bill filed to enforce an executory agreement for the sale of real estate, the defendant may insist that the agreement did not express the real intention of the parties; and, by that means, he may prevent the execution of the contract. But there is no case where the Court has ever rectified such an executory agreement, and at the same time carried it into execution. The only authority which can be adduced for such a proposition are the words of Lord Eldon in *The Marquess of Townshend* v. *Stangroom* (6 Ves. 339); but his decision was contrary to the doctrine contended for; nor does it very clearly appear **[576]** what his real opinion was upon that point. On the other hand, *Higginson* v. *Clowes* (15 Ves. 516; 1 Ves. & B. 524) is an authority to shew that the Court will not vary executory contracts for the purpose of carrying them into execution. In *Clinan* v. *Cooke* (1 Sch. & L. 39) Lord Redesdale, after adverting to a case (*Joynes* v. *Statham*, 3 Atk. 388), in which Lord Hardwicke was supposed to have sanctioned the doctrine now contended for, says: "There is a prior case, *Walker* v. *Walker* (2 Atk. 98), where Lord Hardwicke is made to say something similar; and there seems to be a floating idea in the mind of his Lordship that by possibility a case might be made in which even a plaintiff might be permitted to shew an omission in a written agreement, either by mistake or fraud. However, I can find no decision except the contrary way. The admission of such evidence as matter of defence is frequent." From these authorities it is clear that the Court will not, at the suit of the plaintiff, admit parol evidence of mistake for the purpose of rectifying executory contracts.

In the cases cited for the plaintiffs, not only were the contracts executed by deed or other written instruments, but there was clear evidence of mistake; except, indeed, in *Lord Irnham* v. *Child* (1 Bro. C. C. 92), where the plaintiff asked for the insertion of a clause in the agreement, which had been omitted, not by mistake, but on purpose. The present case, however, cannot be treated as one of mistake. A species of property was included in the contract, which the parties had no particular intention either to include or to exclude. They had no intention one way or the other. Can the mere

absence of intention in this respect induce a Court of equity to rescind the contract? The defendant bought the manor with all the appurtenances, be they what they might. If anything of less value had been included, he would have had the benefit of it. Then why is he not to have the benefit of every thing valuable appurtenant **[577]** to the manor? In some cases even a crown advowson will pass under the words "rights, members, and appurtenances:" *Whistler's case* (10 Rep. 63). Besides, here there are special exceptions of minerals. Now general words, coupled with a special exception, negative the exclusion of words which the exception does not cover. [The Solicitor-General. Coals and minerals do not appertain to, but are parcel of, the manor.] If the plaintiffs intended to exclude the advowson, they have not executed their intention. They cannot successfully contend that an intention to reduce the agreement into writing is an agreement within the Statute of Frauds. [Alderson, B. Supposing the statute to be out of the question by reason of the admission of the defendant on the record, cannot this Court, upon the authority of the decided cases, reform the agreement? Suppose an action were brought to enforce an agreement which ought to be in writing, and the declaration stated the agreement, but the plea took no issue upon the agreement, would the Judge direct the jury to give no damages, because the Statute of Frauds had not been complied with? I think not. Then cannot a Court of equity give the relief sought for in this case, all objections being removed by the state of the record?] No case has gone that length. In *Henkle* v. *Royal Exchange Assurance Company* (1 Ves. sen. 317) and the other authorities, the party seeking the relief had suffered injury from an agreement executed by mistake against the real intention of the parties. Here, not only is there no mistake, but the party sustains no injury, though he gains no advantage.

There are no grounds for saying that the defendant has waived his objections to the title; because his possession has been of necessity, to take care of the property.

The Solicitor-General, in reply. The sixth and eighth **[578]** sections of the stat. 57 Geo. 3, c. 97, dispose of the whole question as regards that act. It is not necessary to look at the order of circumstances in relation to the contract or the warrant. Suppose everything has been done irregularly in that respect, what does it signify? The whole difficulty is got over by the certificate, receipt, indorsement, and enrolment. Even if the commissioners had no authority to contract, and they had committed some gross error, they alone, under the eighth section, would be responsible to the Crown and the Treasury; their conduct could not affect the purchaser. Independently of this, however, there is no ground for saying that a formal warrant must precede the contract. The 57 Geo. 3, c. 97, does not even require a warrant in writing. The terms of the fifth section may be complied with by the issuing a mere verbal authority. [Alderson, B. The certificate is, in fact, the contract.] That removes all difficulties upon this part of the question. Any doubt upon the point might be removed by the 60th section of the subsequent act, where the words "purchase or sale" are substituted for the word "contract" in this act. The former act, however, is sufficiently clear in this respect.

We come, then, to the substantial question whether the defendant shall or shall not be compelled to take the manor without the advowson? How can the Court carry into execution the written contract before it, without looking at the concurrent circumstances to know what the parties meant? A public board having authority to sell the possessions of the Crown contract to sell inter alia the manor of Eckington. This is a contract to sell something which, belonging as it did to the Crown, would not, if conveyed to the commissioners, carry with it the advowson as appurtenant to the manor. If there was nothing more, it would follow that as the advowson could not have come to the commissioners, the parties could never have intended to sell or purchase more than the grantor **[579]** could have parted with. But then it is said that the defendant ought to have an opportunity of trying the question of law hereafter, and that, at present, the decree ought to be made in his favour. That is not the practice of a Court of equity. If the Court, upon the whole of the contract, sees what the intention of the parties was, no rule is more clear than that it will adopt such a mode of carrying the contract into execution as shall put an end to all possible questions. I agree that no express case goes so far as to decide that the Court will rectify an agreement in favour of a plaintiff seeking specific performance of it according to the real intention of the parties. But in the absence of any express decision to that effect, and without adverting for the present to the Statute of Frauds, if ever there was a

case in which the Court might venture to come to such a conclusion, it is this—a case in which both parties admit in the most unequivocal manner what was their real intention. The statute not intervening, it is clear, upon principle, that the Court has authority in such a case to execute the manifest intention of the parties: *Henkle* v. *Royal Assurance Company* (1 Ves. sen. 317).

The difficulty, in truth, if any, arises on the statute. Does the statute, where the party admits that the written agreement was not his meaning, prevent the Court from enforcing what was his meaning? Your Lordship has adverted to the principle at law, where the defendant does not by his plea insist upon the statute. The same principle applies in equity. The defendant, if he means to take advantage of the statute, must do so by plea or answer. In some cases, where the party by his answer, though admitting the parol agreement, has insisted on the statute, the Court has refused to enforce the agreement. But here the defendant has not raised the question by his answer, and, therefore, the statute cannot be brought [580] in aid to enable him to resist the performance of the contract. Besides, there is no case which discountenances the opinions of Lords Eldon and Thurlow, who both intimate that the difficulty arising from the Statute of Frauds will not stand in the way where the party admits the mistake.

It is said, indeed, that there was no mistake. If the parties so dealt with each other that the advowson was never hinted at, and never, in fact, in their contemplation, the including it in the contract was a mistake. Besides, under the statute, it is very doubtful whether the commissioners could sell an advowson in gross; and if they were not competent to sell that, they could not sell an advowson appendant without express words for that purpose. The word "appurtenances" must be taken with reference to the manor as belonging to the Crown.

The cases of *Clinan* v. *Cooke* (1 Sch. & L. 39) and *Higginson* v. *Clowes* (15 Ves. 516) did not proceed on the ground of fraud or mistake, but simply on the inadmissibility of parol evidence to explain a patent ambiguity.

ALDERSON, B. The argument upon this question having occupied several days, I have had opportunities of considering the case during the intervals which have elapsed between the arguments, and therefore it will be unnecessary for me to postpone my judgment.

This is an information filed by his Majesty's Attorney-General, and the Commissioners of Woods and Forests, praying that the defendant, Sir George Sitwell, may be required to perform an agreement entered into with the predecessors of the plaintiffs, on the 10th of June, 1828; that he may be declared not entitled to have the advowson appurtenant to the manor of Eckington conveyed to him with that manor; that he may be decreed to accept a conveyance of the manor without the advowson, or with the [581] exception of the advowson; and further praying the execution of the agreement under the decree of the Court, and an account and payment of the purchase money.

The objections on the part of the defendant to the specific performance of this agreement are threefold. The first, which goes to the whole case, is—that the Commissioners of Woods and Forests had not power or authority to sell, as they have sold, to the defendant, or to make any binding contract upon him. The defendant denies that the commissioners had authority to sell under 57 Geo. 3, c. 97, which act, repealing all restrictions on the Crown which had prevented it from disposing of its land revenues, gave in lieu thereof power to the Commissioners of Woods and Forests to contract and agree with any person for the sale of any property within the ordering and survey of the Court of Exchequer in England, which should consist of manors, and other estates, with their rights and appurtenances. Now, under the power given by the 4th section of the act, the commissioners put up for sale by public auction, in various lots, the lands in question in this cause, consisting of a manor and other property in the county of Derby. These were not sold at the time, but were afterwards sold by private contract to the defendant, under the following memorandum of agreement, signed by Messrs. Drivers on behalf of the Crown, and by Mr. Humble on behalf of Sir George Sitwell. [His Lordship then read the memorandum.]

Now it is said this contract was not a contract binding on the parties at the time of its execution, and the reason assigned is, because at that time no special warrant had been issued from the Lords of the Treasury authorizing the Commissioners to make this individual contract. That depends on the construction to be put on the

5th section of the act, which says, that no contract for the purchase or sale of any estate or estates shall be made under the authority of this act, unless by special warrant to be issued for that purpose by the Commissioners of the Treasury.

[582] It appears to me that this contract was properly entered into; there having been a treasury warrant completely authorizing the contract. The 5th section does not require that, to render the contract good, the warrant must be made before the original bargaining between the parties on the subject. On the contrary, I apprehend that a good title will be made to the property intended to be sold if the special warrant issue previous to the grant of the certificate required by the 6th section of the act, which is, in truth, the contract between the parties. Possibly, if no contract had been entered into within a reasonable time after the agreement had been made, the defendant might have required the Lords of the Treasury either to assent to or dissent from the agreement; and if an unreasonable time had then been allowed to elapse, he might have put an end to the contract and refused to be bound by it; but if there were nothing of that sort done, it appears to me that as soon as the warrant issued the contract was binding on both parties; and upon the certificate being granted, and the money paid, a good and valid title would be made under the act. Therefore, it appears to me that the first objection altogether fails.

The second objection is upon the terms of the contract. The plaintiffs professed to sell the manor of Eckington "with the appurtenances;" and as the appurtenances of a manor ordinarily include an advowson appendant or appurtenant, the defendant contends that he is not bound to take the property unless there be a conveyance to him in the terms of the memorandum in which the plaintiffs executed the contract, and that the Crown must either give him the manor without excluding the advowson, or otherwise that the contract ought not to be performed. If the question was one between subject and subject, there would, I think, be great difficulty in decreeing the execution of the contract upon any other terms than those for which the defendant contends. It appears to me quite clear that the memorandum of agreement would carry this advowson [583] under the general words "with the appurtenances." There are various authorities to that effect; and I may more particularly refer to Viner's Abridgment, tit. Prerog. (C. c.), 9. This would have been clear, therefore, as between subject and subject; and in that case the next question which would have arisen would have been—whether or not, on the ground of mistake, one party not intending to sell, and the other not intending to purchase the advowson, I could have reformed the agreement, and have directed the specific performance of it when so reformed. I confess I should have had great difficulty in holding that this could be done; because I cannot help feeling that, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds. The only ground on which I think the case could have been put would have been that the answer contained an admission of the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case it would seem as if the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider whether, according to the dicta of many venerable Judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But in my present view of the question it seems to me that the Court ought not in any case, where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement.

But when this is considered as a question between the Crown and a subject, the case assumes a different com-[584]-plexion; because, by the 17 Ed. 2, c. 15, it is distinctly provided that the King shall not convey an advowson without express words to that effect. That being the case, it seems to me that this must be considered as a memorandum of agreement between the Crown and a subject, and must fall under the general rule there laid down: and that there being no express words to that effect, the advowson cannot pass under a conveyance of the manor with the appurtenances. But then it is said, why not let the agreement be executed in the terms in which it was worded? And why deprive the defendant of whatever advantage may be derived

from the conveyance in those terms? The answer is, upon the whole facts of the case, that it would be unreasonable and inequitable so to do. If I had any doubt as to the intention of the parties, I should be disposed to accede to that proposition. But it seems to me perfectly clear that neither the one party intended to sell, nor the other party to buy, the advowson in question. I am almost as certain of that fact as if I could read the parties' minds at the present moment. The advowson was valued at 5000l. The manor with all the property belonging to it was sold for 4000l. It is too clear to admit of hesitation that the parties could never have intended to sell that, as an annexed part, which was by itself of greater value than what was to be given for the whole. It appears, therefore, reasonable to require on the part of the defendant, that he should specifically perform the agreement; and in order to put an end to disputes in future, to declare it to be sufficient for the Crown to convey in plain language that which it was the real meaning and intent of the parties should be conveyed.

As to the remaining objections, which apply only to matters which are the subject of compensation and allowance, it is admitted by the Crown that these must be considered by the Master.

Decree accordingly.

[585] MABER *v.* HOBBS. Dec. 5th, 7th, 1835.—Upon a bill filed for payment of an annuity, the circumstances under which the annuity deed was executed being disputed by the parties, the plaintiff was not allowed to prove the deed vivâ voce as an exhibit, but leave was given him to file interrogatories for that purpose.

[S. C. 5 L. J. Ex. Eq. 45. See further, 2 Y. & C. Ex. 317.]

The bill was brought to obtain payment of the arrears and future produce of an annuity, out of the interest of certain stock which had been settled to the separate use of Elizabeth Hobbs, the wife of the grantor, and which, by the annuity deed, she had assigned to the plaintiff, as a security for the due payment of the annuity. The bill alleged that immediately before the execution of the deed by the grantor and his wife the plaintiff paid the purchase money (300l.) into the hands of the wife, at the request of the husband.

The defence was, that the wife was only a surety in the deed; and that after the annuity had become in arrear, a fiat in bankruptcy had been awarded against the grantor, under which the plaintiff ought to have proved for the value of his annuity, before he sued the surety (6 Geo. 4, c. 16, s. 55). That the purchase-money was paid to the wife, who instantly handed the same over to the husband, upon an agreement that he should pay 45l. to the plaintiff's solicitor for costs; which was accordingly done, the husband alone receiving the residue.

The plaintiff having obtained an order to prove the annuity deed as an exhibit vivâ voce at the hearing, his counsel, after opening the case, now offered that deed in evidence.

It was objected for the defendants, Hobbs and wife, that the deed should have been proved upon interrogatories, in order to give the defendants the benefit of a cross examination of the subscribing witnesses, as to the circumstances under which it was executed: *Lake* v. *Skinner* (1 Jac. & W. 9), *Barfield* v. *Kelly* (4 Russ. 355).

For the plaintiff. In *Lake* v. *Skinner* it was held **[586]** that rector's books and other documents could not be proved as exhibits, where the party producing them might be questioned as to the custody from which they came. In *Barfield* v. *Kelly* the annuity deed was impeached by the answer. Here the defendants admit that the deed was duly executed, but they put a particular construction upon it. If the deed itself be not impugned, it is of course to prove it as an exhibit.

ALDERSON, B. The defendant admits she executed the deed; but says she did it under certain circumstances. You say you will prove the date and signature of the deed without allowing the circumstances to be proved. My opinion is that you ought to prove the corpus of the cause in the ordinary manner. You might otherwise keep a witness out of the way, and thereby open the door to the greatest fraud. I think the objection valid; but, under the circumstances, I shall allow the cause to stand over, to give the plaintiff an opportunity to exhibit interrogatories for the purpose of proving the deed.

It being urged by some of the counsel for the defendants that to allow the cause to stand over under such circumstances would be contrary to all practice; his Lordship said he would consider the matter before he decided that point.

On a subsequent day his Lordship stated that he had consulted the Vice-Chancellor on the subject, who was of opinion that it was quite consonant with the practice of the Court to allow a cause to stand over in such a case. It was accordingly ordered that the cause should stand over, with liberty to the plaintiffs to exhibit interrogatories to prove the deed; the defendants to be at liberty to cross-examine the plaintiff's witnesses, and to exhibit interrogatories to prove such matters as they should be ad-[587]-vised; the plaintiff to pay the defendants the taxed costs of the day.

Mr. Boteler and Mr. Wood, for the plaintiff.

Mr. Simpkinson and Mr. Kenyon Parker, for the defendants, Mr. and Mrs. Hobbs.

Mr. G. Richards, Mr. Bethell, and Mr. Prendergast, for other defendants.(*a*)

[588] EX PARTE TOWGOOD. IN THE MATTER OF THE LONDON BRIDGE ACTS. Dec. 15th, 1835.—Devisees of lands in trust for charitable purposes, having sold part of those lands under the provisions of the London Bridge Acts, were held not entitled to their costs out of the fund arising from the sale; although the will creating the trust directed that the estate should defray the expenses of defending the trust property.

[S. C. 5 L. J. Ex. Eq. 97.]

The petitioners were devisees in trust under the will of the Reverend Daniel Williams, D.D., who died in the year 1715, having by his will devised considerable estates in the city of London in trust for various charitable purposes. The will contained this paragraph—"If also my heirs successively shall be at any charge to defend what is committed to their support as my trustees, or what shall be further ordered by me, my estate shall defray it."

Part of these estates, being required for the approaches to London Bridge, were purchased by the mayor, commonalty, and citizens of the city of London, at the price of 4000l., which was accordingly paid by the purchasers into the Bank of England, in the name of the Accountant-General of this Court, as directed by the act (see ante, p. 76).

The expenses incurred by the petitioners in surveying and valuing the property,

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(*a*) The following note has been kindly communicated to the Reporter:—

Endo v. *Culshaw*.—In Exchequer, 30th April, 1832.—This was a suit brought against the executors of John Spencer for an account of his residuary personal estate, undisposed of by his will. The plaintiffs were Anne Endo, a sister of the testator, and Ann Wilson, the personal representative of Margaret Spencer, the other sister of the testator. By their answer the defendants stated that they had rendered true accounts of the residuary estate to Anne Endo and Margaret Spencer, who were both satisfied with those accounts, had been paid the amount due to them respectively, and had signed receipts for such payments.

Mr. Elmsley, for the defendants, moved for liberty to prove these receipts as exhibits vivâ voce. The motion was special, that the witnesses might be enabled to leave town before the hearing, which was not to take place immediately.

Six receipts were then produced. Five appeared to be executed by Anne Endo, and the other by Margaret Spencer. Upon inspection, a great difference appeared in the handwriting of Anne Endo to four of the receipts, and to the other her mark was put. They were all proved by the attesting witnesses.

Lord Lyndhurst, C. B., expressed his surprise at a practice which allowed documents to be proved vivâ voce, and inquired if it extended to such exhibits as these; but upon being assured by the counsel then in Court that they thought it did, he permitted them to be proved, but not without great hesitation and reluctance; declaring that if they had been produced at Nisi Prius, many more questions would have been asked than were necessary for their mere formal proof—questions suggested by the appearance of the documents themselves, and which might have led to much important evidence.

attending before the jury, investigating the title, &c. amounted to 389l.; and they now prayed that that sum, and also the costs of this petition and incidental thereto, might be paid to them out of the said sum of 4000l.; and that the residue thereof, until a suitable purchase of other lands could be made, might be invested by the Accountant-General in the 3l. per cent. consols; the dividends, as they accrued due, to be paid to the petitioners.

Mr. Norton, for the petition, cited *Ex parte Layfield* (see ante, p. 79).

THE LORD CHIEF BARON was of opinion that he had no authority under the act to allow the petitioners their costs and expenses out of the fund.

[589] LEES *v.* MOSLEY AND ANOTHER. Dec. 18, 19, 1835; Feb. 24th, 1836:—Testator devised as follows:—"I give and devise all that my freehold lease in P., and all and every my chief rents in the town of M., and also my two warehouses in the said town, unto my two sons, H. J. and O., in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned (that is to say), as to one moiety or equal half part thereof to my son H. J. for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said H. J. shall by deed or will appoint; but in case my said son H. J. shall not marry and have issue who shall attain the age of twenty-one years, then to my son O. in fee:" Held, that H. J. took an estate for life in the moiety, with remainder to his children as tenants in common in fee.—Whatever be the primâ facie meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be collected from the words of the will; and therefore it requires a less demonstrative context to shew the testator's intention in regard to the word "issue" than in regard to the technical expression "heirs of the body."

[S. C. 5 L. J. Ex. Eq. 78. Discussed, *Montgomery* v. *Montgomery*, 1845, 3 Jo. & Lat. 56; 8 Ir. Eq. R. 740. Applied, *Phillips* v. *Phillips*, 1847, 10 Ir. Eq. R. 517. Discussed, *Roddy* v. *Fitzgerald*, 1858, 6 H. L. Cas. 881; *Warren* v. *Travers*, 1868, Ir. R. 2 Eq. 461. Applied, *Morgan* v. *Thomas*, 1882, 8 Q. B. D. 577.]

Before the Lord Chief Baron, Parke, B., Alderson, B., and Gurney, B.

Robert Feilden, by his will, after bequeathing the bulk of his personal property to his wife, and after devising various real estates in the counties of Lancaster and Chester to his eldest son Robert Moseley Feilden in fee, devised as follows:—"I give and devise all that my freehold lease of a farm in Prestbury, in the county of Chester, called Barber's tenement, and all and every my chief rents in the town of Manchester, and also my two warehouses in Poolfold, in the said town (subject to a mortgage for 4000l. secured thereon), unto my two sons, Henry James and Oswald Feilden, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof, to my son Henry James for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said Henry James shall by deed or will appoint; but in case my said son Henry James shall not marry and have issue, who shall attain the age of twenty-one years, then I give and devise the said moiety to my son Oswald, and his heirs for ever." And as to the other moiety of the said farm, chief rents and warehouses, the testator gave and devised the same to his son Oswald and his heirs absolutely for ever.

At the date of the will and of the death of the testa-**[590]**-tor, Henry James Feilden was a bachelor. Upon the death of the testator he entered upon and suffered a recovery of his moiety of the property so devised to himself and Oswald, and the whole was afterwards conveyed to the defendants as trustees for sale.

The property having been put up for sale by auction in lots, the plaintiff attended at the sale, and was declared the purchaser of Lot 1, which comprised the warehouse at Manchester. He accordingly paid his deposit, and entered into a written agreement with the vendors to complete the purchase, upon having a good title made to him. He afterwards, however, upon learning the state of the title under the fore-

going will, refused to complete his purchase, contending that Henry James Feilden having only a life estate in the property devised to him, the recovery suffered by him was inoperative to convey his moiety of the estate to the defendants. The defendants, on the other hand, insisting on their title to sell, the present bill was filed, praying for the delivery up of the agreement, and the return of the deposit; and the question at the hearing was whether Henry James Feilden took an estate for life, or an estate tail under the will. The case originally came on and was partly heard before Alderson, B., at Gray's Inn Hall, when his Lordship reserved it for further argument before the full Court, on account of the general importance of the question.

Mr. Preston, Mr. Duckworth, and Mr. Lynch, for the plaintiff. The question is whether the children of Henry James Feilden take by descent from their father, the words of the devise creating an estate tail in him, or whether they take as purchasers in their own right. We contend for the latter proposition. A gift to A. and his issue singly is beyond doubt an estate tail: *King* v. *Melling* (1 Ventr. 232). A devise to one for life, and after his decease to his issue, standing singly, is a gift to him as tenant in **[591]** tail, for the purpose of including all his descendants. It may be conceded also that where there is a gift to one for life, and after his decease to his issue or issue male as tenants in common and their heirs, it has, under circumstances, been held to be an estate tail: *King* v. *Burchell* (Ambl. 379; 1 Eden, 424). But in that and similar cases there was a limitation over, on an indefinite failure of issue of the parent. In such cases the estate has been held to be an estate tail to effectuate the general intention of the testator, and that the remainder over may take effect. If the gift here had been to the "heirs of the body," as in *Shelley's case* (1 Rep. 93), then, though the gift to the parent might be in express terms for life, that taken singly would not have excluded the estate tail: but here the gift is to the "issue," with superadded words of limitation, "and their heirs." The issue, therefore, are capable of taking a fee simple as purchasers, and it is for their benefit to do so. The gift, therefore, is clearly a gift to the parent for life, with remainder to his children as purchasers in fee. There is no occasion to hold it to be an estate tail in the parent, because the children themselves take an estate of inheritance. It is unnecessary to have recourse to the general intention in opposition to the particular intention. But then it will be said that there is a limitation over in this case. The terms of that limitation, however, instead of supporting the construction of an estate tail, defeat it. The ulterior gift is not to take effect upon a failure of issue generally, but in an event totally distinct from it, and which might have excluded the issue, namely, "in case my said son shall not marry and have issue who shall attain the age of twenty-one years." In *Doe d. Davy* v. *Burnsall* (6 T. R. 30; 1 B. & P. 215) there was a limitation of the same nature. The gift was in one entire clause, to M. O. and the issue of her body as tenants in common. The limitation over was **[592]** "in default of such issue, or living such they should all die under the age of twenty-one years;" and the Court held that the issue took as purchasers as tenants in common in fee. The fee sprung up from the limitation over. In this case Lord Kenyon relied on *Loddington* v. *Kime* (1 Salk. 224), in which the devise was to A. for life, with a limitation to his issue male and their heirs for ever, and no limitation over upon a failure of issue generally, and the Court held that A. took an estate for life. *Doe d. Long* v. *Laming* (2 Burr. 1100) is an authority upon the same point. There the gift was to A. and the heirs of her body, and their heirs, and there was no limitation over on failure of issue. It was contended that "heirs of the body" must of necessity be words of limitation, and not purchase; but Lord Mansfield combated that notion, and held, under the circumstances, that the heirs of A.'s body took as purchasers in fee. *Right d. Shortbridge* v. *Creber* (5 B. & C. 866; 8 D. & R. 718) and *Doe d. Cooper* v. *Collis* (4 T. R. 294) are authorities to the same effect, there being no limitation over in either case after a failure of issue generally. In *Willcox* v. *Bellaers* (Turn. & Russ. 491) the devise was to H. T. W. for life, and after his decease to such of his children as he should by will appoint, and to their heirs; and for want of such appointment, to the heirs of the body of the said H. T. W. and their heirs. Then followed a limitation over, like that which occurs in this case, namely, that in case H. T. W. should happen to die without issue, then from and immediately after his decease, the testator devised the property to another person for her life,(*f*) with limitations over. The Court was so

(*f*) See *Barlow* v. *Salter*, 17 Ves. 482.

strongly of opinion that H. T. W. took only a life estate, that the purchaser was not compelled to take the **[593]** title. *Jesson* v. *Wright* (2 Bligh, 1) is distinguishable from the present case. That was simply an estate tail, and there was nothing to hinder it from being so considered, except the word "child." There were not even superadded words of limitation to the heirs general. It was, in effect, a gift to the party and the heirs of his body simply. In the present case, in order to create an estate tail in Henry James, the Court must strike out of the will the words "who shall attain the age of twenty-one years;" but such a step will not be taken unless there is no other mode of giving the will a rational construction. [The Lord Chief Baron. You say that the limitation over is only upon one event, namely, in case the parent should have no child who should live to twenty-one. Suppose he had one son who married, and died before twenty-one, leaving a son? Alderson, B. In that case there is a difficulty; for if the word "issue" mean children only, and not grandchildren, the estate would go over.] In *Hockley* v. *Mawbey* (1 Ves. jun. 143; 3 Bro. C. C. 82) the word "issue" was held to embrace all the descendants of R., whether children or grandchildren, living at his death. [Parke, B. You construe issue to be issue living at the death of the son. Suppose it means any descendants, it would make the limitation over too remote; but I do not know that that would hurt your argument.] The Court would probably only say that the testator intended something which he could not carry into effect. Suppose some of the descendants are disappointed, is that so objectionable as taking the estate away from the other children and giving it to the eldest son? The testator meant to give the benefit of the devise to as many of the family as possible.

It will be contended that the word issue in this case is not less inflexible than the words "heirs of the body;" and that the words of limitation engrafted upon that word **[594]** will not affect the proposition that this is an estate tail in the parent. In many cases, as in *Shelley's case* (1 Rep. 93), it has been held that the grafting words of limitation upon them will not change the words "heirs of the body" into words of purchase, unless they turn the order of succession of the heirs out of the ordinary course. The word "issue," however, is more flexible than the expression "heirs of the body." In the case of *Curshaw* v. *Newland* (2 Bing. N. C. 58) the word "issue" was held to be a word of purchase. In *Crump d. Woolley* v. *Norwood* (7 Taunt. 362; 2 Marsh. 161) the gift was to the parent for life, with remainder to the heirs of his body, with superadded words of limitation; and the Court held that the estate expectant on the parent's life estate was a contingent remainder: therefore holding that the issue of the parent took as purchasers. That was a stronger case than the present, because here the gift is to the issue eo nomine. In *Hockley* v. *Mawbey* (3 Bro. C. C. 82; 1 Ves. jun. 143) the devise was to R. and his issue, to be divided amongst them as he should think fit, and if R. should happen to die without issue lawfully begotten, then over: Lord Thurlow held that the issue took as purchasers. *Doe* v. *Collis* (4 T. R. 294), *Merest* v. *James* (1 Brod. & Bing. 484; 4 Moore, 327), and *Doe d. Strong* v. *Goff* (11 East, 668), are authorities to the same effect. [Parke, B. Must not *Doe* v. *Goff* and *Crump* v. *Norwood* be considered overruled by *Jesson* v. *Wright*?] Those cases are stated to be overruled, but chiefly by learned writers who have carried their own particular views too far.(*h*) *Jesson* v. *Wright* might have been decided without overruling *Doe* v. *Goff*; and consequently the observations of **[595]** Lord Redesdale upon the latter case were mere unnecessary dicta. Besides, the same learned writers who state *Doe* v. *Goff* to be overruled, admit that the children in that case might have taken the fee, which entirely sweeps away Lord Redesdale's reason for overruling it. [The Lord Chief Baron. It cannot be said that *Doe* v. *Goff* is overruled, except upon the words "share and share alike as tenants in common." Those words might be inconsistent with the words "heirs of the body;" but they may not be inconsistent with the word "issue."] Nor is there any sufficient reason for saying that the case of *Crump* v. *Norwood* (7 Taunt. 362. See Jarman on Devises, vol. 2, p. 481) is overruled.

The next observation to be made is, that here the limitation to the issue is by way of remainder. That distinguishes this case from *Wilde's case* (6 Rep. 17 b.), and *Broadhurst* v. *Morris* (2 B. & Ad. 1). Now in *Doe d. Gallini* v. *Gallini* (5 B. & Ad.

(*h*) See Hayes's Inquiry into the Effect of Limitations to Heirs of the Body, sect. 4; Jarman's edit. of Powell on Devises, vol. 2, p. 477, &c.

640; 2 Nev. & M. 632), Denman, C. J., in delivering the judgment of the Court, observes that, according to the late cases, technical words in a will must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. Now there is nothing to shew that the testator did not mean to use the words "with remainder" in their technical sense; and even upon that principle the construction contended for by the plaintiff is clearly made out. The superadded words of limitation are also of great importance; and it may be remarked that such words constitute the difference between the case of *Doe* v. *Laming* (2 Burr. 1100), on which we rely, and that of *Doe d. Bosnall* v. *Harvey* (4 B. & C. 610; 7 D. & R. 78). Now, those words cannot be satisfied by giving **[596]** an estate tail to the parent. In *Doe* v. *Collis* (4 T. R. 294) the supperadded words gave weight to the construction that the children took as purchasers; whereas, from the want of those words, the same Judges who decided that case decided differently in *Doe d. Blandford* v. *Applin* (4 T. R. 82). In *Backhouse* v. *Wells* (1 Eq. Ca. Abr. 184, pl. 27) there were words of limitation grafted on the words issue male, and it was held that the issue took as purchasers. [The Lord Chief Baron. There the devise was to the parent for his life "only."] According to *Robinson* v. *Robinson* (1 Burr. 38) that would not affect the construction. The case of *Denn d. Webb* v. *Puckey* (5 T. R. 299), and others of that class, are distinguishable from the present. There, as well as here, there were superadded words of limitation; but here, those words, for the reason given by Mr. Fearne (Conting. Rem. 182, 183), have the effect of controlling the previous word "issue," so as to prevent the ancestor from taking an estate tail. The reason is, and this did not apply in *Denn* v. *Puckey*, that the words engrafting the fee point out a different mode of descent than the previous words would do if there were no engrafted words. For the same reason, the present case is distinguishable from *Roe d. Dodson* v. *Grew* (2 Wils. 322; Wilm. 272). In addition to which, in both those cases, there was a limitation over upon an indefinite failure of issue. In *Doe d. Gillman* v. *Elvey* (4 East, 313) the words, "equally to be divided," annexed to the superadded words of limitation, were held to prevent H. Gillman from taking an estate tail; and the word "respective" will have the same effect here. In *Doe d. Hallen* v. *Ironmonger* (3 East, 533) other words annexed in the same manner had a similar effect. In *Mogg* v. *Mogg* (1 Mer. 654), which was very like the present case, and in *Franklin* v. *Lay* (2 Bligh, 59, n.), the **[597]** effect of the superadded words of limitation was destroyed by the limitation over upon an indefinite failure of issue. In *Doe* v. *Goff* (11 East, 668), *Doe d. Candler* v. *Smith* (7 T. R. 531), and *Doe d. Cole* v. *Goldsmith* (2 Marsh. 517; 7 Taunt. 209), there were no such superadded words; therefore no argument can be drawn from those cases against the plaintiff. In addition to the other authorities in his favour, are *Gretton* v. *Haward* (2 Marsh. 9; 6 Taunt. 94), *Ginger d. White* v. *White* (Willes, 348), *Goodright d. Docking* v. *Dunham* (1 Dougl. 264), *Ryan* v. *Cowley* (Ca. temp. Sugd. 7). The case of *Hockley* v. *Mawbey* (1 Ves. jun. 143; 3 Bro. C. C. 82) is a very strong authority for the plaintiff, for there there was no gift to the children except in the words of the power. In *Jesson* v. *Wright*, in which the points of difference from the present case have been already noticed, Sir Edward Sugden argued ab inconvenienti; observing that, upon the death of each child, the share of each would go over (2 Bligh, 14). Here no such difficulty exists, because words of inheritance are given to the issue. Lord Eldon appears to have contemplated that a case like the present might occur, when he said, "The words, 'heirs of the body,' will indeed yield to a particular intent; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator" (2 Bligh, 53).

The difficulty arising from the suggestion that Henry James might have a child who might die under twenty-one leaving a child seems to be met by the observations of Tindal, C. J., upon a similar point, in delivering the judgment of the Court in *Gallini* v. *Gallini* (4 Nev. & M. 894), in error. He says, "It is objected against this construction that if an estate tail is given to the grandchildren as purchasers, and one of the **[598]** children had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise as to such grandchild would have been altogether defeated. It must be admitted that such would be the consequence; but it must be observed that if the supposed event took place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might

think fit upon that contingency taking place; and the argument, therefore, is not entitled to the same weight as where a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death, and over which he has no control." Therefore the testator's general intent is not to be set aside because it may fail upon one particular event. Here, after the devise to Henry James for his life, there is a contingent remainder to his children if he should have any; but if he should not marry and have issue who should attain twenty-one, the estate goes over. If he has children and they die under twenty-one, it turns the remainder over into an executory devise: *Gulliver* v. *Wicket* (1 Wils. 105), *Doe d. Harris* v. *Howell* (10 B. & C. 191; 5 M. & R. 24).

Upon the whole, we submit that this is an estate for life in the parent Henry James, with a contingent remainder to all his children in fee as tenants in common; that, upon the birth of a child, the remainder which was contingent becomes vested in that child; that, upon the birth of another child, the estate opens and lets in that child, and so on; and that, when all are in esse, they become tenants in common in fee, subject to the power of distribution in the parent, and subject to be divested in this event only—namely, upon the death of all the children under twenty-one; and that there is an ultimate contingent remainder in fee to the testator's son Oswald in the event of Henry James dying without children, but in case **[599]** he die leaving children who die under twenty-one, then an executory devise to Oswald.

Mr. Temple, Mr. Hodgkin, and Mr. Bagshawe, for the defendants. Henry James Feilden took an estate tail. First, there are technical words in the will sufficient to bring the case within the rule in *Shelley's case;* secondly, taking the rule respecting technical words in a will to be as laid down in *Jesson* v. *Wright*, there is nothing here to control those words. In *Shelley's case* the gift was to the "heirs male of the body," but those words are not essential to give an estate tail. The word "issue" is equally efficient for that purpose, and is primâ facie a word of limitation: *Doe d. Dodson* v. *Grew* (2 Wils. 322; Wilm. 272). In *Doe* v. *Gallini* (2 Nev. & M. 633; 5 B. & Ad. 642) Denman, C. J., in delivering the judgment of the Court, says that the word issue embraces the whole line of descendants generally, and is synonymous with "heirs of the body." That being so, it is clear that a devise to A. for life, with remainder to his lawful issue and their heirs, putting out of the question all controlling words, gives A. an estate tail: *Goodright d. Lisle* v. *Pullyn* (2 Ld. Raym. 1437). Then the rule is that technical words in a devise shall have their legal effect, unless there are other words which clearly deprive them of their ordinary signification. That has been frequently laid down; but more especially by Lord Redesdale in *Jesson* v. *Wright* (2 Bligh, 57), and by Lord Alvanley in *Poole* v. *Poole* (3 B. & P. 627). [The Lord Chief Baron. The words "heirs" and "heirs male," in those cases, must be words of limitation, because heirs are not co-existent. That does not necessarily apply to the word "issue," which may mean existing issue, or all the descendants. Alderson, B. When the words "heirs of the body" are used in their proper sense, it is certain that heirs in **[600]** succession are meant. Therefore, a devise to heirs of the body, "share and share alike," is an inconsistency; but a devise to the issue, "share and share alike," is not necessarily so.] If we can shew that "issue" is equivalent to heirs of the body, the cases cited apply. In *Doe* v. *Grew* (2 Wils. 322) Gould, J., speaks of "issue" as synonymous with "heirs." Even words which seem to designate particular persons, as "sons," "children," &c., may be held to be words of limitation, and to confer an estate tail: *Mellish* v. *Mellish* (2 B. & C. 520; 3 D. & R. 804). So the words "heir male," in the singular number, may be held to include all the issue in order to effect the general intention. The word "issue," however, is in itself a word of limitation, and includes all the descendants, unless the contrary be shewn. In Hargrave's Collectanea Juridica, vol. 1, p. 403, Lord Hardwicke says that it has been established ever since the case of *King* v. *Melling* that the words "issue of the body" are as strict as "heirs of the body," and equally give an estate tail. It is clear, also, from *Sibley* v. *Perry* (7 Ves. 522) that Lord Eldon was of opinion that the word "issue" is primâ facie a word of limitation.

Then, is there any thing in this will to control the meaning of the word "issue," and to take it out of its ordinary sense as a word of limitation? It is clear that the testator never contemplated that Oswald could take any interest in Henry James's part of the estate, until all the descendants under Henry James were extinct. The plaintiff's construction leaves one of those descendants totally unprovided for. The

testator gives his son a power to appoint the estate to the issue, in such shares and subject to such charges as he shall think fit; shewing he intended to give him a larger interest than a mere life estate. [The Lord Chief Baron. Supposing the power **[601]** of appointment to be valid, the question whether Henry James took an estate for life or in tail would depend on the will which he made himself. But how, in the absence of a power executed by Henry James, can you call on a Court of equity to declare the rights of the parties? I thought a Court of equity would only do that which it might be supposed the party would have done himself: *Kennedy* v. *Kingston* (2 Jac. & W. 431).] Notwithstanding the power of selection, the Court may declare this to be an estate tail in the parent. That power, until it is executed, in no way affects or neutralizes the estate tail. This is a gift to a father in tail, with a power of appointment enabling him to cut down his own interest to that of an estate for life. Whether done by a shifting clause in a settlement or by a power in a will, it is the same thing. [The Lord Chief Baron. Then you must admit that, until you know what the will is, the estate is uncertain.] That will not affect the defendants' equity, because a parent may by his own acts extinguish the power which he was entitled to execute by his will: *Smith* v. *Death* (5 Madd. 371), *West* v. *Berney* (1 Russ. & M. 431), *Bickley* v. *Guest* (id. 440). That the power will not control the previous words, so as to give the ancestor an estate for life only, is clear from *Doe* v. *Goldsmith* (2 Marsh. 517; 7 Taunt. 209). [Alderson, B. There the same words were used as in *Doe* v. *Grew* (2 Wils. 322): namely, "heirs of the body," not issue. It is dangerous to suggest an equivalent, and then argue on the equivalent as the thing itself.] *Seale* v. *Barter* (2 B. & P. 485), and the argument in *Jesson* v. *Wright*, are to the same effect. [The Lord Chief Baron. Where an estate tail is given in clear words, an additional power, inconsistent with that estate, is void.] With respect to the words "tenants in com-**[602]**-mon," *Doe* v. *Harvey* (4 B. & C. 610; 7 D. & R. 78) is an authority to shew that those words will not affect the previous estate tail. That case was decided on the ground that *Jesson* v. *Wright* had settled the question. [The Lord Chief Baron. Supposing the power of appointment to be good, would not an appointment in favour of a grandchild under this will be sufficient?] If "issue" includes a grandchild, why should he not take at all events under the word "issue"? Whatever be the terms in the will in which the particular estate is given, whether "son," "issue," "heirs," the question is, what is the intent as to the gift over? Does it mean on failure of issue of particular persons designated in the will, or after an indefinite failure of issue? No doubt there are many cases where general technical words have been held to be words of purchase. But in those the limitation over did not depend on an indefinite failure of issue. Here, on the contrary, it does so depend; for the words as to the issue attaining twenty-one do not negative the construction that an indefinite failure of issue was intended. In *Jack d. Fetherston* v. *Fetherston* (9 Bli. (N. S.) 237) the testator gave to W. F., son of Catherine F., and his heirs male according to their seniority of age, all his estate not thereinbefore disposed of; and in case of failure of issue male of the said W. F., or such lawful issue male not attaining the age of twenty-one, then over; and it was held to be an estate tail in W. F. [The Lord Chief Baron. There the original limitation was not attended with any ambiguity. It was not necessary to derive any aid from the limitation over, in order to hold it to be an estate tail.] The limitation over formed one of the grounds of the decision. *Doe* v. *Smith* (7 T. R. 431) is an authority to the same effect. So, if *Doe* v. *Goff* (11 East, 668) had been capable of being sustained on the ground of the **[603]** limitation over, Lord Redesdale would not have denied it to be law. [The Lord Chief Baron. If he was of opinion that an estate tail vested in the ancestor by the original limitation, the limitation over might be rejected. In that case he might be right in saying that *Doe* v. *Goff* was not law, but not if the original limitation offered any reasonable doubt.] There is, however, no occasion to resort to the gift over to support this case; and the superadded words of limitation, whether engrafted on the words "issue," or "heirs of the body," are inoperative to control the estate tail: *Denn* v. *Puckey* (5 T. R. 299), *Frank* v. *Stovin* (3 East, 551), *Mogg* v. *Mogg* (1 Mer. 654), *Franklin* v. *Lay* (2 Bligh, 59, n.), *Goodright* v. *Pullyn* (2 Lord Raym. 1437), *Wright* v. *Pearson* (Ambl. 358), *Kinch* v. *Ward*,(*g*) *North* v. *Martin* (6 Sim. 266). If "issue"

(*g*) 2 Sim. & St. 409. In the marginal note of this case insert after "executors," the words "with a limitation over in default of issue generally."

means "children," the fact that Henry James was a bachelor at the time of the devise will give him an estate tail: *Wilde's case* (6 Rep. 17 b.), *Broadhurst* v. *Morris* (2 B. & Ad. 1), *Doe d. Jones* v. *Davies* (1 Nev. & Man. 654; 4 B. & Ad. 43).

The cases cited on the other side, in which there were no limitations over, are clearly not applicable to the present. In *Doe* v. *Burnsall* (6 T. R. 82) it was not decided that there was not an estate tail in the parent; but that whether it was an estate tail, or an estate for life with contingent remainders over, the estate of the issue, and all subsequent limitations, were equally barred by the recovery. In *Curshaw* v. *Newland* (2 Bing. N. C. 58) the gift over was on failure of a son and daughter only, and not upon an indefinite **[604]** failure of issue. *Crump* v. *Norwood* (7 Taunt. 362; 2 Marsh. 161) cannot easily be reconciled with the other authorities. *Willcox* v. *Bellaers* (Turn. & Russ. 491) is not applicable. [The Lord Chief Baron. That is not a decided case, and, therefore, no authority.] *Backhouse* v. *Wells* (1 Eq. Ca. Abr. 184, pl. 27) depended on the word "only." The present case falls within the rule in *Shelley's case*, a rule which ought not to be frittered away by nice distinctions. By construing the estate in Henry James to be an estate tail, the testator's intention will be best complied with, and none of his descendants in that line will be disappointed.

Mr. Preston, in reply. The word "issue" is not a technical word, though the words "heirs of the body" are: *Lovelace* v. *Lovelace* (Cro. Eliz. 40). *Burnsall* v. *Davy* also shews that "issue of the body" does not necessarily mean "heirs of the body." In *Doe* v. *Harvey* there were no superadded words of limitation, and the Court thought that, in the absence of those words, they were bound by the case of *Jesson* v. *Wright* to reject the words of modification "tenants in common," and to hold the estate in the ancestor to be an estate tail. The word "issue" is only used for "heirs of the body" for the purpose of the statute de donis. Not that it may not be synonymous with other words in certain cases; but it is only when used for descendants that it is tantamount to heirs of the body. Here, the testator uses the word "issue," and not as in *Goodright* v. *Pullyn* and other cases "heirs of the body." Besides, he introduces this limitation with the words "with remainder," which means that there must be a particular estate to support it. The Court is asked to put a construction on this will, by which one branch of the family shall take the whole property to the exclusion of **[605]** the other branch. That was not the testator's intention, and the Court cannot disappoint the particular intention unless there be a general overwhelming intention requiring it. The mere circumstance of the testator's forgetting that by the limitation over in case of the issue dying under twenty-one some of his descendants might on a certain event be defeated, is not a sufficient reason for construing this an estate tail. If *Jesson* v. *Wright* be correctly reported, Lord Redesdale did not see the true bearings of *Doe* v. *Goff*, and throughout the argument in the former case the authority of the latter is not disputed. If the testator intended to give an estate tail, it is clear that knowing, as he did, the meaning of technical words, he would have used the proper words for that purpose. Besides, the words "in such shares and proportions" are not applicable to one, but to a plurality of persons. It is argued, that in order to comprehend all the issue of Henry James—for instance, his grandchildren—living at his death, the limitation over must be considered as taking place upon an indefinite failure of issue. That, however, is not necessary. Even if the word used had been "child" instead of "issue," there is authority for saying that not only the issue in the first degree, but any of the family who had attained twenty-one, might take: *Doe d. Smith* v. *Webber* (1 B. & Ald. 713). Suppose, in this case, there had been a son and a grandson, and the son had died under twenty-one, the grandson attaining twenty-one would have been entitled to the fee. Upon the whole, there is no case where the word "issue," with superadded words, has not been held to be a word of purchase, unless there be a clear intention to the contrary. In *Jack d. Fetherston* v. *Fetherston* there were no superadded words of limitation. *Smith* v. *Death*, and other cases of that class, are not applicable here; but, even if they were, their authority has been much doubted in the profession.

[606] Feb. 24th, 1836.—ALDERSON, B., now delivered the judgment of the Court. After reading the clause of the will above stated, his Lordship proceeded as follows:—The question is whether under this devise Henry James Feilden took an estate for life or an estate tail.

It has been long settled that in construing devises the governing principle is the intention of the testator to be collected from the words of the will itself. In order

to ascertain that intention, however, the Courts have adopted rules which no doubt it is very desirable should be as clearly and distinctly laid down as possible, and generally acted upon. And with this view it is often far better that the particular objects of individual testators should occasionally be frustrated rather than that there should be a general uncertainty in the titles to real estates, productive, as such uncertainty always must be, of expense, and presenting, as it must in many cases do, obstacles to the easy transmission of landed property from one purchaser to another.

But in endeavouring to attain this laudable object, the Courts must take great care, and exercise much watchfulness, lest from a mere love of generalisation they shake titles already existing, with a view to future and theoretical good. Upon a careful examination of the authorities we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words "heirs of the body," which are technical words, properly admitting only of one meaning, are used, it becomes necessary to shew affirmatively that the testator meant clearly to use them as words of purchase; or, more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not [607] enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to shew a probable conjecture that he intended to designate children only by that phrase.

Thus, in the case of *Jesson* v. *Wright* (2 Bligh, 1), the House of Lords, overruling the previous decision of the King's Bench, held that W. W. took an estate tail. There the devise was to W. W. for life, remainder to the heirs of the body in such shares as W. W. should appoint; and for want of such appointment, to the heirs of the body, share and share alike, as tenants in common; and if but one child, the whole to such one child; and for want of such issue, then over. Now there the only circumstances to control the words "heirs of the body" were the provision that they should take as tenants in common, and the use of the word "child." Both these circumstances might, not unreasonably, apply to the mode in which the testator intended the heirs of the body to take (a mode which the law would not allow), and by no means clearly shewed that he meant to limit those words to the children of W. W. only, excluding their descendants, and to devise over the estate before there should be a total failure of the descendants of W. W.—a conclusion to which all the various inconveniences so forcibly pointed out in that argument would lead.

Another instance of the application of the rule with which we began may be found in that class of cases in which "sons" or "children," which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will affirmatively and clearly, that by these expressions the testator meant all the descendants of the body to take as heirs.

There is, however, a third class of cases where a testa-[608]-tor uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intended to use the expression, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the primâ facie sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the Court is ultimately to decide.

The first point, therefore, to be considered is—whether "issue" be a word of this nature. Now we think that this sufficiently appears, from referring to the various authorities. The first is the statute de donis (13 Ed. 1, c. 1), in which this word is used, and in which it sometimes means children, and sometimes all the descendants, according to the context in which it is found. Thus, after stating the cases of estates upon condition, &c., it proceeds thus: "In all the cases aforesaid, after issue begotten and born (post prolem suscitatam et exeuntem) between them to whom the lands were given under such condition heretofore, such feoffees had power to alien." There, it is plain, issue means child, for the power exists as soon as a child is born. Again, the statute speaks of land reverting to the donor: "If issue fail, in that there is no issue at all; or if any issue be, and fail by death, or heir of the body of such issue failing." In this one sentence the word is used in two senses: first, as intending all descendants;

and, secondly, as including the children only. And here too the Latin word used in the original is not "proles," as before, but "exitus" throughout the sentence. This appears a decisive authority for its double meaning, and the books abound with others to the [609] same effect. In all of them it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even, perhaps, be conceded that this is primâ facie its meaning. But the authorities clearly shew, that whatever be the primâ facie meaning of the word "issue," it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to shew such intention than the technical expression of "heirs of the body" would do.

Thus in *Roe* v. *Grew* (2 Wils. 322) Lord C. J. Wilmot says, it is a word either of purchase or limitation as will best effectuate the intention of the testator: and in *Ginger* v. *White* (Willes, 340) Willes, C. J., speaking of the word issue, says, "It does not ex vi termini create an estate tail in a will as 'heirs of the body' do in a deed, but only where it appears that the intent of the testator was that the word should have that construction, or at least where it does not appear that the intent of the testator was otherwise."

Again, in *Doe* v. *Collis* (4 T. R. 249) Lord Kenyon, after argument on this very point, says (and this shews how important a duty it is for reporters to give the argument as well as the judgment) that in a will "issue" is either a word of purchase or limitation, as will best answer the intention of the devisor, though in the case of a deed it is universally taken as a word of purchase. And in another part of the same case, comparing it with "heirs of the body," he says that those words always give way with greater difficulty than the word "issue." And the latest case on the [610] subject contains a dictum of Sir Edward Sugden to the same effect: *Ryan* v. *Cowley* (Ca. temp. Sugd. 7).

If this be so, the Court in the present case have to look to the terms in this will, in order to ascertain whether, by construing the word "issue" here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there it would be an estate tail. For the word "issue" might include all descendants; and here, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's case* would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, "and their respective heirs in such shares and proportions, and subject to such charges as he the said Henry James should by will or deed appoint." Now, according to the case of *Hockley* v. *Mawbey* (3 Bro. C. C. 82), the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit.

Now if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it, and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. [611] On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If then the will stopped here it would seem clear that the Court ought to read "issue" as a word of purchase.

Then comes the devise over. "But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee." Now the effect of such a clause, if superadded to a remainder to children, would be to shew an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause

can convert the estate previously given into an estate tail. In fact, the case of *Doe* v. *Burnsall* (6 T. R. 30) is a distinct authority on this part of the case.

Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words "lawful issue" in this will, accompanied by their context, as words of purchase; and in so doing we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words with such a context as in this will have ever been held to be words of limitation.

We therefore think, for these reasons, that in this case Henry James took only an estate for life, and that there must be a decree for the plaintiff as prayed, with costs.

Decree accordingly.

[612] PILKINGTON *v.* HIMSWORTH. Dec. 17th, 1835.—Where an answer had been put in by an illiterate defendant, unaccompanied by any affidavit by his solicitor as to its having been read over and explained to him previously to his being sworn, and the jurat did not state that he had affixed his mark to it in the presence of the commissioners; ordered, upon motion that the answer should be taken off the file, for irregularity, with costs.—Objections to the form of the jurat of an answer cannot be waived by the parties to the suit.—Defendant admitting by his answer that he had in his possession a promissory note on which he had commenced an action against the plaintiff, but which the plaintiff by his bill alleged to have been long since paid, was ordered to deposit the same with his clerk in Court for the inspection of the plaintiff, although an injunction to restrain the action had been dissolved.

[S. C. 5 L. J. Ex. Eq. 95. See 4 Y. & C. Ex. 566.]

The answer of the defendant in this case, who was an illiterate person, having been taken before commissioners in the country, the jurat was made out in the following form:—

"This answer was taken, and the within-named Francis Himsworth, the defendant, was duly sworn to the truth thereof on the Holy Evangelists, at the office of William Palmer, situate &c.; the same having been carefully read over and explained to the said defendant, who appeared perfectly to understand the same, between the hours &c., &c. (here followed the date), by virtue of the commission hereunto annexed. Before us, "J. FALCONER.
"W. PALMER."

The answer was not accompanied by any affidavit by the defendant's solicitor, shewing that it had been read over and explained to the defendant, and that he had made his mark thereto, in the presence of the solicitor and of the commissioners; though it appeared that affidavits of that nature had been generally made in similar cases.

Mr. Simpkinson and Mr. Jeremy now moved that the answer might be taken off the file for irregularity, with costs. They relied, first, on the want of an affidavit, as before stated; and, secondly, on the defect in the jurat, in not shewing that the answer had been explained to the defendant, either by his solicitor or any of the commissioners; or that he had made his mark in the presence of the commissioners previously to his being sworn. In support of the motion they cited *Attorney-General* v. *Malim* (1 Younge, 376), and contended that the plaintiff's having taken **[613]** an office copy of the answer was no waiver of these objections: *Curzon* v. *De la Zouch* (1 Swanst. 185), *Yates* v. *Hardy* (Jac. 223). The party could not make the objection till he had seen the answer.

Mr. S. Girdlestone, contrà. By taking an office copy of the answer, the plaintiff has precluded himself from objecting to the form of the jurat: *Sirr* v. *Benyon* (Forrest, 22). [The Lord Chief Baron. I do not think so. This is not an irregularity which can be waived. The form of the jurat is not a matter between the parties, but arises from the rules of the Court.] There are various irregularities which a party may commit, without violating the rules of the Court. Irregularity in the jurat will not prevent him from being indicted for perjury; for the jurat is not a necessary part

of the affidavit, which is set out in the indictment, and in which perjury is assigned: *Rex* v. *Emden* (9 East, 445). No mischief, therefore, can result from considering the irregularity as waived; because the defendant will be still amenable for perjury: *Rex* v. *Benson* (2 Camp. 508). Upon the question of waiver, *Sidgier* v. *Tyte* (11 Ves. 202) is an authority for the defendant. [The Lord Chief Baron. There, the irregularity proceeded from not filing the answer in time.] That point was adverted to in the argument, but the Court paid no attention to it. The present case cannot be considered as being governed by that of *Attorney-General* v. *Malim* (1 Younge, 376), which must have been decided upon the merits, and not upon the mere point of practice. The affidavits which were read in support of that motion related to facts which took place before the commissioners, and could not have **[614]** been received for the purpose of aiding defects in the jurat. Those affidavits were conflicting, and the Court required further affidavits, and under those circumstances the answer was retaken. The conclusion, therefore, is that the jurat was right in that case. [The Lord Chief Baron. I certainly cannot see how such affidavits could be received, upon an objection to the jurat.] There is no rule requiring the answer to be read, or the party to make his mark in the presence of the commissioners. All that can be required is, that the commissioners should take the answer upon a due examination of the defendant, and return it engrossed to the Court: 1 Fowler, 367. Originally, it was not necessary that the defendant should sign his answer at all. The objection as to the want of an affidavit by the defendant's solicitor is untenable. Such an affidavit may be necessary in a town cause, because the answer is sworn before a Baron who knows nothing of the circumstances of the case; but it cannot be necessary upon an examination before commissioners in the country.

Mr. Simpkinson, in reply. The decision in *Attorney-General* v. *Malim* turned entirely on the form of the jurat, though the defendant attempted to support his case by introducing matters connected with the merits. If it were not so, why did the second jurat differ from the first? (*a*) As to the other point, the practice of this Court requires that in the case of an illiterate defendant **[615]** an affidavit should be made by his solicitor, shewing that the answer is really that of the party sworn, and for that purpose stating that the defendant's mark was affixed to it in the presence of the solicitor and the commissioners. Such an affidavit is not required in the Court of Chancery; but, in the jurats returned in that Court, it is expressly stated that the

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(*a*) The Reporters are indebted to one of the officers of the Court for the forms of the jurat and affidavit on record, as used in *Attorney-General* v. *Malim*, upon the answer being retaken in that cause. They were as follows:—

"This answer was taken, and the above-named defendants, J. M., M. J., T. K., T. C., and T. H., were severally duly sworn to the truth thereof upon the holy Evangelists at the office of W. F. W., situate in R. in the county of W., this 10th day of April, 1832, by virtue of the commission hereunto annexed, before us; the same having been previously read over and explained to the defendant T. H., who appeared fully to understand the same, and affixed his mark thereto in our presence.

"W. F. W. "J. S.
"G. H. "W. W."

"J. S., of R., in the county of W., solicitor, one of the commissioners named in the commission hereunto annexed, maketh oath and saith, that he this deponent did this 10th day of April, 1832, in the presence and hearing of W. F. W., G. H., and W. W., three other of the commissioners in the said commission named, distinctly and audibly read over and explain to the above-named defendant T. H. (as well as to the other defendants above named) the contents of this their answer as above written. And that he, the said T. H., appeared fully to understand the same, and affixed his mark thereto in the presence of this deponent, and of the said W. F. W., G. H., and W. W., before he the said T. H. was sworn to the truth thereof as above certified.

"J. S.

"Sworn at R. aforesaid, this 10th day of April, 1832, before me,
"M. H. B., a Commissioner for taking Affidavits in the Court of Exchequer."

party made his mark in the presence of the commissioners: Smith's Practice, vol. 2, p. 505.(*a*)

THE LORD CHIEF BARON. I have no doubt upon the question of waiver; because assuming that the practice of **[616]** the Court requires that the jurats should be in a particular form, it is not competent for the parties to waive that requisite. In such matters they cannot impose upon the Court a consent of their own. Jurats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is an universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court.

Whatever doubt I have, arises from the want of any previous settled rule of practice in these cases. I doubt whether the case of *Attorney-General* v. *Malim* was not decided on the ground of misconduct in the commissioners rather than on the practice of the Court, and unquestionably the very fact of receiving affidavits in order to discuss the res gestæ in the cause, would look as if the Court had instituted inquiries as to what the commissioners had done; which would be totally inconsistent with the question as to the jurat. On the other hand, if the objection had not been to the form of the jurat, I cannot help thinking that the same form would have been adopted in that case the second time as had been adopted in the first instance. On the contrary, however, another form was made use of, which removed the objections which are said to have been made to the first jurat.

Considering, therefore, *Attorney-General* v. *Malim* as settling the practice upon this point (and we have no knowledge of the practice but from decided cases), I think I shall consider that case as governing this, and that the same form of jurat which was objectionable there is equally objectionable here. I must, therefore, comply with this motion.

Motion granted.

[617] Feb. 18th, 1836.—The plaintiff in this case, who was a farmer and land-surveyor, had employed the defendant as his bailiff at 10s. per week. In February, 1835, the plaintiff gave up his farm, and thereupon the relation between the parties ceased, the plaintiff believing that all accounts between them had been settled and paid. The defendant afterwards charged the plaintiff to the amount of 176l., including 10l. alleged to be due from the plaintiff on his promissory note. The plaintiff refusing to pay this sum, the defendant commenced an action against him on the note, and also to recover 176l. for goods sold and delivered, work and labour done, money paid, and on an account stated. The plaintiff then filed his bill, alleging that the note in question had been long since paid, though left confidentially in the defendant's custody, and praying for a general account of the dealings and transactions between himself and the defendant, for discovery of evidence of the truth of the charges, and for an injunction to restrain the action.

The case made by the defendant was, that the plaintiff had employed a clerk in his business of surveyor, who had made acknowledgments which bound the plaintiff; and upon those merits the common injunction which had been obtained was dissolved. The defendant by his answer denied that the note in question had been paid, but admitted that it was one of the items of account between himself and the plaintiff, and that it was in his possession.

Mr. Jeremy now moved that the defendant might be ordered to deposit this note with his clerk in Court, with liberty to the plaintiff to inspect it; observing that at the hearing the plaintiff might be able to shew, either from indorsements on the note

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(*a*) The officers of the Court of Chancery having been consulted for the purpose of this motion, certified that the jurats in that Court in the case of an illiterate defendant are in the following form:—

"This answer was taken, and the above-named defendant, A. B., has duly sworn to the truth thereof upon the holy Evangelists, at the house of &c., this day of (the same having been first read over and explained to the said A. B., who appeared perfectly to understand the same, and made his mark thereto in our presence), by virtue of the commission hereunto annexed.

"C. D.,
"E. F., } Commrs."

or otherwise, that, at least, as to that item in the account, he was entitled to some relief.

[618] Mr. S. Girdlestone, for the defendant. The injunction has been already dissolved on the merits. The plaintiff has not such an interest in this note as to entitle him to have it produced in this Court. The note must be produced at the trial of the action, and it will then be competent for him to dispute its validity. This is in effect the defendant's title deed. Under similar circumstances the Vice-Chancellor refused to allow the production of a bill of exchange. [The Lord Chief Baron. Suppose it had been suggested to be a forged bill, would not a Court of equity have allowed the plaintiff inspection? If the Vice-Chancellor thought otherwise, he must have been of opinion that he had a more limited power than is exercised by a Judge at law.] In *Freeman* v. *Baker* (not reported) a person drew a bill upon Roberts, one of the directors of a company, who accepted it in the name of himself and the other directors. It was then indorsed to Freeman, who brought an action upon it, not against Roberts, but against the other directors. They filed a bill for discovery, alleging want of consideration. Freeman's defence was, that he gave consideration for it by means of a cheque upon his bankers. A motion was made that Freeman might be ordered to produce the bill of exchange and the cheque. The Vice-Chancellor granted the motion as to the cheque, but refused it as to the bill of exchange. [The Lord Chief Baron. There the only case made was, that the bill was indorsed without consideration; and, therefore, there was no occasion to look at the bill. Here it is alleged that in the pleadings at law there is a count on the promissory note and a count on the account stated. Now, to give evidence on the account stated, there is no occasion to produce the note before the jury, and you might get a verdict without it. It is contended, however, for the plaintiff, that though the ac-**[619]**-counts are primâ facie evidence against him; yet upon an inspection of them and of the note, he might be able to make out a case of fraud. Suppose, upon the hearing, the plaintiff adduces sufficient evidence for me to refer it to the Master to see whether this was a fair account, you must then produce the note in the Master's office.] If we went into the Master's office upon the settled account, and the Master was of opinion that the accounts were not binding, it would be optional with us to produce the note. However, the case made by the plaintiff's bill is not that of a settled account impeachable for fraud, but that of an unsettled account. The defendant by his answer denies that the note has been paid.

THE LORD CHIEF BARON. I think the plaintiff has a right to see the note. I must not take answers to be conclusive in all cases. They are so for certain purposes, but not for others.

Motion granted.

GOMPERTZ *v.* BEST. Jan. 11th, 1836.—Contempt of Court for non-payment of costs cannot be waived by the parties.

[S. C. 5 L. J. Ex. Eq. 21.]

The exceptions to the defendant's answer having been overruled with costs (ante, p. 114), the plaintiff, being in contempt for non-payment of those costs, obtained an order to dismiss his own bill.

Mr. Elderton, for the defendant, moved to discharge the order so obtained, with costs.

Mr. W. Rudall resisted the motion, on the ground that the defendant had waived the contempt by filing a cross bill. He cited *Edmond* v. *Ross* (9 Price, 5), and *Levi* v. *Ward* (1 S. & S. 334).

[620] THE LORD CHIEF BARON was of opinion that this was not an irregularity which could be waived.

Order discharged, with costs.

BEST *v.* GOMPERTZ. Jan. 15th, 1836.—Demurrer under circumstances overruled, with full costs.

Upon obtaining the order to dismiss his bill as above stated, the defendant in the present suit filed his bill in Chancery against the plaintiff, impeaching some only of the transactions (ante, p. 116) which he had in this Court endeavoured to set aside

for fraud. To the bill in Chancery the present plaintiff pleaded a former suit depending, and his plea was submitted to. To the bill in this Court he filed a cross bill, for discovery of matters necessary to complete his defence in the original suit. The defendant answered the cross bill in part only, demurring as to the rest. Having afterwards abandoned his demurrer, which was of great length—

Mr. Elderton, for the plaintiff, moved that it might be overruled, with full costs.

THE LORD CHIEF BARON ordered the demurrer to be overruled, with costs to be taxed by the Master.

[621] TOLDERVY *v.* COLT AND OTHERS. Nov. 16th, 18th, 1835; Feb. 26th, 1836. —Testator devised his real estates to trustees upon trust that his daughter M. should, until twenty-one, if sold and unmarried, receive thereout an annuity of 60l., and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40l.; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50l., and the said estates should immediately upon such marriage be in trust for the children of M., as tenants in common in tail; and for default of such issue, in trust for the testator's sister S.: provided, that if M. should marry with the consent of the trustees, it should be lawful for them to settle the estates upon M. and her husband for their joint lives and the life of the survivor, with remainder to the issue of M., in such shares as the trustees should appoint, and in default of such appointment in such shares and proportions as were thereinbefore limited. M. married with the consent of the trustees (upon which occasion a settlement was made pursuant to the will) and died without issue: Held (reversing the decision, ante, p. 240), that the remainder to S. was conditional, depending on M.'s marriage without consent; consequently, that M. having married with consent, the remainder to S. failed, although M. died without issue.—The Court will not, before the hearing of the cause, appoint a receiver of the rents and profits of real estate, on the mere ground that the party making the application has a good title; no fraud or spoliation being alleged against the party in possession.

[S. C. 5 L. J. Ex. Eq. 25: at Law, 1 M. & W. 250; 1 Tyr. & G. 324.]

(Before the Lord Chief Baron, Parke, B., Alderson, B., and Gurney, B.)

The Court having, upon the motion for the production of the deeds and documents in this cause (ante, p. 240), decided in favour of the plaintiff's title, a motion was made in her behalf on the authority of *Stitwell* v. *Williams* (6 Madd. 49), that a receiver might be appointed of the rents and profits. But inasmuch as the application was founded on title alone, and not on any alleged fraud or spoliation on the part of the defendant, the Lord Chief Baron was of opinion that the Court could not interfere at that period of the cause. His Lordship therefore ordered the motion to stand over until the hearing; and considering the will, on which the plaintiff's claim depended, to be one of difficult construction, and to involve a question of some importance, he directed that the cause should be heard before the full Court.

The cause now came on for hearing. The defendant, Sir John Colt, gave in evidence the marriage settlement of Mr. and Mrs. Colt. By this settlement, dated the 30th of November 1782, and reciting the will (see ante, 240) of James Bowman Clarke, the freehold property in question was conveyed by the trustees, Toldervy and Davis, to certain uses **[622]** therein mentioned, until the marriage; and after the marriage, to the use of Mr. and Mrs. Colt for their joint lives, and the life of the longest liver of them, but not without impeachment of waste; with remainder to trustees to preserve the contingent remainders; with remainder to the use of all and every the child and children of Mr. and Mrs. Colt, to be equally divided between or among them, if more than one, share and share alike, as tenants in common in tail, with benefit of survivorship; and if there should be but one child, or all but one should die without issue, to the use of that one child in tail. By the same indenture the leasehold property was made subject to limitations, as similar as possible to the limitations in the freehold estates.

Mr. Temple and Mr. Wilcock, for the plaintiff. It will be contended, on the other side, that the testator's daughter, under the circumstances which have occurred, took the estate absolutely, and that the ultimate remainder to his sister, Sarah Toldervy,

under whom the plaintiff claims, depended only on the daughter's marrying without consent. It is clear, however, from the will, that the testator meant to give his daughter a very limited interest. He disposes of the whole of the estate to the trustees: he makes them owners of the fee with very important powers—namely, of consenting to his daughter's marriage, and distributing the property amongst her children. With respect to the power of consent, it is remarkable that during the life of William Toldervy it is given to him alone, though he was the husband of the testator's sister. The daughter was to have no power whatever of intermeddling with the estate. The testator, in fact, gives her no part of the estate—no part even of the rents and profits specifically, but only an annuity out of them; and her children take as tenants in common in tail only in the event of the trustees not exercising the power of distribution in their favour. Then, notwithstanding the provi- **[623]**-sion made for the daughter's marriage with consent, the testator devises his remainder in the property at Whitechapel to his two sisters. That shews that, although his attention had been drawn to the event of a marriage with consent, he still looked to his sisters as the ultimate takers of the estate. No one can look at the latter part of the will without seeing that it is connected with the original devise. The provision as to the daughter's marriage with consent is introduced not as a substantive devise, but only as varying the interest of the daughter in the estate, giving her still a limited interest, which is made impeachable of waste. After this provision in reference to a marriage with consent, power is given to the trustees to increase the daughter's allowance in case she should remain single until thirty-one, and this is followed by a provision for the maintenance of the children in case of a marriage without consent. The whole must, therefore, be looked upon as one general devise. The intention was to give a limited interest to the daughter for her life, and to make provision for her issue, if she should have any; but if she should have none, to give the fee absolutely to the sisters. The testator contemplated the marriage of his daughter as unlikely; though in case such an event did happen, he thought it right to provide for her issue. To support the defendants' case it must be contended that there was a time when the daughter might have had the whole estate settled on himself. [Alderson, B. Suppose she arrived at thirty-one, and did not marry, what interest would she take?] In terms there is no interest given to her in that case, but there is enough in the will to have enabled the trustees to have made her a provision. It is clear, however, that she was not to have the absolute interest, for her estate is restricted in every case. It will be said that, by our construction, the heir-at-law is disinherited. Where there is a complete devise of the estate, no particular regard is paid in equity to the heir-at-law. The Court will look simply to the construction of the will, **[624]** without favouring any party. [The Lord Chief Baron. The doctrine has long been exploded that the heir-at law has any particular privilege or favour from the Court. Alderson, B. What he has is a clear primâ facie title, which you may shew to have been taken away.] Where the whole estate is devised, the Court will look to the will without favour to any party. [The Lord Chief Baron. If there be a devise over to a stranger, and no intermediate devise, there will be a resulting trust in equity for the heir-at-law.] Where the testator devises part only of his estate, the Courts have said that they cannot make a will for him, and the heir-at-law takes the undevised part; but where the testator has made, legally, a complete devise, he has done all that the law requires; the heir-at-law is disinherited, and nothing is regarded in a Court of equity but the bare construction of the will: *Falkland* v. *Bertie* (2 Vern. 333). Now here it was the manifest intention of the testator to devise his whole estate, and the devise to the trustees is complete. Besides, the testator's general intention must prevail, even against express terms which are inconsistent with that intention: *Synge* v. *Hales* (2 Ball. & B. 508), *Thellusson* v. *Woodford* (4 Ves. 227). In *Sherratt* v. *Bentley* (2 Myl. & K. 159) the late Master of the Rolls carried this doctrine so far as to reject the words "heirs, executors, administrators, and assigns," in favour of the general intention of the testator. *Colhoun* v. *Thompson* (Beat. 242) is a case involving the same principles. Supposing, therefore, the proviso as to the daughter's marriage with consent to be in any degree repugnant to the rest of the will, it must yield to the general intent. The two provisoes, however, as to the daughter's marriage, are not inconsistent with each other; inasmuch as they shew the time at which the children's interests were to vest. If the daughter married without consent **[625]** the children were to take immediately; if with consent, they were not to take until after the death of the daughter and her

husband. That is the fair interpretation of these provisoes; and where there is a reasonable ground for the use of particular words, they must be confined to that ground. It is clear, upon the construction of this will, that, whether the marriage turned out to be provident or improvident, the children were to stand in the same situation except as to time; and if there were no children, the estate was, in either case, to go over to the sisters. *Mackinnon* v. *Sewell* (2 Myl. & K. 202; C. P. Coop. 224).

Mr. Knight, Mr. Preston, and Mr. Cooper, for the defendant, Sir John Colt. The testator was a careful and affectionate father. By his will he provides most anxiously for his daughter; and it is plain that he intended to prefer his own posterity to any other class of persons. Not that he cared to preserve his own name, for his will is that of a man who knew that his daughter, who was the object of his care, was his heir-at-law and sole next of kin. He knew that what he did not dispose of his daughter, as his heir-at-law, must ultimately obtain. There are several general rules which will be of material assistance in construing this will. First, that no Court is at liberty to depart from the grammatical or legal construction of the instrument, without an evident necessity, arising from the apparent intention of the testator, deduced from the whole will. [Parke, B. I have always thought that the best language in which that rule can be laid down is that of Mr. Justice Burton, in *Warburton* v. *Loveland* (1 Huds. & Brooke, 648), where he applies it to the construction of statutes.] Secondly, that in construing a will of any obscurity, not merely the events which have happened, but those which might by reasonable possibility have happened, must be taken into **[626]** consideration. Thirdly, that the heir-at-law has a primâ facie right, and you must shew a title paramount to him, before you can take any thing from him. Fourthly, that although in general it is to be presumed that a man sitting down to make his will does not intend to die intestate, yet this rule admits of exceptions; more particularly where the individual who would take in case of his intestacy is an object of notice in his will. Fifthly, that regard must be had to the governing motive, or predominant feeling of the testator; and that though effect must be given, if possible, to all the words of the will, yet obscure words are never to be extended to bear on a subject foreign to the general intention.

In considering the effect of the will, let us first suppose that it contains no power enabling the trustees to make a settlement on the daughter's marriage with consent; and, secondly, that it contains such a power. On the first supposition the construction of the will is plain. The testator gives the whole estate to the trustees upon certain trusts. Now an equitable limitation, whether created by will or not, is subject to the same rules of construction as a legal limitation. The only exception is in the case of an executory trust: *Jervoise* v. *Duke of Northumberland* (1 J. & W. 570), *Garth* v. *Baldwin* (2 Ves. sen. 646), Sanders on Uses, cap. 3, sect. 5. Supposing the will to rest here, the daughter takes every thing, except she marries without consent. The words are, "And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise, &c.;" that is to say, the testator neither wills, directs, nor devises, till after a marriage has been had without consent. It is clear, therefore, that upon the grammatical construction of the will, the ultimate limitation to the sisters depends solely on the condition that the daughter marries without consent. Then the legal **[627]** questions to be considered are those which have occurred in many other cases—namely, whether a condition or contingency affecting one portion of a series of limitations ought to be carried on to the other limitations of the series; and, also, whether an ultimate limitation, which, strictly speaking, depends upon the failure of a prior limitation, ought to be let in where the prior limitation never comes into effect at all.

Upon the first question the case of *Davis* v. *Norton* (2 P. W. 390) is a decisive authority; and the principle of that and similar cases is clearly summed up in the words of Mr. Fearne (Conting. Rem. 235)—"The construction in these cases as to the restriction of the contingency to the estate first hinged upon it appears to depend on the testator's apparent intention not to extend it further. For wherever there is no apparent distinction in view in this respect between such estate and those which follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations." The other leading authorities on this point are *Doe d. Watson* v. *Shipphard* (1 Doug. 75), and *Denn* v. *Rudclyffe* v. *Bagshaw* (6 T. R. 512). Then, as to the second question, the rule is that where the limitation over depends on a conditional clause involving several events, and it cannot be reasonably supposed that the devisee

was not to take in one case more than in another, the limitation over may take effect, though some of the previous events provided for have not occurred: *Murray* v. *Jones* (2 Ves. & B. 313), *Jones* v. *Westcomb* (1 Eq. Ca. Abr. 245, pl. 10), *Gulliver* v. *Wicket* (1 Wils. 105), *Williams* v. *Chitty* (3 Ves. 545), *Holmes* v. *Cradock* (3 Ves. 320), *Parsons* v. *Parsons* (5 Ves. 578), *Simpson* v. *Vickers* (14 Ves. 341), *Humberstone* v. *Stanton* (1 Ves. & B. 385). The case of **[628]** *Mackinnon* v. *Sewell* was one of the same nature. It was decided on the principle that you cannot infer it to be a testator's intention to give property over if the children of A. should die under twenty-one, but not to give it over if such children never come in esse. In that case, therefore, it was held that, there having been merely a defective specification of all the modes in which the previous limitations might fail, the limitation over must take effect, notwithstanding the previous limitation had failed in a manner not expressly provided for. But the principles on which that and other cases of the same class were decided are clearly not applicable to the present. In this case the governing motive of the testator was to prevent an improvident marriage by his daughter. With that view he limits her interest in the property previously to her attaining thirty-one. No provision whatever is made for her attaining that age unmarried; and it is clear that if that event had occurred, the rents would have belonged to her as heiress-at-law of the testator. The testator has evidently left a portion of his property to be dealt with by the law. He makes no provision as to the rents between the time of his daughter arriving at thirty-one and dying unmarried. Suppose she had not married, why is it to be presumed that after thirty-one she was not to have the disposal of her property? The argument on the other side would have been equally applicable in the case of her not marrying at all. [The Lord Chief Baron. Suppose she had married without consent, and had no children.] Whether they died, or never came in esse, would make no difference, provided she married without consent. On that event alone the interests of the sisters depend. When that takes place the estate is fixed and becomes subject to a series of limitations which exhaust the fee.

Thus far the argument has proceeded on the supposition that the will contains no power enabling the trustees to **[629]** settle the property in the event of the daughter's marriage with consent. But after protecting his daughter against an improper marriage it occurred to the testator that a case might arise in which she might marry respectably, but in which the trustees might think a settlement prudent. She might marry a man in trade or a very young man. He therefore gives the trustees power to make a settlement in that event, though he by no means makes it imperative upon them to do so. In this power he cautiously leaves the reversion undealt with, instead of settling it to the previous uses. Now, without evident necessity, which does not exist in this case, the previous limitations of the reversion cannot be transposed to this place. But then it is argued that in whatever way the limitations to the issue fail, the sisters must take. Suppose the daughter had married with consent, and the trustees had omitted to execute the power of settlement, and she had left issue—according to the plaintiff's argument, the issue, who could have only taken under the settlement (the words "so that" governing all the succeeding clauses), would have lost the estate. That, however, is so far from being the case, that their mother would have taken the fee. [The Lord Chief Baron. Suppose the marriage had been with consent and no settlement made, the estate would go to the wife and to the husband for her life. But the trustees are not authorized to settle the property on them without making him impeachable of waste. That presents a doubt whether the words "it shall and may be lawful" are not imperative.] Take the case as it stands. A settlement was in fact executed with the consent of the trustees, and confined to the issue of the marriage with Mr. Colt. Suppose he had died, leaving Mrs. Colt surviving him, without issue—would there have been a power of making another settlement? The power would have been exhausted; and consequently, according to the plaintiff's argument, the issue of a second marriage could not be **[630]** provided for. [Parke, B. A Court of equity would have relieved against such an execution of the power.]

To return to the main point in this cause. The contingency of the daughter's marrying without consent pervades and governs the whole of that clause which contains the limitation to the sisters. The doctrine of conditional limitations has been well settled ever since *Holcroft's case* (Moore, 487). The rule that governs them all is that the Court will never construe words to be words of conditional limitation, except

to effect the undoubted intention of the testator; and that if the words are those of condition, they must be so construed, unless there be a clear intention to the contrary, to be gathered from the whole will. (Powell on Devises, by Jarman, vol. 1, p. 197.) We therefore contend that the marriage of the daughter without consent was the strict condition on which alone the sisters were to take; that there is nothing in the will repugnant to this construction; that a contrary construction might, if there had been issue, have defeated that issue; and that such a result was directly at variance with the intention of the testator.

Mr. Johnes for the children of James Bayley Toldervy.

Mr. Stinton for the heir-at-law of the surviving trustee.

Mr. Temple, in reply. There can be no doubt that it was the intention of this testator to guard his property from being thrown entirely into the hands of his daughter. It has been said that if she arrived at thirty-one unmarried, she would have taken the fee. That cannot be inferred from the general tenor of the will. The testator meant to give his daughter no more than a life-estate, though with such additional advantages as, under the cir-**[631]**-cumstances, he thought it right to give her. He took care, however, that under every circumstance she should not be enabled to dispose of the fee. Her children were to be provided for, whether the marriage took place with or without consent; but, on the other hand, the estate was not to go out of the family. It is contended that if she had married with consent, and no settlement had been made, the issue could not have taken at all. That is not the true construction of the instrument. In no event could the issue fail to take a beneficial interest, even if there had been more marriages than one. Perhaps if the clause containing the power of settlement had terminated at the words "direct and appoint," the issue might have been at the mercy of the trustees; but it goes on, "and for want of such direction, limitation, or appointment, in such shares as are hereinbefore limited respecting the same." In default of a settlement, therefore, they would take as tenants in common in tail. [Alderson, B. The defendant's counsel read the clause thus: "And so that in default of such direction or appointment, the trustees shall convey," &c. You read it, "and in default of any conveyance by the trustees, the estate shall be in such shares," &c. Parke, B. Every thing that follows "so that" is a description of the settlement, if they make it.] Even upon this construction, if the trustees had died without exercising the power of appointment, the children would have had a right to come in and claim the estate as tenants in common in tail. The cases cited on the other side are almost all distinguishable from the present. In that of *Davis* v. *Norton* (2 P. W. 390) the condition so clearly applied to all the devisees that they could not explain it away. Upon the principles of *Murray* v. *Jones* (2 Ves. & B. 313), and *Jones* v. *Westcomb* (1 Eq. Ca. Abr. 245, pl. 10), this is a conditional limitation to the sisters, and not merely a gift upon condition.

[632] At the close of the argument, Mr. Preston, with reference to the question whether the power of settlement, in case of a marriage with consent, was imperative on the trustees, mentioned *Brown* v. *Higgs* (8 Ves. 561), and *Duke of Marlborough* v. *Lord Godolphin* (2 Ves. sen. 61).

PARKE, B., observed that, having on a former occasion expressed an opinion in favour of the plaintiff upon the construction of this will, he felt himself bound to say that, after hearing the arguments advanced for the defendants, he was inclined to retract his former opinion. He should, however, give the case his best consideration.

Feb. 26th, 1836.—THE LORD CHIEF BARON now delivered the judgment of the Court. This was a bill filed for the purpose of obtaining possession of an estate which the plaintiff claims under a clause in the will of Mr. James Bowman Clarke. The case came before me first upon a motion for the production of papers and title-deeds; and upon that motion I was certainly of opinion that the plaintiff was entitled to the remainder in this estate upon the death of the testator's daughter. The will, however, was obscure, and of difficult construction, and I refrained from pronouncing any judgment upon it till I had consulted another member of the Court, my brother Parke, to whom I sent it without any comment or suggestion whatever. He returned it to me in two or three days, with rather a strong opinion in confirmation of my own; and I in consequence delivered my judgment in favour of the claim of the plaintiff. The case was afterwards revived upon a motion for a receiver; and as the will was to be discussed, and the plaintiff's title to come under consideration a second time, I thought

it expedient that it should be discussed before the full Court. The case accordingly underwent a very solemn and deliberate argument, and the Court have desired me to express their **[633]** obligation to the counsel on both sides for their able, elaborate, and ingenious arguments upon that occasion. Many new lights were thrown upon the consideration of the subject, and some circumstances in the will were brought more distinctly to our attention than had occurred to me upon the first argument; and I am not ashamed to confess that I have drawn, upon the second argument, a conclusion at variance with that which I drew from the first. I am authorized by my Brother Parke to say the same thing for him. He, also, upon the second argument, found reason to change his opinion; and I have now to state the unanimous opinion of the Court in favour of the defendant, Sir John Colt.

Upon the first occasion I thought that there was no doubt, nor do I now doubt, that if the testator's attention had been called to the particular case which has occurred, and which gives rise to this question, he would have declared his intention to have been in favour of his sisters. The will still appears to me to be obscure, and no opinion which can be given upon it can be one of very great confidence. It is very much disjointed, the clauses are thrown about in very great confusion, and, in order to make them intelligible, the best mode is to collect the different members of it, and join them together. I have taken some pains to do so, and likewise to abbreviate many of the clauses; and it appears to me that when the various scattered provisoes and exceptions are put together, they will assume something of this form:—

The testator, Mr. James Bowman Clarke, bequeathed the whole of his estate, both freehold, leasehold, and personal, to Toldervy and Davis, whom he made his executors. He gave them power to receive the rents and profits; to mortgage the real estate, for the purpose of raising money for the payment of fines upon renewing the leasehold estates; to renew the leasehold estates; to invest the money raised in new purchases of either leasehold or freehold property; to mortgage for the purpose of raising **[634]** money to accumulate; and to invest the accumulations in new purchases, and in the mean time to deposit them in the Bank of England. In short, he gave them very great powers over this estate; and declared them to be trustees for the objects of the will. The objects of the will are stated to be these: to the intent and purpose that his daughter Mallett should, till twenty-one, if sole and unmarried, receive annually the sum of 60l.; and from time to time thereafter, till she should attain the age of thirty-one, being still sole and unmarried, receive an additional annuity of 40l. Then there comes, very much disjointed from that bequest, in a remote part of the will, this proviso—"Provided that the trustees shall be authorized and empowered, not only during her minority, but at any time or times afterwards, till she arrives at the age of thirty-one, and so long as she is unmarried, but not otherwise, as they shall think fit, to pay and apply any further sums beyond the two annuities of 60l. and 40l. for her maintenance and education, or her advantage, so as they do not exceed the amount of the annual rents and profits." So that, in effect, this was giving to her these annuities at all events till she arrived at the age of thirty-one unmarried; and, at the discretion of the trustees, giving her the benefit of the whole of the rents and profits till she came to that age, if she remained unmarried, but not otherwise. Now those words "but not otherwise" are very important, because they shew that if she married, the trustees were not to give her more than what was otherwise provided for her. Then there is a proviso that if his daughter should, either before or after thirty-one, marry without consent of the trustees, or the survivor of them, she should be paid an annuity for her life only of 50l., and not the other two annuities of 60l. and 40l. before mentioned. "And from and immediately after the marriage of my daughter, without such consent as aforesaid, I direct that the said estates" (the first clause relates to the freehold estate, but **[635]** the subsequent parts of the will throw together the whole, and therefore I comprise the whole in one statement here) "shall be in trust for all and every the child and children of the body of my daughter lawfully to be begotten, in such shares and proportions, manner and form, as the trustees shall from time to time direct and appoint, with or without power of revocation; and for want of such direction, in trust for such child or children, equally to be divided between them, as tenants in common, and the several and respective heirs of the body of such child and children lawfully issuing, with cross-remainders; and if but one such child, then to that child alone, and the heirs of his or her body lawfully issuing." In default of issue

of the children, the testator devises the property to his sisters. By a subsequent proviso, the testator directs that in case his daughter should marry without consent, and have issue, that issue should, at the discretion of the trustees, have a provision for their maintenance and education during their minority, out of the estate so bequeathed to them, until they should be respectively entitled to their respective shares of the property under the will.

These are the important parts of the will, with the exception of a proviso for the case of the daughter's marriage with consent, to which I shall now advert. That proviso is likewise placed in a remote part of the will, and gives to the trustees power to convey the estates to new trustees, upon the trusts there declared: and, supposing the conveyance to be made in pursuance of the proviso, the effect of it is to give an estate for life, with benefit of survivorship, to the husband and the wife, and then an estate tail to the issue of the body of the wife, as tenants in common, in such shares as the trustees choose to appoint; and in default of appointment, in such shares and proportions as before. But that clause is not followed by any limitation of the remainder after the estate tail. Upon the former argument it struck me that the testator's in-[636]-tention to provide for the sisters was very apparent. In the first bequest, he had devised the remainder expectant upon the estate tail in the children to the two sisters; and I thought that he had a design to provide for his sisters this estate in remainder at all events. Although the will was expressed obscurely and ambiguously, it had occurred to me that by putting the proviso for the case of a marriage with consent into a place which I thought I could discover to be its proper place, that would remove all difficulties, and would effectuate the testator's intention, that the remainder to the sisters should take effect after the estate tail given to the children, either in the case of a marriage without consent, or a marriage with consent. That was the impression under which I certainly gave my first opinion; but upon the elaborate argument which we have had upon the subject since, I have seen reason to change that opinion.

Now, let us see what it is that the children take. The estate is given to them expressly in case of a marriage without consent. The remainder is to take effect after that estate expires, and is dependent upon that estate, and no other. That is the first remainder, and it begins with the words, "and for default of such issue." Now, it is admitted on both sides, and I think it cannot be denied, that the word "issue" there means issue of the children. It cannot mean issue of the daughter, because no estate tail is given to the daughter, nor, in that clause, any estate for life; and, therefore, a limitation to the sisters, after a general failure of issue of a person who was to take no particular interest, would have been too remote. What is given to the daughter, in case of her marriage without consent, is an annuity of 50l., and nothing more; and immediately the children are born, they take estates tail, liable to be modified by any direction or appointment the trustees may make. If they make no appointment, they take estates tail, as tenants in com-[637]-mon with cross-remainders. Then upon what does the remainder to the sisters depend? It depends upon that estate tail. If that estate tail is taken away, the remainder is taken away.

The question has been argued on behalf of the plaintiff, as if the present ought to be ranged under that class of cases in which it is contended that the case of *Murray* v. *Jones* (2 Ves. & B. 313), and the more modern one of *Mackinnon* v. *Sewell* (2 Myl. & K. 202; C. P. Coop. 224), are comprised. It has been said that those cases are an authority for the proposition that the Court will not, where it is contrary to the apparent intention of the testator, allow a condition, which in words may appear to be, a preliminary condition of vesting the estate, to operate upon all the limitations following that condition. Now, it appears to me that that is not the true character of those cases. Those cases do not furnish questions upon the operation of a condition upon subsequent limitations, but they are mere constructions of the condition itself. The case of *Murray* v. *Jones* arose upon the will of Lady Bath. The person who drew her will used a multitude of unnecessary words, for the purpose of giving to Mrs. Fawcett the personal estate, in case Lady Bath should not have any second child that arrived at the age of twenty-one, or, being a daughter, married before that age. The drawer of the will had perplexed himself by putting all possible cases, when he meant to state only one case, namely, her having no second child who should arrive at the age of twenty-one, or daughter who should marry before that age. Sir William Grant, who decided that case, put it upon the true ground. He said, she meant to

give the estate to Mrs. Fawcett and her children, in case she, the testatrix, should have no daughter or son that arrived at the age of twenty-one. Why, she had no children at all; therefore, she had none that **[638]** arrived at the age of twenty-one. Therefore he interpreted the condition, however obscurely expressed, to include the case of her dying without leaving any children; and he made use of this remarkable expression: "That, if there were any gradations in the performance of the condition, she had more than performed it;" for, whereas she meant to give the estate over, if she had no child that arrived at the age of twenty-one, as she had left behind her no child at all, therefore she had not one that arrived at the age of twenty-one. He illustrated that further by shewing that, in another part of the will, in declaring who should be the ultimate object of her bounty after Mrs. Fawcett and her children, in case they failed to exist, she makes provision, if she herself should leave no children behind her, and Mrs. Fawcett should leave no children behind her, that then the estate should go to a third party. That clearly shews, that her intention was to give the estate to Mrs. Fawcett and her family, in case she, Lady Bath, should die without leaving any children. It is perfectly plain, therefore, that that was the interpretation of the condition itself, shewing what the condition meant; and, therefore, that no question could arise there of a condition operating upon a subsequent limitation. The condition did operate on a subsequent limitation; and there the condition was what the Master of the Rolls interpreted it to be, and not, as the other party contended, that she should actually leave a child living after her death; that was no part of the condition. The case of *Mackinnon* v. *Sewell* was one precisely of the same nature, and therefore requires no further observation.

On the other side, it was argued by the counsel for the defendant, that this case ranges itself under that class of cases in which a rule of construction, founded on plain common sense, has been illustrated, namely, that where a condition precedes a certain series of limitations, each of that series must be taken to be affected by that condition, **[639]** unless there is a manifest intention upon the face of the will to be collected to the contrary; that is to say, in other words, you follow the plain grammatical construction of the will in giving effect to the limitations, unless you find by some other parts of the will that the testator's intention was to deviate, in any one particular, from that plain grammatical construction. The question then is, whether the condition upon which the estate tail is limited to the children does not also apply in this will to the limitation in remainder to the sisters. It appears to me, upon the words of the instrument that it clearly does. But I think it is hardly necessary to go into that class of cases to determine the construction of this will, as far as it depends on that first and second limitation, because, as I before observed, the estate tail is given to vest in the children immediately as they are born, and is given upon the express condition of the marriage of the mother without consent, and therefore the remainder over is made to depend upon that estate tail. Why, then, if you take that estate tail away, what becomes of the remainder? Now, if it were legitimate to transfer the proviso for a marriage with consent, immediately after the limitation to the children upon a marriage without consent, and to make it part of the same sentence, then undoubtedly the limitation to the sisters over would depend upon the one estate tail as well as upon the other; and if it depended only upon that I own I should have had the courage, in order to meet the apparent intention of the testator, to have transferred the proviso in that manner, under the authority of several cases well known to gentlemen who are in the habit of considering these subjects, in which the opinion, rather widely laid down by Mr. Justice Buller (2 T. R. 223), has, however, been acted upon; where he says that the Court may mould and transpose the clauses of a will, for the purpose of **[640]** giving effect to the intention of the testator. But I find this extraordinary fact in this will—I find a clear case in which the sisters could by no means have any remainder at all, and that is this: the testator has provided for his daughter till she arrives at the age of thirty-one unmarried; and he has provided for her also if she marries before or after thirty-one; but if she remains single from thirty-one to the day of her death, the only provision made for her is a provision by law; there is no provision by this will. It was argued in that case that he must be supposed to intend to die intestate. I do not think he intended any such thing; but a man may, without intending to die intestate, in effect make no provision at all but what the law makes. It appears to me a confusion of ideas to say that a man intends to die intestate when he makes a will, because he probably intends to devise every thing; but it

happens very often that he omits to make a particular devise; and if it is a casus omissus a Court of law cannot supply it afterwards. Now, then, suppose the daughter had never married at all, why the object of the trusts given to the trustees being to provide for a particular person, the daughter, her children, her husband, and in one case, for the persons in remainder, who are specified in the will, if she does not marry at all and dies unmarried, there is an end of their trust, except that which the law raises for the benefit of the daughter. What estate, then, does she take? Not an estate for life—she takes no particular estate—and therefore no remainder can depend upon her life. She takes no estate tail, and therefore no remainder can depend upon that estate. She clearly takes an estate in fee, liable, if you please, to be divested by her marriage, with or without consent, after thirty-one; but yet, if she remains unmarried after thirty-one, and dies, it is clear that she dies seised of an equitable estate in fee-simple in all these premises; and it goes, therefore, to her heir-at-law, or may be bequeathed by her will.

[641] There is one case, therefore, where clearly the testator has omitted to make any provision for his sisters at all, or to give any such estate as could support any remainder to the sisters. Well, then, it is asked, and I think very properly asked, as one case of that sort was plain, manifest, and incontrovertible, why should not the other case also of a marriage with consent be ranged under the same class of cases either of a design to die intestate, if you please so to put it, or of a casus omissus; and why should you supply it in one case more than the other? It is very remarkable that in the proviso for a marriage with consent, the estate tail is given to the children in a different manner. The first estate tail vests in them the moment they are born. They take as purchasers in both cases; but in the first case they take the estate tail from the moment they are born. But in the other, the estate is given to the husband and the wife for life, and for the life of the survivor; and then, the estate tail depending on that estate for life, goes to the children. Undoubtedly that would make no difference, if it were followed either in words or by construction, with a remainder over to the sisters. But that proviso for a marriage with consent is followed by no such remainder to the sisters. Now, where shall I put it in the will? What right have I to say, as I first thought I had, that I can put it before the limitation of the remainder to the sisters? Suppose he himself had inserted it in the will at an earlier part: he might still have put it after that remainder. If he had so done, the same difficulty would have occurred as occurs now, though placed after it at a greater distance. I cannot say, therefore, that he intended that the limitation to the sisters of a remainder dependent on a particular estate tail, granted upon a certain condition only, was to follow the estate tail granted upon another condition, and in a different part of his will. If I were asked my opinion of the intention of the testator, if the case had been suggested to him, I should say that **[642]** if he had been told, "You have made a provision for your sisters in case of a particular marriage without consent; but in the other parts of your will you have left no provision for them, as to your estates bequeathed to your daughter," I should think it very probable indeed he would have said—"Then fill up that omission, and gave them the remainder again." But a Court of justice has no right, in interpreting a will, to make a probable conjecture of what a testator would have done in a particular case, and then to do it for him, when there are no words in the will to justify that course. We are bound to find out the intention of the testator; and, though that intention be expressed obscurely or ambiguously, yet if it is expressed in words some how or other, or expressed by so strong an implication that you cannot avoid seeing he contemplated the thing and meant it, though he has not expressed it accurately; in that case you are bound, if you can find such intention expressed in the will, to give effect to it, and very often to mould and modify the estate in such a way as to give effect to the intention that he either clearly has expressed or intended to express. But if the words do not express any such intention, it is not because you can conjecture such intention to be highly probable that you are to insert words in order to give effect to it. The testator has not done what he probably would have done had the case occurred to him; but if he has not done it a Court of law has no right to do it for him. It therefore appears to me that we cannot, by anything but a probable conjecture, which, in my opinion, the Court has no right to act upon, insert this proviso immediately before the limitation over of the remainder to the sisters. And if we cannot do that, then the limitation over to the sisters clearly depends upon the conditional estate tail given to the children;

and as that conditional estate tail never existed in the case that has occurred, of course the remainder falls to the ground.

I ought to state that it is the opinion of some of the **[643]** judges, and for aught I know, of all of them; certainly, to have expressed it to me that the proviso for making a settlement in the case of a marriage with consent was not imperative upon the trustees. I own that I myself do not entirely concur in that opinion. I am inclined to think that, although the words used in that proviso are, "it shall and may be lawful," the trustees would probably have been compelled, if the necessity had arisen, to make that conveyance, or to hold the estate in trust for the children. That depends on a class of cases of which *Brown* v. *Higgs* (8 Ves. 561) is a leading authority in modern times. Upon that, and other cases of the same nature, I think it cannot be doubted that where an apparent power is combined with a trust, if the power is not executed, a Court of equity will execute the trust in some manner; and, therefore, that if the trustees in this case, supposing children to have been born after a marriage with consent, had omitted to make any conveyance at all, a Court of equity would have allowed the children to have had the benefit of that clause in the will, considering it as a trust combined with a power. However, the judgment of the Court in this case must be given without reference to that interpretation; because, as the other judges are of opinion that it was a matter of mere discretion in the trustees, if they are right in that opinion, there can be no doubt at all that the plaintiff could have no claim. But the ground upon which we are all agreed in giving judgment for the defendants is this, that we think we cannot indulge in conjecture for the purpose of introducing one proviso into another place than that where it exists in the will, and into that precise place which would make it give effect to the limitation over of the remainder to the sisters. We think we cannot do that but by conjecture, which we have no right to indulge in; and upon this ground the bill must be dismissed.

Decree accordingly.

[644] SIR RICHARD CARR GLYN, BART., THOMAS HALLIFAX, RICHARD PLUMPTRE GLYN, CHARLES MILLS, AND GEORGE CARR GLYN, *Plaintiffs;* MANOEL JOAQUIM SOARES, AND HER MOST FAITHFUL MAJESTY DONNA MARIA, QUEEN OF PORTUGAL AND THE ALGARVES, *Defendants.* Nov. 27th, Dec. 16th, 1835; Jan. 19th, 1836.—To a bill for discovery in aid of a defence to an action at law, a person who is not a party to the record at law, but for whose benefit the action is brought, may, under circumstances, be made a defendant; and if that person be resident abroad, service of subpœna to appear on the attorney of the plaintiff at law may be ordered to be good service on the party so resident abroad.—Although the general rule of a Court of equity is that a mere witness cannot be made a defendant to a bill for discovery, yet that rule will be relaxed in all cases where an absolute failure of justice would result from its application.—Don Miguel, as King of Portugal, effected a loan for the use of his Government by the issue of certain bonds, the consideration for which was paid in bills of exchange drawn upon certain bankers in England. The bills were made in two parts, of which the first parts were remitted to England, and accepted by the bankers, and the second parts were remitted to the Treasury of Portugal, being specially indorsed to the Treasurer of the Royal Treasury of Portugal, on account of the loan. After the dethronement of Don Miguel, the second parts of the bills came into the possession of Donna Maria's government, and were, by her orders, indorsed by her treasurer (the same individual who was treasurer under Don Miguel) to S., resident in England, with instructions to recover the amount due thereon, and remit the same to the Portuguese Government. S. having brought his action on the bills against the acceptors, and a bill in equity having been filed by the acceptors against S. and the Queen of Portugal, for a discovery of the circumstances under which S. obtained the bills: Held, upon demurrer by the Queen—first, that she was a proper party to the bill for discovery, although not a party to the record at law; and, secondly, that if the bills came into her possession by fraud, and were indorsed by her agent to S. under circumstances of duress, that was a defence which the acceptors, in the action brought against them by S., were at least entitled to urge for the opinion of a court of law.

[S. C. 5 L. J. Ex. Eq. 49 : reversed, nomine *Queen of Portugal* v. *Glyn*, 1837, 7 Cl. & F. 466 ; West, 258.]

In July, 1835, the present plaintiffs, jointly with Edward Richardson, filed their bill in the Court of Chancery against the present defendants, under the circumstances and for the purposes mentioned in the report (3 Myl. & K. 450) of that case. To that bill the defendant Soares demurred on three several grounds, one of which was that Richardson ought not to have been joined as a co-plaintiff in the bill ; and his demurrer, upon that ground, was allowed.

In consequence of that decision, the present bill was filed by Messrs. Glyn & Co., without Richardson. It was in substance the same as the bill filed in Chancery, stating that in March, 1833, Don Miguel, then King of Portugal, being in want of a loan for the purposes of his Government, Messrs. Outrequin & Jauge, bankers at Paris, entered into an agreement with him for negotiating such loan, and remitting the same when raised, for the use of his Government, to the Treasurer of the Royal Treasury of Portugal ; that bonds were accordingly issued, by which Don Miguel and his Government became bound to pay to the holders the several sums of money mentioned in those bonds, together with half-yearly interest thereon ; that between the 1st of March and the 30th of June, 1833, Outrequin & Jauge advanced or procured to be advanced considerable sums of money on the security of those bonds, and that great part of the monies so received was remitted to the Treasurer of Portugal for the use of Don Miguel and **[645]** his Government ; that amongst the proceeds of the bonds so remitted were six bills of exchange, drawn by Baron d'Est of Paris upon the plaintiffs, and made payable to the order of Outrequin & Jauge ; that these bills were made in two parts, of which the first parts were remitted by Outrequin & Jauge to their agents, Gower & Co., in London, to be presented to the plaintiffs for their acceptance, and the second parts were remitted by them to the Treasury of Portugal with this indorsement : "Pay to the order of the Treasurer-General of the Royal Treasury of Portugal value in account of the negotiation of the Royal Loan of Portugal ;" that the first parts of these bills were duly accepted by the plaintiffs, not on their own account, but in the course of their banking business, and as agents for Richardson, who kept a banking account with them ; that the second parts were duly received some time in June, 1833, by Joachim Fernandez Couto, as the agent of Don Miguel and his Government, and as Don Miguel's Treasurer of the Royal Treasury of Portugal ; that upon the evacuation of Lisbon by Don Miguel's troops on the 24th of July, 1833, Donna Maria was proclaimed Queen of Portugal, and shortly afterwards Don Pedro and his adherents, on behalf of Donna Maria, assumed the government of Portugal ; that Don Pedro and his adherents seized and took possession of the second parts of the six bills of exchange, and caused each of them to be indorsed to the defendant Soares, who was a mere agent of Donna Maria ; and that the indorsement on each bill purported to be signed by Couto, and to bear date the 7th of August, 1833, which was after Couto had ceased to be treasurer of Don Miguel's Government, and while he was in fact not treasurer of Portugal, either under Don Miguel's government or otherwise ; that the loan so raised, and the bonds issued by Don Miguel, had been expressly repudiated by Donna Maria, who had declared all the acts of Don Miguel to be null and void ; that **[646]** neither Donna Maria, nor any person on her behalf, had given any consideration for the bills ; that nevertheless, after such pretended indorsement by Couto, the bills in question had been remitted to Soares, that he might recover the amount thereof for the use of Donna Maria and her Government, and that he had for that purpose commenced his action against the plaintiffs ; that Outrequin & Jauge had given notice to the parties liable on the bills not to pay the amount to any agent of Donna Maria.

The bill charged that the action was virtually that of the Queen of Portugal, Soares being merely her agent ; that the queen and her agents had divers documents in their custody, by which the want of title of the Queen and her Government to the bills would appear, and that in setting up any title thereto they acted in fraudulent concert together ; that Outrequin & Jauge never agreed to raise, and never in fact raised any loan for Donna Maria or her Government ; and that in remitting the bills to the treasury of Portugal they did not mean to make them payable to Donna Maria or any agent of hers, or to any person not acting under the authority of Don Miguel or his Government ; that Couto, before the date of the pretended indorsement in his

name, had been dismissed from his office of treasurer by a public decree, issued by Don Pedro for that purpose; that if he ever in fact subscribed his name to any special indorsement of the bills to Soares, he was compelled to do so by duress and by threats of imprisonment and loss of life; that in fact he never indorsed them, and that the pretended indorsement was written on the second parts of the bills after he had subscribed his name; that the Queen never intended to recognise the loan or pay the bondholders; that she had personal knowledge of, and had divers communications with, her agents and ministers relative to many of the circumstances stated in the bill, and that she withheld from Soares, with **[647]** his concurrence, the information most material to the plaintiffs' defence.

The bill prayed for a discovery of the several matters charged in the bill in aid of the plaintiffs' defence to the action, for a commission for the examination of witnesses abroad, and for an injunction to restrain the action in the meantime.

The defendant Soares, by his answer, admitted that no part of the bonds or scrip had yet been paid by the Queen of Portugal. He however stated his belief that, in case the loan were not completed by her Government, it was her intention to apply the proceeds of the bills in payment of such bonds as were outstanding. He admitted that for that purpose he had been directed by the proper officer of the Queen's Government to receive the proceeds of the bills of exchange which had been indorsed to him, and to remit the same to the Treasury of Lisbon. He further admitted that he had, personally, no property in those bills, and that he had given no consideration for them; but having received them under the circumstances before mentioned, and the plaintiffs and the drawer of the bills having, as he believed, received full value for them, he submitted that he ought to be considered, as between himself and the plaintiffs, the holder of them for a valuable consideration. He denied, to the best of his belief, that he was a mere agent of the Queen, under the circumstances attending his receipt and possession of the bills. He submitted that the bond-holders had no claim upon the bills, inasmuch as Outrequin & Jauge did not, in his belief, receive them in exchange for scrip or bonds of the loan, but purchased them in the same manner as persons wishing to make remittances to a foreign country usually purchase bills of exchange for that purpose; that is to say, by means of bill-brokers or otherwise they purchased them, at the market price, of persons having occasion to draw on England. In answer to the charge in the bill **[648]** respecting Couto, the defendant gave no information further than that he believed the indorsement on the bills to have been signed by Couto while he was Treasurer of Portugal, and under the authority of Don Pedro as Regent of Portugal. Upon the other matters charged in the bill, he gave no material information. He concluded by submitting that the Queen had been improperly joined as a defendant in this suit, and that she was not a party to the action.

The Queen of Portugal not having appeared to the bill, the plaintiffs, on the 19th of November, obtained an order that service of subpœna on Soares or his attorney in the action at law might be good service on the Queen of Portugal. A motion was now made, on the part of the defendant Soares, to discharge that order.

Mr. G. Richards and Mr. Roupell, in support of the motion, contended that this being a mere bill for discovery, the order which had been obtained was contrary to all practice; and that, even in cases where relief was prayed, the Court was unwilling to substitute service on the party's agent for service on himself: *Bond* v. *Duke of Newcastle* (3 Bro. C. C. 385), *Anderson* v. *Lewis* (id. 429), *Smith* v. *Hibernian Mine Company* (1 Sch. & L. 238), *Roberts* v. *Worsley* (2 Cox, 389). They then proceeded in a line of argument similar to that which was afterwards adopted on the argument of the demurrer of the Queen of Portugal; contending that the order for substitution of service was nugatory, on the ground that the Queen of Portugal, not being a party to the record at law, ought not to have been made a party to the bill for discovery; that no instance could be produced of such a proceeding, and that the cases where the assured are made parties to bills by underwriters were distinguishable **[649]** from the present, because the assured might be considered as parties to the record at law. In the course of the argument they cited *Richardson* v. *Soares*.(*a*)

Mr. Simpkinson and Mr. J. Russell, contrà, contended that it was clear from the answer of Soares that he was the agent of the Queen of Portugal; if he were not,

(*a*) Nom. *Glyn* v. *Soares*, 3 Myl. & K. 450.

he could in no way be affected by substitution of service on the solicitor. That being so, the Queen's admissions might be used by the plaintiffs in equity as a defence to the action at law; *Hanson* v. *Parker* (1 Wils. 257), *Harrison* v. *Vallance* (1 Bing. 45; 7 Moore, 304); that a bill for discovery was necessary to obtain this evidence, and would lie against the Queen as the real, though not the nominal, plaintiff in the action; that the cases of bills by under writers against the assured afforded a precedent for such a bill; that if the bill were sustainable, the order for substitution of service was proper, for that when the plaintiff at law is out of the jurisdiction, substitution of service on his attorney at law will be ordered to be good service, in every case where the bill is filed as a defence to the action, whether by injunction or otherwise: *Smith* v. *Hibernian Mine Company* (1 Sch. & L. 238).

Mr. Richards in reply.

THE LORD CHIEF BARON. The question between the parties is shortly this—whether a party suing at law, not proprio jure, but as agent for another, though in his own name, by any principle which is acted upon in this Court, should be restrained in his action until the party for whom he acts puts in his answer to a bill of discovery. Now Mr. Richards not only contends that, admitting that to be the practice of the Court in the case of an action on a policy, the names of the parties interested **[650]** appear on the record, and consequently it is known who is the real party concerned—but he goes a step farther, and calls the assured a party to the record. That is not so. The assured is no more a party to the record that any other person is a party whose name is mentioned in the declaration; no more than the drawer of a bill of exchange is a party in an action brought by an indorsee against the acceptor. There was no occasion, till it was required by statute, that the names of the assured should be inserted on the record at law; and it is new to me to hear that, before discovery is granted in a Court of equity upon a bill of this nature, you must look to the record at law to see whether that may act as an estoppel against the party seeking the inquiry. I always understood that the practice of Courts of equity upon questions of this nature was not so strict as that of Courts of law. Certainly a Court of law does not consider the record at law an estoppel, except as between persons who are parties to the record.

Then, on what is the practice founded, that if an agent bring an action on a policy, this Court will grant an injunction against him, and also against the party for whom he brings the action? If it could be shewn that, before the statute, this Court could, upon no principle, have entertained a bill for an injunction against the party interested, I should think myself bound by such a rule; but no such rule or practice appears to have existed. On the contrary, it appears to me that where a party brings an action not proprio jure, but on behalf of another person who is in possession of facts of which a discovery is necessary for the defendant in the action, the latter has a right to file a bill against that person, as if he were actually the plaintiff at law; and I can conceive no other principle on which the practice existed of compelling the plaintiff at law, in an action on a policy, to abstain from proceeding in his action. Why, then, not apply that prin-**[651]**-ciple to an action brought on a bill of exchange or other security? It is objected that, without proceeding to file a bill of discovery against him, the party may be made a witness, and that a bill for a commission to examine witnesses will answer all the purposes of a bill of discovery. But that may apply in cases where a party is interested in a policy; yet that argument has not been used, or has not prevailed against this sort of order, as applied to the case of the assured. Nothing, again, is more common than actions brought on bills of exchange by a party who has no interest—a banker for instance. Now, suppose an action had been brought on a bill by a banker as the agent of another person, the bill being specially indorsed to the banker, if you will (for that will make no difference), and suppose it appeared that the party for whom the banker was employed was a customer living abroad, and that what that customer had said, written, and done in reference to the bill, formed the defence at law; I see no principle of discovery which should not apply to such an individual living abroad, as well as to an assured on a policy. Suppose, for instance, that he had signed a settled account at Paris, that that document had been left there in his custody, and that he had afterwards sent the bill to his bankers in London for the purpose of the action—would there be any colour of justice in saying that the acceptor should be allowed to make that defence at law, but not to file his bill to compel the party at Paris to produce that document on which his defence

rested? Suppose the bill were filed merely against the agent here; he would only say that he knew nothing about it. Again, suppose the party abroad refused to be examined as a witness; what remedy would the defendant at law have, but a proceeding of this nature in a Court of equity? A deed in the custody of the other party might be a complete defence to him; yet there would be no means under a commission to compel the production of it, or to examine the party as a **[652]** witness. I never heard that foreign Courts would compel a party to be examined under a commission against his own wishes and interest.

If the defendant Soares had distinctly averred by his answer that he brought his action not as the agent for the Queen, but on his own behalf, he might of course have come into this Court to set this motion aside. But he admits that he is the Queen's agent; or, at all events, he does not deny that he is her agent qua queen. He admits that the bills were remitted to him for the purposes of the action, and that the proceeds when recovered are to be applied in Portugal for the use of the Queen's Government. Now, no one supposes that the answer of some of the Queen's officers could not be obtained to the matters inquired after by this bill. The case, therefore, seems to me to fall within the principle of those cases where a bill for discovery in aid of a defence at law is filed against the assured not resident in this country.

The cases which have been cited in support of the motion have no application. In one of them (*Bond* v. *Duke of Newcastle*, 3 Bro. C. C. 385) it was attempted to substitute service of subpœna on the defendant's clerk in Court. Now, the clerk in Court is in some sense the agent of the party who employs him; but he is employed not individually, but as the officer of the Court, and, except for certain purposes, there is no privity between him and his principal. Again, the case in Schoales & Lefroy (*Smith* v. *Hibernian Mine Company*, 1 Sch. & L. 238) is quite beside the question. There the Court refused to hold that service of subpœna on a person acting as agent for the defendant, under a general power of attorney, should be deemed good service on the defendant resident out of the jurisdiction. It would be contrary to all reason that it should be so. But if that agent had taken part in the action, and had come into Court as plaintiff, then it seems clear that the service would have **[653]** been good. Lord Redesdale said, "The Court has indeed substituted service in several cases where the party may have notice of the proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent for a different purpose cannot be looked on in that light." It is quite clear, therefore, that if that person had brought the action for the benefit of his principal, the very bringing that action would have made him agent in that particular thing, and then the service upon him would have been good.

Upon the whole, the case appears to me to depend on a plain and clear principle, and that the practice ought to be applied where the principle may be applied. I think, therefore, that the order must stand.

Motion refused.

The foregoing motion having been refused, the Queen of Portugal demurred to the bill on two grounds—first, that she was not a party to the record at law, and therefore not a proper party to the bill for discovery; and, secondly, that if the matters inquired after by the bill were true, they would afford no defence to the action.

Mr. Cresswell, Mr. G. Richards, and Mr. Roupell, for the demurrer. First, the Queen of Portugal not being a party to the action at law, ought not to be made a defendant to this bill. If the bill had been filed against the **[654]** Queen of Portugal alone, your Lordship would not have entertained it, and her being made a co-defendant with Soares can make no difference, because Soares alone is answerable at law. [The Lord Chief Baron. Suppose in this case there had been no bill of discovery, and the plaintiff in equity had tendered evidence in the action at law to shew that Soares acted under the Queen's directions, and that the costs were paid by her, then her admission would be evidence against him.] If the Queen had put in an answer, and there were no other evidence than her answer, your Lordship would reject it. That alone will be evidence against Soares on this bill, which would be evidence against him at Nisi Prius. At law, the admission of the Queen could not be given in evidence against him, unless there were evidence in the first instance to connect them as parties in these transactions. Here, there is no such evidence, and the bill must be dismissed. Soares,

by his answer, states that he was not the agent of Donna Maria. Supposing even that the Queen states the contrary, and that she is in fact the principal, no discovery from her will be available until the question of agency has been resolved. If this bill be sustainable against the Queen of Portugal, she may upon general principles file a cross-bill against the plaintiffs; yet to hold that she could do so under present circumstances, would be at variance with the decision of the Master of the Rolls in *Richardson* v. *Soares*.(*a*) The case of *Angerstein* v. *Wentworth* (1 Fowler, 227) is an authority to shew that this bill cannot be sustained against the defendant until it be shewn that she is a party to the proceedings at law. There, an action was brought on a policy of insurance, and a motion was made that service on the attorney of a party who was represented to be interested in the policy, but in whose name the action was not brought, might be deemed good service on that party. **[655]** The Court refused the motion, on the ground that no declaration having been delivered, there was nothing to shew that the party was really interested. The Court thought that, until there was something on record to shew who were the parties really interested, a Court of equity could not interfere.

But further, assuming that Soares is agent for Donna Maria, or that he is in some manner bound by her acts, there is nothing in this cause to prevent her being made a witness. The plaintiffs may have her evidence as well as her answer, your Lordship retaining the injunction till the evidence is produced. They have no right to make her a party without first shewing that her evidence as a witness is inadmissible. *Fenton* v. *Hughes* (7 Ves. 287) is an express authority to shew that a bill for discovery against a mere witness is not sustainable. [The Lord Chief Baron. Are not the assured equally capable of giving testimony? and yet they are made defendants.] There is no instance where, in an action on a policy, an assured has been called to give evidence for the defendants. A party to the record cannot be called upon to give evidence for either side. [The Lord Chief Baron. In some cases parties to the record have been allowed to examine each other by consent. The late Lord Chief Justice Mansfield carried this practice to a very great extent; perhaps, indeed, too far. An assured, however, is not a party to the record, and I should say that in an action on a policy he may be called as a witness by the defendant on the record. A Court of law regards no parties as incompetent, with reference to the record, except those who are parties to the record: *Bauerman* v. *Radenius* (7 T. R. 663). The assured being named in the record is only made necessary by statute (19 Geo. 2, c. 37. See 16 East, 143). If an executor brings an action to recover monies due to the testator's estates, can it be **[656]** doubted that any person interested under the will, as for instance one of the residuary legatees, may be called by the defendant for the purpose of proving a settlement of accounts? Now, suppose an act of Parliament passed enacting that the name of a party so interested should be inserted in the record; would that make any difference in his competency as a witness?] In such case we submit that the defendant, having the advantage of the statute, ought also to suffer the corresponding disadvantage. But, independently of principle, the authorities are strong to shew that a bill of discovery in aid of a defence at law can only be sustained against the parties to the record at law. In *Few* v. *Guppy* (Hare, on Discovery, 124) an action was brought for the infringement of a patent. The plaintiff in the action was a trustee to whom the property in the patent had been assigned. The defendants at law filed a bill against the trustee for a discovery and production of the papers in aid of their defence. Upon a motion to produce those documents, Lord Lyndhurst held that the trustee was under the same obligation to produce them as if he possessed both the legal and beneficial interest; observing that it was not possible that the cestui que trusts could be plaintiffs in the action, nor was it possible that they could be made defendants to the bill of discovery, for the bill being brought in aid of the defence at law could be filed against none other than the plaintiffs in the action. [The Lord Chief Baron. There is an evident distinction between a trustee, regularly constituted, and a person who is only called a trustee from the position in which he stands. Many of the rules of equity will apply to the one, which will not apply to the other. I remember, in a case in the Privy Counsel, Sir William Grant adopting that distinction. Here, you call Soares a trustee for the Queen of Portugal, but he is not so with all the incidents of trusteeship.] **[657]** There may be some distinction

(*a*) Nom. *Glyn* v. *Soares*, 3 Myl. & K. 450.

between the case of an ordinary trustee, and that of a person who is made a trustee against his will, but Soares is not shewn to be in that situation; and therefore, the general rule applies. In the cases in which witnesses have been made parties, as in *Plummer* v. *May* (1 Ves. sen. 426), relief has been prayed against them. [The Lord Chief Baron. That was a remarkable case. It was a bill to set aside a will in this Court, and the subscribing witnesses, who had no interest, were made parties.] It was a bill for relief, because costs were prayed against the witnesses as parties to a fraud. The same thing occurred in *De Beauvoir* v. *Rhodes* (not reported). On the other hand, to a bill merely for discovery, the parties must be parties to the record at law: Mitford, Pl. (p. 156, 3rd edit.); p. 188 (4th edit.)); *Shackell* v. *Macaulay* (2 Sim. & Stu. 79). Such a bill is ancillary to an action at law, and enables the parties to examine each other, which they cannot do at law. *Carvell* v. *Watkins* (5 Madd. 18) shews that it is only appendant to an action, and cannot lie independently of it. Where the bill is filed in aid of an action, not only must an action be pending or intended, but a good ground of action must be shewn; for, unless the evidence sought would, if used, assist the legal claim of the party seeking it, a Court of equity will not grant the discovery. A suit for discovery, therefore, is a quasi trial in this Court, and the merits must be entered into. In *The Mayor of London* v. *Levy* (8 Ves. 398) the plaintiffs averred that they had a right of action against the defendants, or some of them; but this allegation was held to be too vague, inasmuch as some of the defendants might be mere witnesses, against whom there could be no right to file such a bill. That case, therefore, but more especially *Fenton* v. *Hughes* (7 Ves. 287), are authorities for this demurrer. In the latter case, Lord Eldon observed that though in some instances the exa-**[658]**-mination in this Court might be better than at law, yet that would not alter the general rule upon the subject. In truth, the interference of a Court of equity does not extend to aid the process at law, but only supplies it where it does not exist. Policy cases are an exception to the rule, more on practice than principle. No doubt, the assured may be joined in a bill of discovery, but that is an anomaly in the law; and in *Shackell* v. *Macaulay* (2 Sim. & Stu. 87) Sir John Leach said that underwriting cases were not to be reasoned upon as furnishing general rules. But even admitting that this case is to be governed by analogy to those of policies of insurance, no interest is averred in the Queen of Portugal by this bill.

The second ground of demurrer is that the matters in respect of which discovery is sought would, if true, afford no defence to the action. In 1833 Outrequin and Jauge, at Paris, sold certain bonds or scrip, which professed to secure to the holders of them certain sums and interest, to be paid by the Government of Portugal, Don Miguel being then de facto king of that country. The parties who purchased these bonds knew the precarious nature of their security, and took their chance as to the consequences. By the sale of these bonds, Outrequin and Jauge realized considerable sums of money, which were remitted to the agent of the Portuguese Government, by means of bills. Some of these bills, which are the subject of this suit, were drawn by Baron d'Est upon Richardson's agents, in favour of Outrequin and Jauge, Baron d'Est having a private demand upon Richardson. The bills were accepted by Richardson's agents, who are the plaintiffs, and, as there is no allegation to the contrary, they must be taken to be acceptors for value. They have no right to inquire in the action whether the holder has given value for the bills. Whoever may be ultimately entitled to the proceeds of the bills, Soares is not only **[659]** authorized, but bound, to obtain payment from the acceptors. It may be another question who is to obtain payment from Soares. The first parts of the bills were remitted to Messrs. Gower, to be delivered to the party who should produce the second parts. The second parts were made payable and indorsed to Couto. Is it to be said that no person can be entitled to these bills, or can compel payment of them, but Don Miguel or his Government? Has he any right to them, as the representative of the Portuguese Government? Clearly not. It is not said that they were indorsed to his personal agent, but to the treasurer of the Government, for the use of the Government. Don Miguel's Government no longer exists; but is the acceptor thereby discharged? If so, he is fortunate, for he has received value for the bills. On the contrary, Couto having, as he was bound to do, indorsed these bills, and received the proceeds as the representative of the Government to which they belonged, Soares, who now holds them, is entitled to receive the proceeds as against Richardson; and the latter cannot enter into an inquiry as to the value which Soares gave for them.

But then it is said that Donna Maria has got Couto to indorse these bills as Treasurer-General, when, in fact, he was not so. If the present Government be a lawful one, it is entitled to the funds belonging to the old Government. If there had been no contest, and Don Miguel had died, these bills would have belonged to his successor, not to his executor. [The Lord Chief Baron. I assume that the Government is lawful; but the Queen has declared the contracts of her predecessor unlawful.] If Donna Maria is not the lawful owner of these bills, it will be for the Court to determine who is. The Government is entitled, unless the bills are indorsed to some one else. They are indorsed to Soares. If he has given value for them, they are his; if not, he is trustee for the Portuguese Government. They remain the property of the Government until **[660]** it is shewn that the Government has parted with them. Soares, therefore, in any view of the case, is the lawful holder. This is not a case of failure of consideration, as between the acceptor and the other parties to the bill, so as to prevent the holder from recovering against the acceptor. Suppose even that the Queen says that she will not recognise the loan, or pay the bonds; no bond-holder can interfere. They bought the bonds, and received their consideration; they contracted with their eyes open, and knew that there were chances that the Government would be disturbed. They paid their money to Outrequin and Jauge, who laid out that money in the purchase of these bills. Then, how is the question at law affected by any consideration as to whether the Queen will pay these bonds or not? They who advanced their money on these bonds have no interest in the question. It lies solely between Richardson and Soares. Suppose the Court were to hold that the action should be stayed for ever; the bond-holder could have no remedy against Richardson. Why, then, should Richardson be protected? *Jones* v. *Fort* (9 B. & C. 764; 4 M. & R. 547) is an authority to shew that Soares has a right to sue, even though he may not have a right to receive the profits of these bills. He received the bills from Couto, who was agent of one Government or the other; and it lies on the plaintiffs to shew that Couto had no authority to indorse. [The Lord Chief Baron. A party may do an immoral act in obedience to his Government. Suppose the justice of the transactions in Portugal to be doubtful, and that it is doubtful how far they may or may not operate as a defence at law; under such circumstances of doubt, ought the demurrer to be allowed?] If these parties accepted the bills for value, and received from the Government the security which the latter professed to give, they can have no defence at law to an action brought by the **[661]** holder. The holder has no connexion with the acceptor. [The Lord Chief Baron. Suppose a person makes a mortgage, and the mortgage money is advanced by means of bills drawn on the mortgagee's banker; and suppose, before the bills become due, that the mortgagor is divested of all legal title, and some other person, whose title is paramount, ejects the mortgagor, and refuses to ratify the mortgage. In the mean time the bills get into the hands of the agent of either the ejector or mortgagor, and he brings actions against the acceptor. If the parties were all before a Court of equity, would the Court allow either the mortgagor or the ejector to receive the money?] The Court is not dealing with the equities between the parties. Whether Soares is liable to some other person is at present wholly immaterial. If this had been a bill for relief, it might have been shewn that the Queen was not entitled to the money; but the bill is not so framed. At law, therefore, Soares has only to shew that his are the legal hands to receive the money; and any thing relating to the equitable interest can be no defence to such a claim. The judgment of the Master of the Rolls proceeds in a great measure on these principles, and justly; for if the equitable interest does not entitle a party to be a plaintiff, how can it entitle him to be a defendant? [The Lord Chief Baron. You say there is no defence at law. Suppose a bill of exchange is remitted to a steward, for the use of his master, after the steward has been discharged, and suppose that before it becomes due he indorses it away, without giving or receiving any value for it; cannot the acceptor set this up as a defence in an action on the bill? The rule of law is that felony and fraud will not change the title to property.] The bill alleges no case of fraud; and the plaintiffs do not sue as bond or scrip-holders, but merely as bankers, who, in the ordinary course of business, have given valuable consideration for the bills. They allege that they are ready to pay the proceeds to either one in-**[662]**-dividual or the other, and they might in fact have filed a bill of interpleader for that purpose.

Mr. Simpkinson and Mr. James Russell, for the bill. Outrequin and Jauge were

not the mere agents of Don Miguel. The bill states that they contracted the loan; that the scrip and bonds were transmitted to them by Don Miguel and his Government; that in consideration of that they procured bonds from certain individuals on account of the intended loan, and that they also in their own behalf took part of these bonds. They remitted to Don Miguel the amount of the loan in bills of exchange, comprising the six which are the subject of this cause. Having purchased these bills for value, they indorsed the second parts specially as payable to the order of the Treasurer-General of the Royal Treasury of Portugal, on account of the loan. These parts, therefore, were transmitted for the particular purpose and consideration stated in the indorsement. The contract was for Don Miguel; and the question will be whether, the loan being contracted for him and his Government, and the bills remitted for that purpose, any other Government, unless it recognises the acts of Don Miguel, can avail itself of the benefit of this loan. It is clear that the case of a prince or a Government is not different from the case of individuals, with respect to any equities arising out of a transaction of this nature. Now, the whole of the circumstances connected with this loan have been repudiated by Donna Maria. The consideration for these and other bills was scrip, payable with half-yearly interest; and it may be admitted that the acceptors having received value for the bills, it would be immaterial to them whether the holder gave value for them, provided he obtained them legally. But the question is whether the case is so clear that the Court will say that it is perfectly nugatory to grant a discovery in aid of the defence of this action. The bill contains **[663]** charges shewing the agency of Soares, the circumstances attending the indorsement by Couto (more especially as to the date of the indorsement being subsequent to his dismissal), and also the circumstances attending the seizure of Lisbon by Don Pedro and his adherents. These charges would give rise to many important questions. One question would be whether the indorsement by Couto, payable only to the order of the Royal Treasurer of Portugal, could give a right to sue to any subsequent holder of them, even supposing that the Government of Donna Maria, though it repudiated the acts of Don Miguel, had continued Couto in his office. Another question would arise as to the validity of the indorsement, upon the suggestion that, if indorsed by Couto before the 7th of August, he was then under threats and duress. Supposing that not to be the case, another question might arise upon the hypothesis that the bills were indorsed by Couto before the 7th of August and retained by him in his possession, but afterwards seized and negotiated by the Government of Donna Maria. These important questions are sought to be raised by the bill, which likewise charges that the action of Soares is in fact that of Donna Maria; that she has no interest in the bills which are the subject of that action; that she and her agents are in possession of many documents from which her want of interest would appear, and that she withholds that material evidence. Then, are the two grounds which have been mentioned sufficient to support this demurrer?

As to the first ground, the observations made by your Lordship on the former occasion have not been displaced. It is said to be against the principles of a Court of equity to give discovery against any party who is not a party to the record at law. But no case, with the exception of that in Mr. Hare's book, bears out such a proposition. No doubt, a bill cannot be filed against a mere witness, except in certain cases, because the same evidence can be **[664]** obtained at law as by a bill of discovery. But there are certain exceptions to this rule referred to in Mitford (Mitf. Pl. (3rd edit.) 152; (4th edit.) 188); and in any case where, from the peculiar circumstances, a complete discovery cannot be had at law, the rule altogether fails. One of the excepted cases is where a clerk or secretary to a corporation is made a defendant, though having no interest: *Wych* v. *Meal* (3 P. W. 310). Another is, where the assured are made parties to bills of discovery brought by underwriters. Before the statute passed requiring the interest of the assured to be averred on the record at law, the action might have been brought by the mere agent of the assured, who knew nothing of the case. Can it be contended that the statute is the foundation of the principle on which the assured are made parties in equity? To support that argument, the Court must be satisfied that before the statute, bills by underwriters against the assured were not tolerated. There is no authority, however, for such a proposition. The case in Fowler (*Angerstein* v. *Wentworth*, 1 Fowl. 227) only proves that the Court will ascertain for what purpose the action is brought before it will grant discovery.

If the rule contended for on the other side be inflexible, it was unnecessary for Lord Eldon to state any other reasons for not allowing a bill to be filed against a mere witness, than that he is not a party to the record at law. Instead of that, he enters at length into the practice in these cases. It has been said that in *Few* v. *Guppy* (Hare, on Discovery, 124) Lord Lyndhurst laid it down as a clear general proposition that cestui que trusts could not be plaintiffs in an action, and therefore not defendants to a bill of discovery. But, first, it was not necessary in that case to come to that conclusion; and, secondly, if his Lordship's observation is to be treated as a general one, it must be applicable to the case of underwriters, as well as any other. The case itself, however, was peculiar **[665]** in its circumstances. The bill was filed by the cestui que trusts and trustees of a patent, praying for the usual accounts, and an injunction against a party who was alleged to have infringed the patent. A cross-bill of discovery might then have been filed against the trustee and cestui que trusts, but that course was not adopted. A motion was then made for an injunction, and Lord Lyndhurst retained the bill, giving liberty to the plaintiffs to bring an action at law. The action was brought in the name of the trustee only, as having the sole legal interest; and, upon the motion of the defendants at law for the production of the documents, in aid of their defence, the Vice-Chancellor doubted whether the order could be made as against the cestui que trusts. Upon application, however, to Lord Lyndhurst, he ordered the trustee to produce the documents, on the ground that the cestui que trusts having concurred in and adopted the action, which was brought for their benefit, it was not competent for the trustee to object that they were not made parties.

The general rule contended for is not better supported by principle than by authority. Suppose the case of a bond, assigned for valuable consideration, and that after the assignment the assignee receives payment from the debtor, and retains in his possession certain documents from which the fact of payment would appear. Suppose that the assignee, notwithstanding the payment, brings an action on the bond against the debtor, in the name of the assignor; is the debtor not to be at liberty to file his bill against the party claiming to be beneficially entitled, calling upon him to discover those documents by which the payment of the debt could be proved? Even Courts of law will make a distinction between the real and nominal plaintiff, and will not allow the nominal plaintiff to release the action: *Legh* v. *Legh* (1 B. & P. 447), *Anon.* (1 Salk. 260), *Payne* v. *Ro-***[666]***-gers* (1 Doug. 407). Why then, should a Court of equity refuse that discovery, without which the action cannot justly proceed? Even admitting the correctness of the rule contended for, so far as regards a mere witness, will it be said that it is contrary to the practice of a Court of equity to grant such discovery as may be material against a party who is more than a mere witness? In *The Bishop of London* v. *Fytche* (1 Bro. C. C. 96), the bill was filed against both the patron and incumbent. They both demurred to the discovery, and the demurrer was overruled. [The Lord Chief Baron. No objection was made in that case, that the clerk was not a party to the action at law.] No such objection was made. Lord Thurlow also said that that was the first instance of a demurrer for immateriality; and held that where evidence material to a party's defence is sought for, the discovery must be enforced in all cases, unless it would subject the other party to penalties. If it were otherwise, the defendant in equity might plead a legal plea in bar of the bill of discovery, the effect of which would be to transfer the whole question from a Court of law to this Court. But it has been held that a plea of no legal title is not admissible in bar of such a bill: *Hindman* v. *Taylor* (2 Bro. C. C. 7).

The second ground of demurrer is likewise untenable. It is doubtful whether, even if the indorsement had been properly made by Couto, and there had been no duress, it would have passed any interest. This was not the case of one Government succeeding and adopting the acts of another, but excluding that other by violence, and repudiating its acts. Is a Government, so acting, entitled to avail itself of a security given to a former Government in consideration of other securities, and at the same time to repudiate those other securities? If that were the law, Go-**[667]**-vernment cases would differ in this respect from those of individuals; but the case of *The King of Spain* v. *Hullet* (7 Bligh, N. R. 359; 1 Clark & Fin. 333) refutes that proposition. Then, suppose this case—that A., a private individual, by fraud or force obtains possession of a security given to B., another private individual, on which security the party to it will be liable to B., provided B. performs his part of the contract: can it be argued

that A. acquires such an interest in the security as to entitle him to sue upon it? He can only have such an interest (if at all) by adopting the consideration. He cannot repudiate the consideration, and yet sue the party as liable to himself, on the mere ground that he is liable to somebody. The plaintiffs in this case admit their liability, but say that they are not liable to the defendants. They say that Outrequin and Jauge were the parties to whom they gave the bills, and from whom they received the value, and that Outrequin and Jauge were the contractors for the loan, and had a running account with Don Miguel and his Government in respect of these bills. They expressly charge that when Outrequin and Jauge remitted these bills to Portugal, they did not mean to remit or make them payable to any other Government than that of Don Miguel; and, moreover, that Outrequin and Jauge have given them notice not to pay these bills to any person claiming under Donna Maria. Admitting, therefore, their liability to Outrequin and Jauge, or, at all events, that Outrequin and Jauge have an interest in the bills sufficient to warn them against paying the money due upon those bills, the plaintiffs nevertheless contend that the defendants are not entitled to receive that money.

Mr. Cresswell, in reply. Outrequin and Jauge were no more interested in these securities than consignees are interested in goods which are consigned to them for sale, **[668]** with directions to invest the proceeds, and remit them to the consignor. There is no allegation in the bill that they were contractors for the loan, but only that they were employed to regulate it for Don Miguel. There are, however, allegations which strongly tend to shew that the price which they had given for the bills were repaid to them by means of the negotiation of the bonds. The circumstance that they themselves subscribed part of the money will not alter their negotiation. It is not stated that any part of the money was specifically appropriated to the purchase of these bills. They were mere agents, who had no interest in the question, and the notices which they have given, not on their own behalf, but on that of Don Miguel, prove that fact. In the case put by your Lordship of a bill remitted to a steward on his master's account, and indorsed by the steward after his discharge, it might certainly be asked, in an action against the acceptor, what authority the steward had to indorse. The only mode of deciding that question here is by determining whether Don Miguel or Donna Maria is entitled to these bills; and your Lordship will take upon you to say whether a Court of this country will try that question. [The Lord Chief Baron. Donna Maria may be Queen of Portugal, and yet not entitled to recover on these bills.] She is entitled to recover, unless it can be shewn, which it is not, that Couto indorsed these bills unlawfully. They belong to the Government of Portugal, and not to Don Miguel personally. The nature of the bonds was to secure certain payments by the Government. They were the consideration for these bills; the proceeds of the bills must belong to that Government from whom the consideration moved, whether Don Miguel or Donna Maria be at its head. [The Lord Chief Baron. If the Queen does not mean to fulfil the contracts of the Government, can she succeed at law?] She has a legal title against the acceptor, there being no failure of consideration as between the **[669]** indorsee and the acceptor. Suppose a party draws a bill on A. in favour of B., in consideration of a bond given to a third person, and A. accepts the bill: if the payee indorses it, although the obligor of the bond should afterwards become insolvent, or say he will not pay it, that will afford no defence to the acceptor in an action on the bill by the holder. An acceptor who has had value cannot take advantage of such a circumstance.

The object of a bill for discovery being to gain evidence, the plaintiffs should have come into this Court under circumstances which would have enabled them to read the answer of the Queen of Portugal against Soares in the action at law. They, however, state no facts entitling them to that advantage: and hence this case is distinguishable from that of *The Bishop of London* v. *Fytche* (1 Bro. C. C. 96). There the patron declared on his presentation of a particular clerk. He therefore identified himself as to that presentation with the clerk. There is no parallel connexion between the defendants to this bill. Besides, there, both the parties demurred; the plaintiff at law thereby admitting the truth of the charges in the bill. Here, the plaintiff at law does not demur, and, consequently, makes no such admission. The case of *Wych* v. *Meal* (3 P. W. 310), which has likewise been cited in support of the first ground of demurrer, was a bill for relief and not discovery, or the demurrer would have been allowed. The true reason for making the officers of corporations defendants

to bills in equity is, that a town clerk, or other responsible officer, is so much the agent of the corporation that all his acts would be evidence against them. There is no case, however, which decides that an agent of a corporation may, in all cases, be made a defendant to a mere bill for discovery: *How* v. *Best* (5 Madd. 19). The case of *The* [670] *King of Spain* v. *Hullett* (7 Bligh, N. R. 359; Clark & Fin. 333) has no application here, having reference only to a personal contract made by a foreign prince.

Jan. 19th, 1836.—THE LORD CHIEF BARON. I thought it my duty, before I came to a final conclusion upon the question in this case, to look at every authority that was cited on either side, and to review the subject with as much attention as I was able to bestow upon it. I must own that, in the outset, considering this case on principle, I should have had very little difficulty in deciding it; but as it appeared to me of great importance, both as to the rule involved in it, and its consequences to individuals, the sum of money in controversy being large, I thought it would not become me to trust to any principles, either of law or equity, which I might have previously conceived upon the subject, without further investigation.

This is a bill filed against the defendant Soares and the Queen of Portugal for a discovery in aid of the defence to an action at law, brought by Soares against the plaintiffs in equity as acceptors of certain bills of exchange. On a former occasion an application was made to me, on behalf of the plaintiffs, upon an affidavit that Soares was the agent of the Queen of Portugal, and that he brought the action, not for his own benefit, but exclusively for hers, and had himself no claim whatever upon the bills which were the subject of the action; and the affidavit representing such circumstances suggested that the defence which the defendants at law were advised to make, had rendered it very desirable, if not necessary, that the principal party concerned should disclose certain facts. Upon that application, which was ex parte, I made an order that the service of the subpœna upon the agent of the Queen of Portugal should be deemed good service [671] upon her. I did not mean by that to anticipate any decision which might be made either as to the liability of the Queen of Portugal to become amenable to any process of any Court of judicature in this country, or to decide that a bill for discovery in this particular case would lie against her. I thought it not expedient, upon that preliminary application, to decide those questions at once in the negative, and thereby prevent all further inquiry; being, moreover, strongly inclined to think that, if the facts stated were true, on principle, and for the furtherance of justice, she ought to be compelled to answer. An application was afterwards made to set that order aside; and upon that occasion Mr. Soares did not deny that, in bringing the action against the bankers, he acted exclusively as the agent of the Queen of Portugal. The fact, therefore, being established on both sides, that he did not prosecute the action suo jure, or for his own purposes, but for the mere purpose of handing the money to the Queen, I still thought, though I was not bound to decide finally or peremptorily on the subject, that, in this particular case, the Queen ought to make the answer; and I therefore refused the application. The order remaining in force, the Queen of Portugal put in a demurrer to the bill; and although a great part of the argument which was addressed to me upon the demurrer had been anticipated, still the questions, whether she was amenable at all to a court of justice in this country in respect of her regal capacity, or whether in this particular case she ought to be called upon to answer, were questions which might very properly be opened upon demurrer. That demurrer was argued with great ability; and in stating that my original opinion has not been shaken (for I must still adhere to that opinion), I am desirous of laying before the bar the reasons that induce me to support the conclusion to which I originally came.

The bill states that the bills of exchange were accepted [672] by the bankers. That the money lodged with them to pay these bills of exchange came from a Mr. Richardson. That he was the agent of Messrs. Outrequin & Jauge. That Messrs. Outrequin & Jauge were employed for the purpose of raising a sum of money by way of loan for Don Miguel, who was de facto King of Portugal at the time. That Don Miguel had given certain bonds, the effect of which was to pledge the Government of Portugal, as far as he could pledge it, to pay the interest and principal of that loan. That some of these bonds were handed over by Messrs. Outrequin & Jauge to certain persons, who paid for them; that others of them they kept themselves, making themselves not only agents, but parties, and as it were subscribers; and that with the

funds which they had obtained from the persons to whom they handed the bonds, together with their own funds in part, they had purchased the bills of exchange as a means of making the remittances to Portugal. That the bills of exchange were given in sets or parts. That one part was transmitted to London for acceptance, the bills being drawn upon London, and the other part transmitted to Lisbon, indorsed, "To the Royal Treasury of Lisbon, on account of the Royal Loan of Portugal," or some words to that effect, denoting the purpose of the indorsement, and the fund to which they were to be applied. The bill further states that, about the period when the bills of exchange had arrived in Portugal, Don Miguel had abandoned Lisbon, and that possession had been taken of it by Don Pedro, on behalf of his daughter, the present Queen of Portugal. It further suggests that, the loan being contracted apparently for the purpose of maintaining the power of Don Miguel, Don Pedro had published a proclamation, in which he gave notice that it was not his intention to ratify that proceeding; intimating in effect that when his daughter became possessed of the **[673]** kingdom of Portugal, the mortgage or pledge which was made by the then de facto King of Portugal would not be regarded by his successor. It farther states that, upon the arrival of Don Pedro and Donna Maria at Lisbon, a gentleman of the name of Couto, the royal treasurer under the appointment of Don Miguel, had been dismissed from his office, and a commission had been appointed to conduct the affairs of the Treasury. It suggests that about that period the bills were lying in his office, with no indorsement upon them. These proceedings, I think, took place between the 31st of July and the 7th of August. It is suggested that Don Pedro or his agents discovered that these bills were remaining unappropriated in the actual possession of Couto; and that they, either by fraud or force, persuaded or compelled Couto to indorse the bills, for the purpose of transmitting them to the agent of Donna Maria in London, who is the plaintiff at law, and the defendant in this suit. It then suggests other proceedings by Don Pedro of an official nature, and I may say of a legislative nature also (because before the assembling of the Cortes of that country, the legislative as well as the executive power was vested in the sovereign), by which he again decreed that the loan should not be respected, and that the obligations entered into by Don Miguel were utterly void. I must take the bill, therefore, as making these allegations—that, at the time when these bills of exchange arrived in Portugal, the person who had been the official treasurer of Don Miguel was dispossessed of his office; that Don Miguel was driven from his kingdom, and unable to comply with his engagements; and that Donna Maria, who succeeded him, although she was able, was unwilling, and determined not to comply with them. So that the consequence would be, that if the amount of these bills were recovered now, the fund would be paid over to persons who had determined not to pay any consideration for them, or to comply with **[674]** the consideration for which the bills were given. This is the state of facts as raised by the bill.

To this bill there is a demurrer, and the demurrer is argued upon two grounds. The first ground is that a bill for discovery to aid a proceeding at law, or a defence at law, cannot be sustained against any other person than the person who is either the defendant at law or the plaintiff at law; that if an action is pending, the parties to the bill for discovery must be the same as are parties to the record at law; and that if an action is not pending, but about to be brought, the plaintiff in equity must confine it to those persons against whom he is about to bring his action. These were the maxims laid down in argument, and which were said to be so well understood in a Court of equity as to admit of no dispute. The second ground of argument was that the Queen of Portugal ought not to be called on to make an answer to this inquiry, inasmuch as the inquiry itself was unimportant; that it furnished no defence whatever to the defendant at law; that it could not be made use of in evidence, and that, therefore, on the ground of want of materiality, the bill for discovery should be dismissed.

With respect to the first ground, I entertained great anxiety, because the practice of the profession to which I have been most accustomed having been that of a Court of law, I felt that I ought to be cautious how, in opposition to the emphatic declarations of gentlemen of eminence at the equity bar, I ventured to dispute upon principle, and, as it were, upon my own authority, what was said to be a maxim of Courts of equity. I have looked through all the text-writers on the subject and I find no such maxim. There is no one who can be called a text-writer (and there are many upon the practice and principles of equity) in which I can find it laid down as a rule that

you must confine the inquiry to those who are parties at law. A practice, no doubt, might obtain so invariably, **[675]** that every text-writer on the subject might take it for granted, and therefore omit the mention of it; I am aware, for instance, that a foreigner coming to observe the proceedings in courts of law in England has, in compiling a treatise on the subject, embodied in his book a number of points of practice which nobody ever thought of publishing before. That certainly is possible; but I have looked into the cases to see if I could find any dictum of any Judge in equity in which the maxim contended for has been laid down, and I find none, excepting in one case, which is contained in a very intelligent modern work—I mean Mr. Hare's work on Discovery (p. 124).

Before I advert to that case I will consider the other authorities on the subject. I must own that, upon a due consideration of them all, they seem to me not only to establish no such principle, but to establish a principle altogether distinguishable from it, and which goes the full length of supporting the decision which I am about to pronounce in this case. In the case of *Balch* v. *Wastall* (1 P. W. 445) it is reported to have been said by Mr. Vernon, in argument, that Lord Nottingham had decided that where a plaintiff had recovered judgment in an action of debt against an executor, and had issued a fieri facias upon that judgment, to which the sheriff had returned nulla bona—that in that case the plaintiff had a right to file a bill of discovery against the defendant, and also against any other person whom he had reason to suspect, and could shew in his bill probable reason to conclude, had concealed the assets of the deceased, for the purpose of discovering those assets in order to make them liable to his judgment. Now that undoubtedly is stated only in argument, but it is stated on the authority of Lord Nottingham. That case, or rather dictum, I believe, was not adverted to in argument before me; but, as far as it goes, it is against the maxim insisted upon.

[676] In the case of *Wych* v. *Meal* (3 P. W. 310), which was cited in argument, a bill was filed against the East India Company and their secretary for discovery; and the question was raised whether, as secretary, he was not merely a witness, without any such interest of his own as could sustain a bill of discovery against him. However, the demurrer to that bill was overruled, and the reason given by the Chancellor was that, as a corporation did not answer on oath, and could not be compelled on oath to produce documents, the consequence would be, that unless the plaintiff could have the oath of the secretary, who was to be presumed, as their officer, to have access to these documents, he would be without remedy. That case, therefore, establishes this principle, that even where a party has no interest, yet if it be necessary to the ends of justice that he should be liable to make discovery, a Court of equity will compel him to do so; the general rule at the same time being admitted that you cannot file such a bill except against a party who is interested.

There is another case upon the same subject; *Moodalay* v. *Morton* (1 Bro. C. C. 469). That was a bill against the East India Company, and Morton their secretary, for a commission to examine witnesses, and a discovery by whom and under what authority certain possessions which the plaintiff had in the East Indies, under what was called a cowl or lease of the East India Company, had been taken from him, he intending to bring an action against the Company for the damage done to him, but wishing for a discovery, in the meantime, to ascertain how and by whose authority it was done, who were the individuals who had been employed to do it, and under what sanction they did it. To this bill there was a demurrer; and we may infer from the date of that case that the Judge who decided that demurrer was Lord Kenyon, who was Master of the Rolls in 1784. **[677]** Lord Kenyon overruled the demurrer, and he stated that it was proper that the secretary should make answer; and then, upon an objection that no action had been brought, and therefore no bill of discovery could be filed, he makes this answer, namely, that actions against the East India Company, they being a corporation, must be by original; and the original writ in an action upon the case must set forth the whole grounds of the action, exactly in the same form as in a declaration. That most eminent Judge was a practised common lawyer, as well as a practised lawyer in equity; he knew perfectly well the distinction between original writs in certain forms of action, where the writs are merely technical, as in debt or covenant, and original writs in actions on the case (because in actions upon the case, which were brought by original formerly, before the late alterations in process, the plaintiff was bound to set out the whole of his claim in the original writ

as well as in the declaration); and Lord Kenyon says, in answer to that argument, he cannot bring his action, for he must sue by original; and unless he has the discovery he seeks, he cannot tell even how to frame his writ. His Lordship therefore overruled that objection.

A case was referred to from Fowler's Practice in the Court of Exchequer; that of *Angerstein* v. *Wentworth* (1 Fowler, 227). It was a case of this sort: A writ had been sued out by a person of the name of Wentworth, but nothing had been done upon it: it was a mere writ sued out of this Court, and served upon certain underwriters. An application was then made, upon oath that Wentworth was a mere agent, and intended to bring an action on a policy, that he might accept a subpœna to appear for the party interested, who was represented to be living in one of the South American provinces, and against whom the bill was to be filed for discovery. The Court refused the motion, be-**[678]**-cause no declaration was yet filed. Now, that short note has been made considerable use of in the argument for the defendant. Why should the Court, it was contended, have refused the application in that case, unless they meant to say you can have no discovery except against a party to the record at law? Now, it appears to me that the use made of that short note is not justified by the case itself. In point of fact, if the party suing had been the party interested, one cannot say the Court would not have done exactly the same thing. All that had been done was to sue out a writ. The party might never proceed on that writ at all. If he had come to ask for assistance, in order to frame his declaration, that would have been another case; but the defendant in such a case comes quia timet; he cannot tell what the action is to be against him—he cannot tell whether any action will be brought at all. The mere suing out of the writ does not put him to any cost or expense; he cannot tell what is to be done upon it, and there may be very good reason therefore for saying, you come too early to institute any sort of proceeding here. It is not because a man has sued out a writ, that we must necessarily presume he means to follow it up. If he declares upon it you will be in good time for your bill; if he does not follow it up, you may enter an appearance—he will discontinue it, and then you will have your costs at law. Why should you put the machinery of the Court of equity in motion before you are really hurt or threatened? It appears to me that this might be a good reason for refusing an application of that sort, without involving the supposed principle that there must be a party on the record at law before you can find out against whom to file the bill of discovery.

Another case cited for the defendant was that of *Shackell* v. *Macaulay* (2 Sim. & Stu. 79). Upon looking at that case, it does **[679]** not appear to me to have any application. That was a case in which two actions had been brought at law by Mr. Macaulay for two different libels, which related to transactions in two different parts of the world. Mr. Shackell filed one bill only for a discovery, and for a commission to examine witnesses in both causes; and the difficulty there was how he could embrace these two causes (which were quite separate causes of action, and the evidence as to which was to be taken from separate parts of the world) in one bill of discovery, seeking one commission, because there happened to be the same parties in both causes. The very judgment of the Vice-Chancellor in dismissing the bill was, that supposing he granted the commission, the commissioners might examine witnesses in one cause in Asia, we will suppose, and that cause might be ready for trial, but yet you could not try it until the commission was completed in Africa, where another set of witnesses were to be examined, and that consequently it was absurd to tie up the plaintiff at law in that sort of proceeding: he ought, in fact, to have filed separate bills, and have sought separate commissions in each case. On that ground, and on that ground alone, the bill was dismissed; but whether the bill was dismissed or allowed, I do not see that it has any application to this case.

The case of *The Mayor and Corporation of London* v. *Levy* (8 Ves. 398) was one in which the Mayor and Corporation of London had filed a bill of discovery against some half dozen persons, in order to discover some fraud that was supposed to have been committed by them in respect of some scavage dues, and they stated that the defendants or some of them had committed the fraud, but the only case they stated applied to two or three of them, and one of them, according to their own statement, had nothing at all to do with it. He happened to be the partner of one **[680]** of the men whom they had suggested to have committed the fraud, but not a fraud in respect of the partnership, or which had anything to do with the partnership transactions.

There was a general demurrer by all the parties, and that demurrer was allowed, upon the ground that the plaintiffs did not make out a definite case against any of them, but stated it too generally, and with too much uncertainty, and as against this one in particular they made no case at all—but because he happened to be the partner of a man who had committed, in a way wholly distinct from the partnership, some supposed fraud, he was made a defendant in a bill of discovery; whereas, if he knew anything, it was merely as a witness; and the principle was recognised that, except where justice requires it, you cannot make a mere witness without interest a party to a bill of discovery; though in a case where justice requires it, as in the case of a secretary, or the town clerk of a corporation, or the secretary to a company which was a corporation, you may do so, but in no other. That was the ground on which the bill in that case failed.

Now, then, let us see what the cases are that reflect some light on the other side of the question. The case of *Plummer* v. *May* (1 Ves. sen. 426) was before Lord Hardwicke, who has there laid down a principle which appears to me, I own, to run through all the subsequent cases, and to be the only principle that is consistent with common sense. That was a bill filed by an heir-at-law against the devisee under the will, and against the witnesses to the will, for a discovery of the circumstances under which it was executed, the bill being, as far as appears from the case, not for relief, but for a discovery of evidence only. A demurrer was put into that bill; and the ground of demurrer was that May, one of the defendants, was a mere witness, and that [681] the party could not file a bill against a mere witness whose evidence he might have at the trial of any action of ejectment which he might bring to establish his right as heir-at-law. My Lord Hardwicke looks at the bill, and says that the objection would have been just if, upon the bill, May appeared to be nothing more than a mere witness; but the bill charged that he had some interest, and such an interest as, supposing it was a bill for relief, might make him an accounting party. And then he states that where the bill charges a party with having an interest, and the defendant demurs, that demurrer admits the interest, and therefore the discovery will lie. May's proper objection, he said, would be by a plea. If he had pleaded that he had no interest whatsoever, and that plea had been submitted to, then the bill, as to him, would have been dismissed. That most eminent Judge therefore established a distinction, which appears to be a just distinction—that where a party possesses an interest which is charged in the bill, although he may not be a defendant at law, yet against him you may ask a discovery. Now, that case of *Plummer* v. *May* has been stretched, as Lord Eldon said, in practice, rather beyond what Lord Hardwicke intended; for you have some instances of bills filed against the devisees in wills, and against the witnesses also, where there was no interest suggested. A strange reason has been given for it, namely, that Courts of equity will assume a penal jurisdiction, and make these parties pay costs for the fraud they were guilty of. But I do not apprehend that to be the ground. If this sort of bill can be supported upon any ground it must be on this, that the bill charges fraud and collusion, and makes these witnesses participators in the conspiracy or fraud to fabricate the will, and therefore supposes or imputes some identity of interest with the person claiming under the will. In such a case it is not enough to say that a party who is made a party to a bill of discovery may be liable to a subpœna, [682] and be brought to give evidence in a Court of justice, himself being one of the fabricators of the fraud: on the contrary, justice may require a full disclosure of the facts by the parties to the fraud, before the action at law proceeds further. If they deny all interest and all conspiracy by plea, that gives rise to another question: but if the party who is charged with fraud and conspiracy is called upon to make a disclosure for the purpose of aiding the party at law, and he admits it by demurrer, it may then be a considerable question whether that is not such a species of participation—not pecuniary interest undoubtedly—but such a species of participation in some sort of interest with the devisees as to make him liable to a bill of discovery in a Court of equity. But, however, I am not bound to go that length; I am only suggesting that *Plummer* v. *May* has been made use of beyond the original intention of it, in several instances which are to be found on the records of Courts of equity in making mere witnesses to a will parties to a bill of discovery. An instance occurred very recently within my own knowledge, where some disadvantage resulted by getting evidence of the witnesses beforehand for the purpose of calling others to contradict them on the trial. To return to the case of

Plummer v. *May*, it is clear that Lord Hardwicke, acting upon principle, has established the distinction, that it is not enough to say, in order to dismiss the bill, that a party may be a witness, provided it appears upon the face of the bill that he has some interest which upon his demurrer he admits: in that case a bill of discovery may be sustained against him.

There was a subsequent case cited at the bar, which is worthy the greatest attention; that of *Fenton* v. *Hughes* (7 Ves. 287). A person of the name of Hughes had brought a qui tam action upon the statute of usury against Fenton to recover penalties, upon which Fenton files his bill of discovery **[683]** against Hughes and Bate; and he charges in the bill that the action was commenced by Hughes at the instance of Bate; and then he sets forth certain transactions respecting bills of exchange, and the discounting of bills of exchange and matters of that sort, in which Bate and another person had been concerned with him; but he does not set forth any species of interest which Bate had in the suit; excepting that it was commenced at his instance. To this bill Bate demurred. Now let us consider for a moment what the result of this statement would be. The action on the statute of usury is brought for the benefit of the plaintiff who brings the action. The informer has nothing at all to do with it; he may be a witness for the plaintiff or for the defendant. He has no interest whatever in it, excepting by some contract he might make with the plaintiff to divide. If he did that, he would be liable to an objection as a witness upon the voir dire, if called by the plaintiff; because, if he admitted he was to receive the money sought for, or had authorized the attorney to bring the action at his cost, that interest would exclude his testimony for the plaintiff; but in no way could he have an interest to preclude his being a witness for the defendant. The case was argued before my Lord Eldon. It is very singular that this peremptory and inexorable rule, which has been so much relied upon in argument before me, was not suggested—that Bate was not a party to the record at law. Lord Eldon took time to consider of it, for I see by the mode in which it is reported that he gave his judgment on a subsequent day. His judgment is very elaborate. I think I may safely appeal to the gentlemen whom I now have the honour of addressing whether any judge ever sat in any Court, whose mind was more full of principles, however narrow the lines of his decisions might sometimes be, who yet took a more enlarged and discursive view of the whole of the case than my Lord Eldon. Lord Eldon was not a case lawyer only. He was deeply imbued with the prin-**[684]**-ciples both of common law and of equity; and any judgment of his, whatever effect it might have as a precedent, perhaps somewhat narrowed by his great anxiety to individualise cases, yet is a very instructive judgment to those who wish to learn. I well remember when that noble and learned Lord first sat as a judge at common law, that the impression which he made upon my mind when he summed up a case to the jury was, that if in some cases he made distinctions too numerous and too refined, which might perhaps perplex a jury not accustomed to legal discrimination, he was a most admirable judge, in all cases, for illustrating every point and giving due effect to every argument suggested by the counsel or by the case before him, on the one side and on the other. I cannot doubt that if such a rule had existed, it would not have been overlooked by him; and he would not have resorted to any of the other arguments which he has adopted for the purpose of allowing that demurrer. What is his judgment? He says that he has looked with great anxiety into the bill, to see if he could discover any sort of interest that Bate had to make him any thing but a witness; and he goes through the topics to shew that Bate was clearly a witness at law for the party who had filed that bill; that if he could not be a witness on the other side, by reason of any interest yet undiscovered, that was for the advantage of the plaintiff in equity; and he comes to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him. Now, if the bill had stated that the plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff on the record, I should have thought it probable, from Lord Eldon's judgment, that he would not have allowed the demurrer. But, on the grounds which I have already stated, he was of opinion that the bill could not be sustained. **[685]** Is not the distinction, therefore, clearly drawn, as Lord Hardwicke has drawn it in *Plummer* v. *May*, though the decision was the other way? In *Plummer* v. *May* the demurrer was overruled by Lord Hardwicke, because an interest was charged and admitted by the demurrer. In *Fenton* v. *Hughes*

the demurrer was allowed by Lord Eldon, and the bill dismissed, because no interest was charged, and the defendant appeared only as a witness. Lord Eldon alludes to the case of *Plummer* v. *May*, and states that, unless it appeared that the party had an interest, that judgment of Lord Hardwicke could not be supported.

Now, looking through the various cases down to a late period, I am still at a loss to see anything else than a laboured distinction in what is alleged to give a party an interest, or no interest, to sustain a bill of discovery. I see nothing whatever to warrant the maxim suggested as the foundation of this argument. There is a case, however, which appears to me to decide the very question: that is the case of *The Bishop of London* v. *Fytche and Eyre* (1 Bro. C. C. 96). In that case Mr. Fytche, who was the owner of the advowson of a living at Woodham Walter, in Essex, brought an action of quare impedit against the bishop, for not admitting his clerk, Mr. Eyre. The bishop filed a bill of discovery against both Fytche and Eyre—that is to say, against both the owner of the advowson and the clerk—suggesting that a bond had been given to place Eyre under an obligation of resigning at the request of the patron; and he required a discovery of that fact. That bill was demurred to before Lord Thurlow; and the most eminent counsel of the Courts of equity of that time were engaged on both sides. Their arguments are given in the report, and it is very singular that none of them suggested that Eyre was not a party to the record, and that the learned Judge who decided the case never noticed that circumstance as an **[686]** objection. The question was—whether it was not a charge of simony? Lord Kenyon was then himself at the bar, and argued the case before the House of Lords afterwards on appeal. He was counsel for Eyre, and made two objections: first, that the discovery sought was immaterial; and, secondly, that, if material, it must be because the contract was simoniacal, and that it was contrary to the rules of equity to compel a man by means of a bill of discovery to confess a crime. Lord Thurlow overruled both objections: he stated, as to the last, that he did not see the consequence so necessary. In point of fact, Lord Thurlow was right. If you come to look at the grounds in which a party can be charged penally with simony, he must have done something more than merely give a bond to resign. But, however, whether he was right or wrong in that, it was the ground of his decision, that there was no necessary punishable criminality to be inferred from it. But, as to the other objection, he says—"It is the first time I ever heard want of materiality alleged as a ground of demurrer to a bill of discovery. The plaintiff is the best judge whether it is material or not; he pays the expenses of it, and if he thinks it is material, why should I decide against him? I must be satisfied that it is perfectly frivolous before I can dismiss his bill on that ground." But an attempt is made to answer the case of *The Bishop of London* v. *Fytche*, by stating that the clerk is necessarily a party interested, and that the complaint in the quare impedit is for not admitting that clerk, and therefore in some sort he is a party to the record. That is an attempt, ingeniously made in argument by Mr. Cresswell, which appears to me to have no just foundation. It was the patron who brought the quare impedit against the bishop for not admitting his clerk—that was, to try his right to the presentation. It does not follow when the patron's right is established, and judgment is given against the bishop, that the **[687]** patron must present the same clerk again: he may present another. Suppose the bishop's defence is (as in that case it was) that the clerk presented is an improper man—that he has been guilty of simony, and therefore ought not to be presented—the bishop has a right to judge of the character and fitness of the person whom the patron presents; and if his judgment is a correct and proper judgment, though the right of the patron be not disputed, yet the particular case must be decided in favour of the bishop; and, if so, the patron may present somebody else. If it is decided in favour of the patron, he is not bound to present the same clerk; and, therefore, that clerk is no more a party to the record than any person whose name is introduced historically or incidentally upon the record. I am not sure, except for the certainty which the common law requires, that the very mention of the name of the clerk was necessary: for, if the patron had stated in general terms that he had presented as clerk a fit and proper person, and that the bishop would not admit him, and that the bishop prevented him taking possession and enjoying the living, by refusing to induct him, I apprehend that would be sufficient; it would certainly be sufficient after a verdict. From this it seems clear that the clerk was no more a party to the record, from his name being inserted in the declaration, than any individual is a party whose name is found in an allegation of special damages by reason of the loss

of his custom and trade. Therefore, the case of *The Bishop of London* v. *Fytche* is a direct decision that where a party is interested in the subject matter of the suit, a bill of discovery may be sustained against him, though not a party to the record at law, as well as against an individual who is a party on that record.

But now we come to the numerous class of admitted cases; namely, of bills of discovery against the assured, where the agent brings the action upon a policy. It is ad-**[688]**-mitted freely that in those cases it has been the constant practice, both in this Court and the Court of Chancery, to allow bills of discovery to be filed, not only against the plaintiff in the action, but also against the assured, on whose behalf the action at law is brought in the name of the agent. That practice being admitted, it is endeavoured to withdraw it from the support of the bill in this case, by stating that the party named upon the record at law as a party interested is substantially the plaintiff on the record. That is to me a new proposition. There is not the least doubt that at common law the party assured, inasmuch as he is not the plaintiff on the record, may be called as a witness for the defendant, and cannot refuse to be examined: upon that there is no question. For the plaintiff he cannot be called; for if on the voir dire he admits he is a party interested in the suit, he must be rejected; but, if the defendant calls him, the defendant may waive his objection to his having an interest, and examine him. Upon what ground is it then that he is made a party to a bill of discovery? On the ground of his being a party interested, and upon no other ground. He is a party interested for whose benefit the action is wholly or partly brought, and therefore a Court of equity exercises jurisdiction over him, and compels him to disclose the truth in order to aid the party against whom he seeks to recover a verdict. But it is not true that the case where the assured is named on the record is the only case in which a bill in equity has been entertained for discovery. The necessity of his being named on the record arises only from the stat. 19 Geo. 2, c. 37, which makes policies, interest or no interest, illegal; but that statute excepts all policies on foreign vessels (see sect. 3); and, therefore, if the action is brought on a policy effected on a vessel not belonging to any of His Majesty's subjects, the allegation of interest not being necessary, because the policy may be interest or no interest, **[689]** the declaration will be good without having any such party on the record as the party assured is alleged to be in ordinary cases. Well, what is the consequence? It does not follow that because the insurance is upon a foreign vessel, the underwriter has not open to him all or many at least of the ordinary objections. It is said by Lord Mansfield that, on a policy interest or no interest, the loss of the vessel on the voyage was always contemplated—that is his dictum. But suppose a foreign vessel is insured, interest or no interest. One of the causes of loss against which the underwriter insures is barratry. Now, barratry cannot be committed, if the owner consents to, or is privy with, the captain or the crew, in committing that fraud, and therefore it is a defence to the underwriter where barratry is charged, to shew that the owner was concurring in the act. Suppose a policy on a foreign vessel, and that the defence of the underwriter is—that the owner of that vessel was privy to the intention of the captain to scuttle and to sink her; you need not allege his interest in the policy, you may simply say it was a foreign vessel; but if the underwriter discovers who was the owner, and has reason to think that he caused the loss, he has a clear right to set up that defence. It is not very long since we had a trial at Guildhall respecting an owner in Portugal of a vessel that had been sacrificed, as it was thought, purposely to defraud the underwriters. I rather think there was a bill in equity in that case; but at all events, I am sure that a bill might have been justly maintained for a discovery.(*a*) Now, if in that case it had been said that you could not file a bill in equity against the owners because they were not parties on the record, the consequence would have been a complete failure of justice. In that **[690]** very case some most important frauds were discovered, which not only made a defence to the action on the policy, but afterwards became the subject of a very serious prosecution and punishment of the parties to that fraud. It appears to me, therefore, that the ground insisted on—that the cases of policies are excepted cases—is a mistaken ground; that, on the contrary, they are not excepted cases, but fall within the general rule that where a party interested is charged in a bill of discovery and called on to

(*a*) It was here observed at the bar that a bill in equity had been filed in that case. It was the case of the "Vianna."

disclose, he is bound to do so; and that a Court of equity will compel him to do so, though he is not a party on the record.

There are a great variety of cases well known to common lawyers, in which an agent may maintain an action in his own name in respect of his being a party to the contract, or the principal may maintain an action in his own name in respect of his interest. Now, such is the case (of very ordinary occurrence) of actions on bills of lading for freight. The captain may maintain an action in his own name for the freight as being a party to the contract; the owner in respect of being the owner, and entitled to receive the money. Now, I will put this case: Suppose the owner of a foreign ship, the captain of which has signed the bills of lading, being abroad, sells the cargo (being the owner both of the cargo and the vessel); that the party has paid him for the freight, the contract being that the owner is to take the freight in the price of the goods, and not to charge freight; and that when the captain comes here, he nevertheless brings an action for the freight—why, if you file a bill of discovery against the captain, he can say nothing but that he has signed the bills of lading, that the defendant is the consignee, and that he has taken the goods on the implied undertaking that he would pay the freight: in what way then is the defendant to accomplish the justice of the case if he may not have a bill of discovery against the **[691]** owner and an injunction? He cannot subpœna him as a witness, because he is not amenable to a subpœna. It is said he may be examined by a commission, but no foreign Court of justice that I know of will compel one of its subjects to appear before a commission to examine witnesses issued from another country. Supposing he did not choose to appear and be examined; I think that counsel would be driven to say—then the Court has no remedy but to grant an injunction against the plaintiff at law until the witness does appear. Surely if you could grant an injunction against proceeding in the suit, because the party who is the real plaintiff at law will not come in and be examined under a commission as a witness, on the same principle you may file a bill of discovery and grant an injunction till he makes answer to that bill.

The case of an action on a policy of insurance by the agent, and a bill of discovery against the principal, comes precisely within the range of cases to which I have adverted; but that is only one instance. There are various other cases, in which an agent may bring an action by reason of his being a party to the contract, and in which, I should conceive, on principle, that if it be admitted that he brings the action for his principal who is not a party on the record, a Court of equity will entertain jurisdiction by compelling a discovery against the plaintiff and that principal, who is the party interested. On these grounds, it appears to me that the first objection fails. I wish, however, the grounds to be distinctly stated on which I sustain this bill of discovery against this objection: namely, that in all cases a plaintiff may file a bill of discovery in a Court of equity, not only against the plaintiff on the record at law, but against the principal on whose behalf that plaintiff sues, by reason of the interest which he has, and which makes him directly amenable for the purpose of making a discovery, and enables the defendant at law to read his answer in evidence. A plaintiff or defendant **[692]** may call a person interested to prove a case against himself undoubtedly; but it is very fit that he should know beforehand something of what that person may say. In the case before Lord Kenyon, his Lordship said that he must know something of the case which he wanted to discover before he could frame his original writ. So I say, that a bill of discovery is, in nine cases out of ten, not so useful for the purpose of reading the answer in a Court of law, as for the purpose of informing the plaintiff in equity what the parties interested in the suit mean to deny or to admit, and in what manner they seek to put their case. In the present case it is admitted by the demurrer that the action is brought on behalf of the Queen of Portugal, exclusively for the purpose of placing at her own disposal funds which, upon the suggestion of the bill, I assume for the purpose of this argument, do not belong to her; funds, which in equity and good conscience she ought not to take; and that the plaintiff on the record is nothing more than her agent, having no scintilla of interest whatever, not even paying the costs of the suit he has brought, against which she indemnifies him. Under these circumstances, it appears to me, that unless that party living abroad, not amenable to the jurisdiction of this Court, and not liable by any process to be compelled to answer under a commission to examine witnesses, could be made, by the process of injunction and discovery known in Courts of equity, to make a disclosure of facts, of which Mr. Soares can

know nothing and on his oath can say nothing of his own knowledge, it would be a failure of substantial justice. Now a Court of equity entertains that jurisdiction: which, whether it has existed from time immemorial or not, has at least been long sanctioned by time, of compelling a discovery and granting an injunction, undoubtedly exercising a most useful and beneficial process of compelling parties to do justice who seek justice. Upon these grounds I am of opinion that, on principle and on law, there is no objec-**[693]**-tion to this bill of discovery because one of the defendants is not a party to the record at law.

Now we come to the other ground—that supposing all the facts admitted by the demurrer to be true, they furnish no defence at law; and I am pressed in argument that I must come to the definite conclusion that the plaintiff cannot maintain the action at all, and that the case in the bill is a good defence at law, before I can allow this bill of discovery. It appears to me that there is a fallacy in that argument, and that I am not bound in the present discussion to ascertain the ultimate conclusion to which I should come on the merits. I just now stated Lord Thurlow's opinion in the case of *The Bishop of London* v. *Fytche*. He says he never heard that want of materiality was an objection to a bill of discovery; that the plaintiff is the best judge what use he can make of it, and that it is sufficient if it does not appear to be absolutely frivolous. I, therefore, must say that the proposition as stated is not true, but that the true proposition is this—that provided I can be satisfied definitively that the defence suggested to be made at law is perfectly frivolous, and is set up merely to gain time, and that, all the facts being admitted, I must of necessity conclude, without argument, that upon the very surface they amount to no defence—that in that case I ought not to allow the bill of discovery: but, on the other hand, that it is sufficient to render the bill sustainable if the parties make out a case that is triable—a case that will bear argument. I will not, therefore, upon the facts alleged in this bill of discovery, decide definitively whether they amount to a good defence at law or not. If I see a case of reasonable doubt, I am bound to permit the discovery to go on. Now what is this case? It is alleged that as the bankers received consideration for accepting the bills, they can make no defence. Let us illustrate that shortly. Supposing a man places 100 sovereigns in the Bank of England, and receives for it a 100l. bank **[694]** note. That bank note is a promise to pay on demand to the bearer, which is the same thing as accepting a bill of exchange payable to bearer. If the person making that deposit is robbed of it on the highway, and the robber or his agent brings an action against the Bank of England, may not the Bank of England make a defence? Why, the famous case of *Miller* v. *Race* (1 Burr. 452) established the distinction which has been adopted in the law since, and which has perhaps been pushed to a further extent than the law warrants. It was an action of trover against the Bank of England for impounding a bank note, and the evidence was, that a gentleman sent this bank note by the general post, under cover, directed to a person at Chipping Norton, Oxfordshire; that on the same night the mail was robbed, and the bank note in question taken and carried away by the robber; and that the plaintiff in the cause, who was a publican, in the usual course of business, had given change for it on the following day, not being at all acquainted with the robbery. An attempt was made to defend the Bank of England, on the ground that the original loss of the note by felony tainted the progress of it through all other hands. The case was much discussed at Nisi Prius; it was argued afterwards in the King's Bench; and it has been a leading case on the subject since. Lord Mansfield determined that it was essential for the purpose of securing the circulation of bank notes or promissory notes of that nature, payable to order or bearer, that a plaintiff, who had given a valuable consideration for them without fraud, should be allowed to maintain an action for them, whatever fraud might have been committed with respect to them by others. He admitted that the robber himself could not maintain an action, nor his agent; but he said that Miller might maintain an action: and accordingly the action was successfully maintained **[695]** against the Bank of England. I should think that the principle is as familiar as any thing that can be stated, that the acceptor of a bill of exchange has a right to put the party who brings the action to the proof that he is the legal owner of the bill. The moment that is done, his defence is undoubtedly at an end. The modern cases have gone very far in this respect. Lord Tenterden, in two or three cases, went the length of deciding that the acceptor of a bill of exchange might even make a defence

against the party who had given consideration, provided it was proved that he gave that consideration under circumstances of such suspicion and of so doubtful a character, as to make it prejudicial to the public interest that a man should so deal. In one of the cases,(*a*) where a bill of exchange was stolen from a letter in the post-office, and within an hour or two, at an early hour in the morning, was carried to a discounter of bills of exchange in Lombard Street, whose clerk discounted it, and made no inquiry at all, did not ask the address of the holder, or of a single name upon it, Lord Tenterden left it to the jury whether or not the habit of discounting bills in that way at an unusual hour, without inquiry, was not very much like that of receiving stolen goods; and the jury found that the want of caution by the party who so took the bills deprived him of the right of maintaining an action. Subsequent cases (*b*) have thrown some doubt upon the length to which that learned Judge went; but the principle is not disputed, that if the party can in any way be suspected of being privy to the fraud by which the bill was obtained, the giving a consideration for it in order to enable the party to bring the action is not enough for that purpose; and therefore the acceptor has a right to defend **[696]** himself by shewing that the party who brings the action has no property in the bill, but has obtained it by felony or by fraud; that he is not the true owner, and that he, the acceptor, ought to be liable to another. But, admitting that he cannot prove that he is liable to another specifically, is that a reason why he should pay it? Certainly not. Suppose the bill of exchange to have been stolen from a person unknown, and that there is clear evidence of the robbery, if the man who stole the bill, or his agent, without consideration, brings an action upon it, the acceptor of the bill may undoubtedly set up the robbery as a defence to the action. It may not be known who is the person entitled to hold the bill, but it is known that he who brings the action never had a title to it at all; and in that case, if no title can be discovered, melior est conditio possidentis; he who possesses the money must keep it till the true owner can be found. Therefore there may be a clear defence for the acceptor for value received in many cases. Is this one of those cases?

Now, I cannot say that I am prepared to express a definite judgment on that subject. I should require consideration before I pronounced it; but, if I am asked for the inclination of my opinion, I should say that this is one of those cases. Strip the case of the majesty of the Queen that surrounds it, and suppose it to be simply that of an individual. Let us suppose the case of a person who had contracted to borrow a sum of money on the mortgage of his estate, and that, before the mortgage was quite completed, the party with whom he had contracted had incautiously given him bills of exchange on his banker in London; or had (as in this case) purchased bills of exchange from other persons with his money, and given him those bills of exchange; and, before they became due, the party who had agreed to give the mortgage was ejected from the estate by a legal process, so that he could not grant the mortgage, and the plaintiff who has suc-**[697]**-ceeded against him, in turning him out of possession, says—"I do not want the money, and I will not grant the mortgage;" and, suppose those bills of exchange to be in the hands of an agent of the original proposed mortgagor, for the purpose of being received when due; and, suppose the agent (to nake the case more analogous) to be also appointed under the new owner, who finds these bills in his possession, and says—"Now, indorse these bills to my bankers in London, to be received on my account:" can the acceptor of the bills make a defence? The consideration for the bills is gone, because the mortgage cannot be granted on the faith of which the bills were given. It is clear, as between the original parties to the contract, the consideration is gone; therefore the acceptor might make a good defence against them. Shall it, then, be said that he cannot make a good defence against another person who has got them by fraud? Besides, it is by no means clear to me in this case that, if the agents of Don Miguel brought an action, they could recover. It is said here that it is on their interest that the action is defended; be it so: I must look to see the legal result. I can easily conceive a case where neither they nor the other party could maintain an action; where the original consideration being gone by matter ex post facto would amount to a defence against

(*a*) *Gill* v. *Cubitt*, 3 B. & C. 466; 5 D. & R. 324. See *Down* v. *Halling*, 4 B. & C. 330; 6 D. & R. 455.

(*b*) *Crook* v. *Jadis*, 5 B. & Ad. 909; 3 N. & M. 257; *Backhouse* v. *Harrison*, 3 B. & Ad. 1098; 3 N. & M. 188.

these parties, and where the other party could not maintain an action because he paid no consideration, but obtained the bills by fraud. In that case the banker might make a defence on behalf of the true owner against either party so bringing the action. Now, does it make any difference that the parties in this case happen both of them to be Sovereign Princes, the one de facto for a time, the other then de jure, but now de facto? It appears to me to make no real difference. I therefore think that the bankers ought to be at liberty to make the defence in question in this case, if they can sustain it at law—either on the **[698]** ground that the parties who now hold the bills obtained them by fraud, or that the party in whom the bills were originally vested could not now maintain the action; the consideration being gone, and that, therefore, the money must be kept till some better owner is found. Why, the true owners ought to be the poor persons who were deluded in taking these bonds; and if they could be brought before a Court of equity, and made parties, it could not be doubted that, the consideration being refused, the Court would not allow anybody but them to get possession of the money, which was really and substantially advanced on the faith of that bargain.

There remains one question behind, which was not mooted at the bar, which, I have thought, required some consideration; and that is, whether a Sovereign Prince can be made amenable to any Court of judicature in this country. As a general proposition, he certainly cannot. We have no process to reach him, neither have we any jurisdiction over him drectly. *Hullett* v. *The King of Spain* (*a*) was a case in which Ferdinand, the late King of Spain, filed a bill in equity. Now, where a sovereign prince himself files a bill in a Court of equity, he becomes immediately amenable to all the processes of equity, and the defendant in that suit has clearly a right to call on him to answer a bill of discovery. That was done in that case. Some question was made about it, because the gentleman who had filed the bill on behalf of the King of Spain, and in his name, had made an application to the Court to be allowed to put in an answer to the bill of discovery filed against the King of Spain, pledging himself to answer fully and truly all the facts required by the bill, and stating that the King of Spain could not be compelled to make an answer; that it would be against his high dignity, and that nobody would dare to propose it to **[699]** him in his own country, with various other plausible reasons; but he offered, by his deputy, to give a full and sufficient answer. My Lord Chancellor Lyndhurst refused the application. There was an appeal to the House of Lords, and that House confirmed his decision; and it was there stated that where a Sovereign Prince becomes a party in a Court of justice by becoming a plaintiff, he must submit to all the processes that the practice of the Court authorizes, as he had sought the benefit of that jurisdiction; and however inconvenient it might be to His Majesty, or contrary to the rules which prevailed in his own country, yet, being a plaintiff in a Court of equity here, if an answer from him became necessary, that answer he must give according to the rules of the Court; and they would not allow him the privilege which a peer exercises, of putting in the answer upon honour, but required it to be done upon his oath. It may be said that that case does not go the full length of this, because the Queen of Portugal is not a voluntary party to any proceeding in equity; but it appears to me, on consideration, that the principle is the same in both cases. Here a foreign Princess is admitted by her agent to be a plaintiff in the name of that agent in a Court of justice in this country. If then the ends of justice require that that Princess, as a principal in the cause, should make a disclosure of certain facts, it appears to me that this Court, though it cannot entertain any jurisdiction to compel her to put in an answer, will nevertheless, as she has now become a party before the Court by her appearance, restrain her by injunction from proceeding in the action, until her answer is put in. Upon the authority, therefore, of that case, and the principle which that case establishes, and which I conceive to be just—namely, that where a sovereign Prince seeks a remedy in a Court of justice in England, that Prince must in some manner be compellable to do justice; and, also, upon the several other **[700]** grounds which I have stated, my opinion is that the demurrer in this case must be overruled.

I forgot to mention one case, which I ought to have adverted to in the first division of this question, namely, that of *Guppy* v. *Few*. It is mentioned by Mr. Hare, in his book on Discovery (p. 124). I mention it in justice to my Lord Lyndhurst. A bill

(*a*) 1 Dow & Clarke, 169; and 1 Clark & Fin. 333; 7 Bligh, N. R. 359.

had been filed respecting the infringement of a patent in the Court of Chancery. The Lord Chancellor had directed that an action should be brought to try the validity of the patent. The patent appeared to be vested in a trustee for the benefit of certain persons; the action was, therefore, directed to be brought in the name of that trustee. A bill was filed by the defendant in the action against that trustee, for a discovery of certain documents and papers, which he alleged would amount to a defence. The trustee in his answer put these documents into the schedule, and referred to them in his answer. An application was made to the Vice-Chancellor on the ordinary motion that he should produce those documents to the clerk in Court, for the purpose of their being examined, and to have copies taken. That motion was resisted on this ground —that he was a trustee only, and held these documents as trustee for the benefit of the cestui que trusts, and that, unless they were parties to the suit, a trustee could not produce these documents. The Vice-Chancellor adopted that argument. An appeal was made to the Lord Chancellor, and he overruled it on the clearest ground, because the trustee was a person directed to bring the action for their benefit, whom he said was in that case to be considered the equitable, as well as the legal representative of the party, and as much bound to produce the documents which he had mentioned in that schedule as the cestui que trusts were bound to produce them; and I think, on con-[701]-sideration, that nobody can doubt the propriety of that decision. But he is said to have gone further, and to have stated in his judgment that the cestui que trusts could not be made parties to a bill of discovery, because they were not parties at law. That very likely was said in argument before the Lord Chancellor, and he might have adopted that expression, but it was not the ground of the decision, and being the only expression of the sort to be found on the subject, I must suppose it was used inadvertently. I cannot agree with the proposition. Supposing the trustee had not the documents, but that the cestui que trusts had the possession of them, I cannot doubt that the defendant at law might have filed a bill against them and the trustee, to produce the documents. The action was brought by their agent for their benefit, and at their own instigation; then could it be said that they were not to make a discovery of those documents in a Court of equity, for the purpose of evidence in the action at law? I think the expression must have been misunderstood, or made hastily without adverting to the circumstances. It was not necessary, however, to determine the point; and it may be remarked that the ground of the Vice-Chancellor's decision was that the cestui que trusts were not made parties to the bill; if they had been parties, it seems to me that he would have acceded to the motion.

Demurrer overruled.

REPORTS of CASES ARGUED and DETERMINED in the COURT of EXCHEQUER in EQUITY: from Hilary Term, 6 WILL. IV. to Michaelmas Term, 1 VICT., both inclusive. By EDWARD YOUNGE, Esq., of the Middle Temple, Barrister-at-Law; and JOHN COLLYER, Esq., of Lincoln's Inn, Barrister-at-Law. Vol. II. London, 1838.

[*Pages* i. *and* ii. *contain General Orders in Equity.*]

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[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER IN EQUITY.

MEMORANDA.

On Saturday, 16th January, 1836, at the Palace at Brighthelmstone, the Lords Commissioners resigned the Great Seal, which was on the same day delivered by His Majesty to Sir Charles Christopher Pepys, Knt., as Lord High Chancellor of Great Britain, who was thereupon created a Peer by the title of Baron Cottenham, of Cottenham, in the county of Cambridge.

About the same time Henry Bickersteth, Esq., one of His Majesty's counsel, was appointed to the office of Master of the Rolls, and was created a Peer by the title of Baron Langdale, of Langdale, in the county of Westmorland.

SYMONS *v.* SYMONS. Jan. 13th, 1836.—Upon the administration of the real property of an infant, this Court will not delegate to the Master the power of approving leases of the estates.

[S. C. 5 L. J. Ex. Eq. 95.]

By the decree in this cause it had been referred to the Master to take an account of the lands and hereditaments to which the petitioner, an infant, was entitled under the [2] marriage settlement and will of his father, and of the rents and profits received since the death of the testator, and to appoint a receiver, and to report what was proper for maintenance; and the receiver was from time to time to let and set the property.

The petition stated that the Master had approved of a receiver, and that many of the lands were held by leases under a power in the settlement, and others remained unoccupied; that the rents were too high; and that repairs were necessary, &c.

The petition prayed that the Master might from time to time report the state of the premises, and whether repairs were necessary, and out of what fund they should be paid, &c.; and whether it would be for the benefit of the infant that any reduction should be made in the rents; that the Master might from time to time receive pro-

posals for taking leases conformable with the power; and that, when and as the Master should accept of such proposals, the trustees of the settlement might execute leases of such lands agreeable to such proposals, &c.

Mr. Hall, for the petition, expressed a doubt whether the latter part of the prayer of the petition was correct, as it implied that the Master's approval of the leases was to be final. He mentioned *M'Dermott* v. *Kealy* (Jac. 374).

The Court was of opinion that that part of the petition could not be granted, and made an order directing the Master to take proposals for leases, and from time to time to report his opinion upon the same to the Court.

[3] WHITEHEAD *v.* CUNLIFFE. Jan. 19th, 1836.—Record amended by adding counsel's name to the answer.

[S. C. 5 L. J. Ex. Eq. 96.]

Mr. Booth moved to take the answer off the file, the name of the counsel who drew it being omitted on the record.

The counsel for the defendant stated that he had signed the draft.

The Court ordered the record to be amended by the insertion of counsel's name.

EDMONSON *v.* HEYTON. 1836.—Order made ex parte to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

[S. C. 5 L. J. Ex. Eq. 22.]

Mr. Purvis moved that the defendant might now, on certificate of answer filed, be discharged out of custody for contempt on tender of the costs of the contempt. He cited *Gray* v. *Campbell* (1 Russ. & M. 323).

Ordered.

NEATE *v.* DUKE OF MARLBOROUGH. Jan. 23rd, 1836.—The words "knowledge, information, remembrance, and belief," if stated at the commencement of an answer as applying to the whole, will govern the whole answer.—If a bill state a fact, not denied by the answer, by which it appears that the defendant has the means of making an inquiry, he must answer as to the result of his inquiry.

[S. C. 5 L. J. Ex. Eq. 98. See in Equity, 9 Sim. 60; 3 My. & Cr. 407.]

The bill interrogated the defendant whether a sum of 2000l., or some other and what sum, was not lent to him on bond of a certain date, or some other and what security, and when?

[4] The defendant commenced his answer by a statement that he intended to answer the bill according to the best and utmost of his knowledge, remembrance, information, and belief. Afterwards, in answer to the particular inquiry relative to the 2000l., he stated (without using the words knowledge, remembrance, &c.) that he was unable to set forth what sum of money he borrowed, but he admitted that he had borrowed some money and gave a bond for it, though when he did not know.

An exception having been taken to the answer for insufficiency in this respect,

The Court overruled the exception; at the same time observing that information and belief upon a point was in nine cases out of ten immaterial.

The bill also charged that another bond, which had been given by the defendant, had been prepared by his attorney. The defendant did not deny this, but stated that he was unable to set forth whether such bond had been given. An exception was taken to this part of the answer.

Per Curiam. Where a bill states a fact not denied by the answer, whereby it appears that the defendant has the means of answering as to his belief, by making inquiry, then his stating that he is unable to set forth, &c., is not sufficient. He ought to make such an answer as might be sufficient to have the cause heard on bill and answer. The plaintiff ought not to be driven to go into evidence.

Exception allowed.

[5] DARTHEZ BROTHERS *v.* LEE AND SAMA. Dec. 15th, 1835; Feb. 19th, 1836.—If A. a merchant in England, guarantee the payment of all purchases made by B., a factor in England, for C., a merchant abroad, subject to the approval of X., an agent of C., A., being simply the paymaster or guarantor for C., can maintain no bill for an account against B. unless he state a case of collusion between B. and X. —A party who has once admitted an account delivered to be correct, cannot afterwards file a bill to have the account taken in equity upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say that the accounting party agreed to deliver up certain chattels demanded by the other, upon condition of having his alleged balance admitted and paid.—A bill brought for a discovery and for an injunction to restrain proceedings at law cannot be demurred to on the mere ground that the plaintiffs in equity are not all defendants at law.

[S. C. 5 L. J. Ex. Eq. 73.]

The bill stated that Juan Sama, a merchant of Havannah, had, for some years previous to the year 1834, been in the habit of purchasing cutlery of Messrs. Vanwart & Co., merchants and factors at Birmingham; and that when the latter sent goods to Sama, they retained for his use a pattern or specimen of each article so marked as to enable Sama to write to his agents in England respecting it. That in 1834, Sama, by means of S. M. Arcos, his agent in England, effected an arrangement of opening a credit and account with the plaintiffs, who were merchants and partners in London, for the more ready payment for the goods shipped on Sama's account. That the defendant, Thomas Lee, was then a factor at Birmingham and London; and that in August, 1834, an agreement was entered into by means of Arcos and the plaintiffs with the defendant, that the latter should in future make the purchase of cutlery goods for Sama, subject to the approval of Arcos. That Lee should receive a certain commission on such purchase, and that the plaintiffs, as the agents or correspondents of Sama, should be responsible to Lee for the price of the goods, and also for his commission and charges, upon his bringing to them invoices thereof, countersigned by Arcos, by way of approval. That, upon such agreement being entered into, the specimens or patterns in the hands of Messrs. Vanwart & Co. were delivered up to the defendant Lee for the purposes of his said agency, and subject thereto to belong to and remain the property of Sama. That the defendant Lee accordingly entered upon the duties of his said agency upon the terms aforesaid, and from time to time purchased and shipped goods **[6]** for Sama, and retained the patterns of goods sent, in the same manner as Messrs. Vanwart had done; and that in 1835 Sama sent a friend or agent to this country, who also delivered to the defendant Lee other patterns for the purposes of Sama's trade.

The bill then alleged that the defendant Lee from time to time delivered accounts to the plaintiffs, purporting to be (though the plaintiffs were unable to ascertain whether the same were in fact) just and true accounts of the several purchases made by him on Sama's account, in which accounts the patterns, as well as the goods actually shipped, were charged for. That during Lee's agency he purchased goods (though to an inconsiderable amount) for the plaintiffs on their separate account, as well as for Sama; and that upon the two accounts the plaintiffs had paid to him divers large sums of money; and that, by the means aforesaid, an open account had arisen and still subsisted between him and the plaintiffs. That Lee claimed a balance of 1750l., as due from the plaintiffs to him on these two several accounts. That the plaintiffs had applied to him to come to an account with them in respect of the foregoing transactions, and, upon payment of what was justly due from them, to deliver up to them the patterns or specimens which were in his possession. That the defendant had refused to comply with this request, and had brought his action against the plaintiffs (with the exception of the plaintiff Darthez the elder, who at the time of bringing the action was temporarily out of the jurisdiction) to recover the alleged balance of 1750l.

The bill charged that the plaintiffs, except as regarded the goods bought expressly on their own account, were merely the agents of Sama; that Lee dealt with them in that character, and that it would appear from Lee's corespondence with Arcos and

others that he knew he was so dealing. That the detention of the patterns was injurious to Sama's trade, and that the plaintiffs were an-[7]-swerable to Sama in that respect. That Lee had agreed to give up the patterns upon having the alleged balance admitted and paid. That such requisition was evidence that the accounts rendered by Lee were not just and true accounts, and therefore, to ascertain the truth of them, the defendants were entitled to a discovery of various books and documents in the hands of the defendant. In proof of these circumstances the bill set forth a long correspondence between the respective parties and their solicitors and agents; but it appeared that the plaintiffs, in one of their letters to Lee, had offered to pay him his alleged balance upon having the patterns delivered to them.

The bill prayed for a discovery of facts and documents relating to the transactions mentioned in the bill, for an account, injunction, &c., and the delivery up of the patterns.

To this bill the defendant Lee demurred for want of equity.

Mr. G. Richards, for the demurrer. The object of the bill is to enforce the delivery of these patterns, not to the plaintiffs, but to Mr. Sama. The plaintiffs have no interest whatever in the patterns; on the other hand, they are liable to an action by Lee upon their guarantie, and that action they seek to restrain upon the mere allegation that there are open unsettled accounts between them and Lee. *Frietas* v. *Dos Santos* (1 Y. & J. 574) is an authority to shew that a bill suggesting in mere general terms that there are mutual unsettled accounts is not maintainable. It may be said that those accounts include the private account with the plaintiffs; but, if so, the bill is multifarious. The plaintiffs do not deny their liability to pay the balance, but insist upon the delivery up of the patterns as a condition of payment. They have no right, however, to make such [8] terms. Their stating Lee to be the agent of Sama is a mere subterfuge, in order to threaten him with a long account in equity if he refuses to comply with their demand. If they had stated circumstances shewing that some discovery was necessary for taking a true account of their dealings with the defendant, they might have come into equity for that purpose; but that is not their case.

Mr. Temple and Mr. Rogers, for the bill. The bill is brought for an examination of accounts, for which the plaintiffs have to account over, and for the delivery up of specific chattels. They are entitled to the first part of the relief which they seek on their allegation that they do not know that the balance charged against them is just; and to the second part, on the authority of *Lowther* v. *Lowther* (13 Ves. 95) and *Nutbrown* v. *Thornton* (10 Ves. 159). When a wrong cannot be properly recompensed in damages, equity will give relief. The plaintiffs could bring no action to recover the specific patterns. [The Lord Chief Baron. You could bring no action at all: nor can you come into equity upon such a bill as this. You have undertaken to pay such monies to the defendant as Arcos shall certify to be just. You do not suggest any collusion between Arcos and the defendants. How, then, can the fact of Sama's having got you to give your guarantie give you an equity against the defendants?] Sama, being abroad, constitutes the plaintiffs his agents and factors in this country; and the plaintiffs, under this general authority, make a bargain with Lee in their own names. They are answerable, no doubt, upon their guarantie as original contractors with Lee; but they are accountable to Sama, that they will charge him no more than the just amount due; and they can only charge him through the medium of an account with Lee. Lee purchased the goods and retained the patterns; and it is stated in the bill that he charged the plaintiffs in account [9] with these patterns. He cannot therefore call on the plaintiffs to pay without rendering a true account. [The Lord Chief Baron. Do you suggest any reason to believe that the account rendered is untrue?] The bill alleges that the truth of the account cannot be ascertained without discovery. It is not necessary to allege fraud in a bill for an account; *Corporation of Carlisle* v. *Wilson* (13 Ves. 276); but, if it were so, the statements in the bill as to the requisition made by Lee to have the balance admitted is a sufficient allegation of fraud. Besides, the bill prays for discovery, which is sufficient to warrant a decree for an account. *Barker* v. *Dacie* (6 Ves. 681). [The Lord Chief Baron. Does the bill charge that Sama has given notice to the plaintiffs of fraud on the part of Lee?]

Mr. Richards, in reply, was stopped by the Court.

THE LORD CHIEF BARON. In order to support this bill, the counsel for the

plaintiffs are driven to make a modification of the terms of the contract contrary to its legal effect. In allowing this demurrer, I do not intrench upon any one of those principles by which Courts of equity are guided in matters of account. No doubt, without alleging fraud, a party is entitled to an account in equity, where the nature of the transactions renders the taking it there more convenient than elsewhere, or at least as convenient as in a Court of law: I do not deny that proposition. If, for instance, the parties allege that the accounts which have been rendered are intricate, and that some doubt exists as to the balance, that would be a good ground for seeking for an account in equity, although an action might be brought at law upon the same matter; and there would be no occasion in such a bill to suggest fraud. But there are cases where an account having been stated and admitted [10] by a party, he ought to state the grounds of his coming into a Court of equity for relief, lest it should appear that his bill has been filed for the mere purpose of delay. For instance, if he states that an account has been delivered which he has at one time admitted to be just, but the truth of which he cannot precisely ascertain, and therefore comes to have the account taken in this Court—that alone is not sufficient; he ought to go further, and say that since the account was delivered he finds that he has been imposed upon, and therefore his admission of the account ought not to bind him. That, no doubt, would be a good ground for his coming into this Court: but, generally, the grounds for equitable relief in cases of this nature are—either if the opposite party refuses to account, or there is a difficulty in taking the accounts, or some discovery is necessary before the account can be taken.

Now, what are the facts of this case? The whole interest of the plaintiffs consists in their undertaking to pay Lee the amount of such invoice as Arcos shall certify. The account is simple enough. They cannot be liable at law unless the invoice is previously settled by Arcos. It is not suggested that no accounts were delivered, but it is said that they are not able to judge whether the balance is correct. The meaning of the bill therefore is that the account was at one time correct and admitted, but because the party would not give up certain specimens the plaintiffs would not pay the balance. Is that a ground for the interference of a Court of equity? The fact is that Sama has an agent, Arcos, living in England, whom he has appointed to ship his goods, but he wants a person in London to pay for those goods, and Darthez engages to pay to Lee the amount of them as Arcos shall certify to be correct. Does that give Darthez a right to file this bill against Lee? He could not in a Court of law resist Lee's demand, nor can he in a Court of equity, because he has undertaken to pay on that certificate. If the defendant [11] had given a certificate which Arcos could not explain, Darthez might then have had a ground for seeking the relief which he now asks; but, unless he can make out a case of fraud as between Arcos and the defendant, he has no right to come into equity with such a bill as this. The purchase of the goods was an affair, not between Darthez and Lee, but between Arcos and Lee. The bill, however, suggests no fraud in Arcos. The plaintiffs admit that they are willing to pay the balance if Lee will deliver up the specimens to Sama. They have no interest, however, in that. If Sama claims them, let him do so by himself, or by his authorized agent Arcos; he can do no act to the prejudice of the plaintiffs, by reason of Lee's refusal to give up these specimens. If he were to set up any claim against the plaintiffs in that respect, they might say, we were bound to pay Lee the invoiced price of the goods, but we had nothing to do with the specimens.

If the bill contained a statement that Sama had given the plaintiffs notice of some fraud committed by Arcos or Lee, and had required the plaintiffs not to pay the balance till the accounts were delivered and investigated, the plaintiffs might say they were entitled to an account from the defendant before they made such payment, because they had notice from their principal of a fraud committed, and they could not safely pay it now. That would form a just ground for their refusal to pay. But they do not suggest that. I asked a question upon that point in the course of the argument, and it was not said that any notice had been given from which I could see reason to believe that the plaintiffs had been imposed upon. If they allow the documents between Lee and the agent who had the disposal of the goods to be true, they could not join issue with the defendant at law, and how can they then in equity? Never was there a case, denominated one of account, more unjustifiable than the present. I protest against the conclusion of fraud which has been drawn from [12] the statement in the bill. The plaintiffs, like bankers, had only to pay the money due on their

guarantie, and when they had done that they would have done their duty. As to their claim upon Lee for the patterns, Lee may well say, non hæc in fœdera veni; if Arcos has any complaint to make upon that subject, let him do so.

Demurrer allowed.

Feb. 19th.—The demurrer, for want of equity, having been allowed, the plaintiffs filed their bill against Lee alone, charging him with specific acts of fraud in his accounts; charging also that the approval of Acros was not intended by the contract to influence the price of the goods, but only to determine their quality and species; and praying discovery in aid of the defence to the action, omitting all prayer for relief.

The defendant demurred to the bill, on the ground that the plaintiffs had stated no case entitling them to join as co-plaintiffs in the bill.

Mr. G. Richards, for the demurrer, contended that, the action not having been brought against Darthez the elder, who was at that time abroad, but only against his three co-partners, Darthez the elder was not affected by the judgment at law, so as to enable him to join as a plaintiff in this bill. He cited *Cardale* v. *Watkins* (5 Madd. 18), and *Richardson* v. *Soares*.(*b*)

Mr. Temple and Mr. Rogers, for the bill. The statute 3 & 4 Will. 4, c. 42, s. 8, precludes the defendant at law from pleading the non-joinder of Darthez the elder in abatement. Besides, he has a positive and direct interest in the action. The contract was made with the four; and though **[13]** in form the judgment is against the three only, yet, under that judgment, the partnership effects may be taken in execution. Supposing there were any foundation for the objection, which there is not, it ought to have been made by plea.

Mr. Richards, in reply, observed that a plea for want of parties would not hold to a bill of discovery; that, in *Richardson* v. *Soares*, Richardson was as much interested as Darthez the elder could be; that Darthez the elder had only a collateral interest in the action, and was therefore to be considered as a stranger to the proceedings at law; and that it was a general rule that a bill for discovery in aid of a defence to an action could not be filed by a stranger to the action.

The Lord Chief Baron. It appears to me that I must overrule this demurrer, which is founded on the mere technical objection that the plaintiffs in equity are not all defendants at law. The cases which have been cited for the defendant depend on the principle that no party can file a bill for discovery unless he has some interest in the discovery; that a mere stranger, who on the face of the bill appears to have no interest, cannot maintain such a bill. No proposition can be more just. Another principle is that a party to be entitled to file a bill of discovery must have had an action actually brought against him, or some reasonable ground to expect an action to be brought against him. That also, as a general proposition, is true; but it is not universally true—as, for instance, in the case of an action already on record. In such a case the rule does not of necessity exclude the introduction of another man as plaintiff, who, though no action is brought against him, has an interest in an equal degree with the parties against whom the action is brought. Suppose that in this **[14]** case no action had been brought, but that there existed the apprehension of one; could it be contended that all the four partners were not entitled to join as plaintiffs in the suit in equity? Why, on the very principle that they might file a bill in apprehension of an action, it would be competent for them so to join. The question then is, whether, when an action is actually brought against three only out of four partners—and that for a reason appearing on the face of the bill itself—there is any strict rule of law by which the four partners are excluded from joining as plaintiffs in the bill? I am of opinion that no such strict rule of law can be found. In the case of *Richardson* v. *Soares*, Richardson could by no possibility be effected in interest, directly, by the judgment at law. If he had joined with Glyn in filing a bill for relief, the nature of his interest might have made him a necessary party. But that was a mere bill of discovery filed in aid of the defence to an action brought by the holder of certain bills against Glyn as the acceptor. How could Glyn's acceptance of those bills affect Richardson's interest so as to render him a necessary party to that bill? In the present case the judgment at law, though ostensibly and in name it might not

(*b*) Nom. *Glyn* v. *Soares*, 3 M. & K. 450.

affect Darthez the elder, yet would affect his assets. The execution of the judgment would have an immediate effect on his own property, and therefore he has a direct interest in defending the action. Besides, a partner has reason to apprehend other consequences from an action brought against his co-partners. Suppose Darthez the elder to be in this predicament—that no bill had been filed, no defence made to the action, and judgment obtained against the three; could not the plaintiff at law file a bill in this Court calling on Darthez to account for his assets, in order to make them liable; and would not the judgment be primâ facie evidence that his assets were bound by it? Darthez, therefore, has an **[15]** interest in all the future consequences of the judgment; and surely, if there were any strict rule of law, as that which has been suggested, it would be necessary to relax it in his favour. But no such rule of law exists. It is a mistake to call that a strict rule of law which is only an illustration of a general principle. It appears, therefore, to me that Darthez the elder has a complete interest, as well as his co-partners, in the discovery sought by this bill; and, consequently, that there is no objection to his being made a party to the bill.

Demurrer overruled.

KNEBELL *v.* WHITE. Feb. 17th, 24th, 1836.—A bill for an account of the rents and profits received by the grantee of an annuity in possession of the premises demised to secure the annuity, must contain an offer by the plaintiff, either to redeem in the terms of the deed, or to repurchase upon equitable terms, to be settled by the Court.—A bill for an account of partnership transactions must pray for a dissolution of the co-partnership.—Generally, a bill for an account need not contain an offer by the plaintiff to pay the balance if found against him.—Upon a bill for an account, evidence to shew on which side the balance lies cannot be used at the hearing.

[S. C. 5 L. J. Ex. Eq. 98.]

A person of the name of Margrave, being possessed of some leasehold property at Shadwell, by an indenture dated the 15th of September, 1813, in consideration of the sum of 225l., granted an annuity of 24l. 15s. to one Dunn, for the term of his life; and, to secure that annuity, demised the leasehold premises to Dunn, his executors, &c., upon trust, by selling or mortgaging the same, or by such other ways and means as to him or them should seem meet, to raise such sum and sums of money as should be sufficient to pay the annuity, and all arrears, and also all such costs, charges, and expenses (if any) as the grantee or his executors should sustain or be put to by reason of the non-payment of the annuity, or taking possession, collecting, and receiving the rents; and after payment and satisfaction thereof, to pay to or permit Margrave to receive the residue of the rents and profits to his own use. The annuity deed contained a clause of re-purchase.

Margrave regularly paid the annuity, and died in 1822, **[16]** having bequeathed the leaseholds to Sarah Clegg, and appointed her his executrix. The annuity having become in arrear, Dunn entered into possession of the premises, and remained in the receipt of the rents and profits till his death.

The suit was instituted by the executors of Sarah Clegg against Dunn, and revived against the present defendant, who was Dunn's executor. Tho original bill, after charging that there was nothing due to the defendant Dunn that he had been overpaid, and had refused to account, prayed for an account of the rents and profits of the premises, and of all payments for ground-rent, annuity, repairs, taxes, rates, and other outgoings; that the defendant Dunn might, upon taking such account, pay to the plaintiffs what, if any thing, he might appear to have been overpaid, and deliver up to the plaintiffs possession of the premises. The plaintiffs made no offer by their bill either to pay what might be found due from them on taking the account, or to re-purchase the annuity.

The defendant Dunn, by his answer, denied that he had refused to account with the plaintiffs, alleging, on the contrary, that he had delivered to them a written statement of his receipts and disbursements. He stated that he was still ready and willing to account with them, and that the annuity should be re-purchased. He set forth a schedule of his accounts, by which he made it appear that a considerable balance was due to him.

Mr. Chandless having opened the case for the plaintiffs, the Court asked on what

authority this bill could be sustained, which contained no offer to pay the balance of the account if found against them?

Chandless then referred to the observation of Sir John Leach in *The Columbian Government* v. *Rothschild* (1 Sim. 103), **[17]** and contended that it was not necessary on a bill for an account to make a specific offer to pay the balance.

Mr. Simpkinson and Mr. Moore, for the defendant. The dictum of Sir John Leach in *The Colombian Government* v. *Rothschild* is of very doubtful authority. A totally contrary doctrine was laid down by Sir A. Hart in *Hickon* v. *Aylward* (3 Molloy, 1). In that case there was an original and cross-bill, and the cross-bill prayed an account without offering to pay the balance, in case it should appear to be against the plaintiff; and Sir Anthony Hart said, "The cross-bill, which as to Dolphin is an original bill, does not contain an offer to pay the balance if against the plaintiff; and where a bill for an account omits such an offer, Lord Eldon often decided that it would not do, and there are several cases in which supplemental bills have been filed; but I think I can, without putting the parties to the expense of filing a supplemental bill, allow them, although I cannot compel them, to go into the Master's office to assert their rights. The question, therefore, is not settled by the case before Sir John Leach; but even if it were, this is not a bill for a mutual account, as in the case of *The Colombian Government*. It is, in truth, an action by a mortgagor against a mortgagee. The leasehold premises were demised to the original defendant for the purpose of securing payment of the annuity and all costs and arrears; and by the terms of the deed, the annuity is made redeemable. The Court cannot order even payment of the arrears, for they are not personally due to the plaintiffs, but are a charge on the estate. Then will your Lordship entertain this suit, the plaintiffs not undertaking to do what is equitable, by offering either to pay or to redeem? The Court cannot, on further directions, decree the plaintiffs to redeem. The plaintiffs cannot make that offer on this record. They **[18]** have chalked out their own course, and cannot, under the general prayer, ask such relief: *Palk* v. *Clinton* (12 Ves. 48). [Alderson, B. Cannot the plaintiffs amend their bill?] In *Field* v. *Delany* (1 Molloy, 174) liberty to amend was refused, and it ought to be refused here. This is a harassing bill: an account was delivered to the testator, and the defendant, in his answer, expresses his readiness both to account and redeem. The Court at the hearing does not in general give liberty to amend, except to add parties, or to correct some error in a date or a sum. [Alderson, B. Are there not some cases of partnership that bear upon the point as to the plaintiff not offering to redeem?] Those cases are analogous to the present. The plaintiff in a partnership bill cannot pray for an account without also praying a dissolution. It must be admitted that Sir John Leach, in *Harrison* v. *Armitage* (4 Madd. 143), decided the other way, but the authorities in general support that proposition. *Forman* v. *Homfray* (2 Ves. & B. 329), *Marshall* v. *Colman* (2 J. & W. 266), *Loscombe* v. *Russell* (4 Sim. 8). The last of these cases goes much further than the present, and the judgment of the Vice-Chancellor is very much in point. He allowed the demurrer in that case, observing that the plaintiff purposely avoided a prayer for dissolution. Here, the plaintiffs purposely avoid an offer to redeem. [Alderson, B. No doubt the objections to the bill in that case are very strongly put in the Vice-Chancellor's judgment. I at first thought that the good sense of the rule was with Sir John Leach, on the ground of the hardship in dissolving a profitable partnership in order to get an account; but I am now disposed to think otherwise. Here, the party in possession is employed not merely in receiving the rents, but in doing repairs and paying the ground-rent. The balance between the parties may, as observed in *Loscombe* v. *Russell*, be **[19]** turned each way a hundred times in the course of the suit.]

Mr. Chandless, in reply. This is a case in which the amendment, if necessary, should be allowed. If the objections which have been taken were fatal, the defendant would have demurred. On the contrary, he puts in an answer stating that he is willing to come to a fair and just account. After such a clear submission to account, ought the objections to prevail? It is said that there is no offer to pay, and no offer to redeem. Upon the first point, the proposition is not shaken that a bill for an account carries with it an offer to pay the balance. Upon the second point, how does the case stand? Here, no doubt, there is a trust for the grantee, upon failure of payment of the annuity, to enter into the receipt of the rents and profits; but there

is an ultimate express trust for the plaintiffs. How are they to get at the surplus, of which there is an express trust for them, without filing a bill for an account? Is the grantee, under such circumstances, to receive the rents and profits for twenty years, and not to be called on to account without an offer by the other party to re-purchase? This is an annuity, and not a mortgage; and the power is in truth to re-purchase, and not to redeem. In bankruptcy, the grantee of an annuity cannot prove for the original price of the annuity, but for that price reduced by subsequent diminution in its value. It is a mistake to say that the bill cannot be amended. Leave to amend is only refused where the party asks for relief inconsistent with the prayer of his bill —where, for instance, a party files a bill as a specific creditor, and, not being able to prove his case in that character, wishes to make himself a general creditor; but that does not apply where the general aspect of the bill remains the same. The partnership cases are scarcely applicable; but, admitting **[20]** them to be so, the case of *Richards* v. *Davies* (2 Russ. & M. 347), which is later than any that have been cited, overrules *Loscombe* v. *Russell* (4 Sim. 8), and that class of authorities.

The Court, at the conclusion of the argument, called on the plaintiffs' counsel to say whether they would then undertake either to pay the balance, if found against them, or to redeem; to which they replied, they would undertake to pay but not to redeem.

In the course of the cause, the defendant's counsel tendered proof that the defendant had not been overpaid; but that on the contrary, a considerable balance was due to him.

For the plaintiffs it was contended that such evidence could not be read at the hearing of the cause: *Walker* v. *Woodward* (1 Russ. 107).

ALDERSON, B., was inclined to reject the evidence, but said that, in the view which he took of the case, it was unnecessary to decide the question.

Feb. 24th.—ALDERSON, B. In this case two points were reserved for consideration. First, it is objected that, as the bill is framed, the plaintiffs cannot have the account prayed for, for that this bill contains no offer to pay the balance, if found against them. But, on looking at the cases, I think that this is not a good objection. The cases seem to establish that the prayer of an account is equivalent to an offer to pay the balance, if ultimately found to be against the plaintiff; and that, in case it be found against the plaintiff, the Court may, on further directions, decree against him that he do pay such balance. At any rate, as there is an offer at the bar on the part of the plaintiffs **[21]** to do this, I should not allow this objection alone to deprive them of the remedy, but should permit them, if it were necessary, to amend their bill in that respect.

But there is a second objection. This is a bill to have an account of rents and profits of premises in the defendant's possession, which he holds under an annuity deed, to reimburse himself an annuity granted by the person now represented by the plaintiff. That deed contains a clause of redemption on certain terms. There is no offer to redeem on the terms of the deed, or even to re-purchase on such equitable terms as the Court might direct on inquiry before the Master.

Upon this it is contended for the defendant, that the jurisdiction of this Court is not to be used in favour of a man who does not offer to do complete equity; and that the present case may be compared to that of a partnership, where, it is said, the Court will not interpose, unless a dissolution is prayed. On that point there are contradictory decisions; the opinion of Sir John Leach being at variance with that of Lord Eldon and of Sir Launcelot Shadwell. As I am obliged, therefore, to consider the case upon principle, it seems to me that the reasons assigned by the two latter Judges are the more satisfactory, and that I ought to adopt their opinion. Then, what is the principle? It seems this—that, where there is an open account in which the antecedent items, respecting which the account in equity is sought to be taken, are necessarily connected with, and not capable of being severed from, the other items of the account which are to arise in future, the Court will not interpose; for if it did, it would tolerate the bringing of a suit, which could never come to an end till the account itself was closed; for the state of the account would be continually changing whilst it was under discussion and settlement. The party who seeks redress must put it in the power of the Court to close finally by its decree the dispute between **[22]** the parties. As soon as he does this, he is entitled to its assistance. In the case of a partnership, therefore, he must pray a dissolution. In this case he must pray either

a redemption on the terms in the deed; or, if time has made an alteration, at all events he should pray a re-purchase on equitable terms, to be settled by the Court. Neither has been done here, nor is the party now able or willing to do this. I think, therefore, that the bill must be dismissed with costs.

But I think, also, I must reject the evidence as to the account, on the authority of the cases quoted, and on the reason of the thing, which confirms Lord Gifford's authority. This will only be material as to the question of costs.

Decree accordingly.

KNIGHT *v.* MARQUESS OF WATERFORD AND OTHERS. Dec. 14th, 1835; Feb. 25th, July 1st, 1836.—In a suit for tithes instituted by a rector against a party who was both patron of the rectory and lord of the manor in which the land for which the tithes claimed were situate, suggesting that a customary payment of 40*l.* per annum, alleged by the defendant to have been made from time immemorial in lieu of all tithes, was founded on a series of corrupt contracts by way of resignation bonds and otherwise, between successive patrons and rectors: Held, upon a supplemental bill of discovery, filed by the rector, that the defendant was bound to produce all such private documents in his custody relating to the matters inquired after by the bill as did not constitute his title to the inheritance of the manor, or the lands of which the tithes were claimed, or the inheritance of the tithes.—The plaintiff is not bound by the defendant's construction of documents in his possession (not his title deeds), if it be clear from the circumstances that they may relate to the plaintiff's title.—Upon a rector's bill for tithes, and a supplemental bill for discovery of documents impeaching the defence, held that the defendant was not bound to produce certain old briefs in his possession, in order to prove the plaintiff's allegation that a former rector's bill, which had been met by the same defence, was dismissed in consequence of collusion between the parties.—Held, also, that the defendant was not bound to produce certain leases which had been granted by his predecessors of the lands for which the tithes were sought.—A plaintiff is not entitled to the production of documents which cannot, from their nature, be evidence of his title, though they may impeach that of the defendant.—Cases stated for the opinion of counsel, whether of old date, or made with reference to or in contemplation of an existing suit or action, are not evidence against the party on whose behalf they are stated, or whose interests they affect; therefore, if they tend to impeach that party's title, he is not compellable by suit in equity to produce them.—Confidential letters between solicitor and client are similarly protected.—Upon a bill by rector for tithes against a lord of a manor who claims tithes within the manor, the defendant may be ordered to produce old maps of the manor, and also the court-rolls, unless they relate to the title of his own lands within the manor.—An answer to a former bill for the same matter, though not filed, is to be deemed a public document, unless the contrary be shewn; if, therefore, it relate to the plaintiff's title in an existing suit, the defendant, in whose custody it is, will be ordered to produce it, unless he can swear that it was not intended to be used as an answer.

[Discussed, *Holmes* v. *Baddeley*, 1844, 1 Ch. 476. See further, 4 Y. & C. Ex. 283.]

The plaintiff was rector of the parish of Ford, in the county of Northumberland, and the Marquess of Waterford was patron of the rectory of Ford, and also lord of the manor of Ford, and an owner and occupier of land within the rectory.

In the year 1830 the plaintiff filed his bill in this Court against the Marquess of Waterford, and several other persons his tenants, being occupiers within the rectory of Ford, for an account and payment of the great and small **[23]** tithes of the land in their several occupations. To that bill, the Marquess, who was then a minor, put in an answer by his guardian, stating his belief that the manor of Ford, containing eight thousand acres, had been from time immemorial comprised within the parish of Ford, and that there had been payable from time immemorial by the lord or owner of that manor for the time being, by equal half-yearly payments, to the parson of the parish of Ford for the time being, the yearly sum of 40*l.* for the maintenance of divine worship there, in lieu of all manner of tithes arising &c. within the manor of Ford; and that the lord or owner of that manor for the time being, or his assigns, had

from time immemorial been entitled in respect of the said yearly sum of 40l., to all the tithes within that manor, or any part thereof. The defendant made no answer to a charge contained in the bill, as to deeds and documents in his custody.

The Marquess of Waterford having come of age, the plaintiff filed a supplemental bill of discovery against him and the other defendants, suggesting that the lords of the manor of Ford, who were patrons of the rectory, and under whom the defendant, the Marquess of Waterford, claimed, used to take bonds from persons about to be presented to the rectory, conditioned for the acceptance of an annual sum of 40l., in satisfaction of the tithes within the manor of Ford; that when no such bonds were given, the rectors, soon after their induction, used to make leases of those tithes to the lords of that manor, and that 40l. a year, or some such annual sum, was the rent reserved on such leases; that at all events, by some instruments or agreements, the sum of 40l. was fixed as the whole amount to be received by the rectors from the lords, for the tithes within the manor of Ford, or parish of Ford; and that the 40l., alleged by the Marquess to be an immemorial customary payment, had its origin in such bonds and leases, or other instruments or agreements. The bill then con-**[24]**-tained other statements impeaching the defence to the original bill, namely, that, about the year 1573, a claim was made and a suit instituted in respect of the tithes within the manor of Ford, by the then rector against the then lord of the manor; that a decree was made, referring the matters in dispute to arbitration, and that an award was made establishing the rector's right; that a considerable district, called Catford Law, formerly belonging to the lords of the manor of Ford, and being part and parcel of that manor, and held as such, was, about the year 1660, sold by the then lord of the manor to a family of the name of Carr, and that the occupiers of that land had ever since paid tithes to the rectors of Ford; that another district, called Heatherslaw, situate within the parish of Ford, and forming part of lands for which the 40l. was claimed to be paid in lieu of tithes, was formerly a manor of itself, and paid tithes in kind to the rector until purchased some time between 1685 and 1717, by the then lord of the manor, after which time the tithes of Heatherslaw were introduced into the leases, bonds, and other instruments, whereby the sum of 40l. was received by the rectors of Ford, in lieu of the tithes of the lands, the property of the lord of the manor of Ford.

The bill then alleged that the defendant, the Marquess of Waterford, had in his possession, custody, or power, divers of the before-mentioned bonds, leases, or other instruments and agreements, and also the before-mentioned award; and also divers old deeds, instruments, and writings, including the deeds of conveyance, or some of them, or some copy of or extract from or abstract of them, or some of them, proving the allegations in the bill respecting Catford Law and Heatherslaw; and also divers other deeds, papers, and writings, which would shew that no such immemorial payment of 40l. existed, or which would in some way tend to shew the plaintiff's title to tithes in kind within the manor of Ford.

[25] The Marquess, by his answer, admitted that Catford Law formed part of the manor of Ford, and had been sold as stated by the bill, and that since such sale the occupiers of it had paid tithes to the rector; but he alleged that this was in order to avoid litigation. He stated that he had not in his possession the conveyance deeds of Catford Law, but that he had those of Heatherslaw, and that they were included in the second schedule to his answer. He denied the other material allegations of the bill. In answer to the general charge as to deeds and documents, he alleged in substance as follows:—That he hath in his possession divers deeds and evidences of title, papers, and writings relating to the tithes of the parish of Ford, but that such deeds, &c., all relate to his, the defendant's, title to the said manor or the lands therein, or the tithes thereof, and that the same do not relate to the plaintiff's title to any tithes whatever within the parish or manor; that he hath, in the first part of the second schedule to his answer annexed, and which he prays may be taken as part thereof, set forth, according to the best of his knowledge, a full and true list and description of such deeds, &c., as are so in his possession; that he hath in the second part of the second schedule, &c., and which he prays, &c., set forth a full and true list and description of divers deeds, &c., which relate to the tithes of the said manor (but which are not in the defendant's possession or power, except that he or his agent may have an inspection thereof at his bankers); that the deeds, &c., so deposited with his bankers, all relate to the defendant's title to the said manor or the lands

therein, or to his right and title to the tithes of the said manor, and that the same do not relate to the plaintiff's title to any tithes whatever within the said parish, or within the said manor; that the plaintiff is not, as the defendant submits and insists, entitled to the production, either in this Court or otherwise, of all or any of the **[26]** deeds, evidences, papers and writings, comprised in either the first or second parts of the second schedule.

The answer then contained a denial that the defendant had ever had in his possession the bonds, leases, and other instruments inquired after by the bill, if any such ever existed; or save, as appeared by the second schedule, any papers or writings relating to the payment of 40l., or any other sum in lieu of the tithes mentioned in the bill.

A motion was now made on behalf of the plaintiff for the production, in the usual manner, of the deeds and documents mentioned in the first part of the second schedule of the answer, and that the defendant might procure for the plaintiff an inspection of the deeds and documents mentioned in the second part of the second schedule.

Mr. Boteler and Mr. Lowndes, for the motion. The plaintiff cannot call upon the defendant for the production of such documents as constitute the defendant's title to the inheritance in the manor or the tithes, nor does he ask for the copies of public documents; he therefore confines his application to such documents as are collateral to the title, and not of a public nature. The cases establish that distinction: *Firkins* v. *Lowe* (M'Cleland, 73), *Collins* v. *Gresley* (2 Y. & J. 490), *Newton* v. *Beresford* (1 Younge, 377). The plaintiff has a right to inspect these documents, and to submit to the Court that the defendant's construction of them is wrong. He is not bound to take the defendant's word that they speak only in favour of his own title. The right to the inspection is fully admitted by that passage of the answer which alleges "that save, as appears by the second schedule," the defendant has no documents relating to the matter in issue.

Mr. Swanston and Mr. Purvis, contrà. The plaintiff has **[27]** not shewn upon the answer a sufficient title for the production of these documents. On the contrary, it is expressly denied by the answer that they relate to the plaintiff's title; and *Bligh* v. *Berson* (7 Price, 205) shews that the defendant's construction in this respect will be adopted by the Court. That case was recognised in *Hardman* v. *Ellames* (2 M. & K. 745). The plaintiff ought in general to shew some interest in the documents he seeks to have produced; but here, as rector, he has a common law title which cannot be affected by deeds and documents. In *Sampson* v. *Swettenham* (5 Madd. 16) Sir John Leach refused to order the production of a deed which gave the defendant title, but which was not connected with the plaintiff's title. [The Lord Chief Baron. The object here certainly is not to establish the plaintiff's title but to impeach the defendant's.] There is no authority for this application. In two of the cases cited the motion was for the production of the vicar's books; but they are public documents, which the tithe-payers have a right to inspect, in order to see what payments have been made by their ancestors. *Glegg* v. *Legh* (4 Madd. 193) is an authority against the present motion, though the demurrer in that case was held to go too far, and was therefore overruled. [The Lord Chief Baron. But it appears from the Vice-Chancellor's observations in that case that if the defendant had confessed by the demurrer that he had in his possession a copy of the deed by which he had conveyed the tithes to another person, that would have shewn he had no title; and though the plaintiff could see nothing else, yet they might see, if they could get at it, the deed by which the defendant had conveyed his right away.]

Mr. Boteler replied, contending that the bill sufficiently charged that the defendant had documents in his posses-**[28]**-sion which disproved his case, and that those charges were not met by an answer denying generally that the plaintiff had an interest in the documents.

THE LORD CHIEF BARON. I have fluctuated much in my opinion in the course of the argument, because I wished to see if there was any case of a rector who had been able by a bill of discovery, or under the authority of this Court, to compel a defendant to produce documents which did not in fact tend to advance the rector's title, but to defeat that of his antagonist. The case cited by Mr. Purvis, and decided in the year 1819, was that of a rector's book. The bill was filed by a rector, and upon an application for that purpose the Court refused to compel the defendant to produce the book of a former rector, which was supposed to have found its way into

the hands of that rector's executors, and thence into the possession of the defendant. Now, if I considered the present case exactly like that, I should of course follow that precedent; but it strikes me, upon looking at the whole of this case, that the plaintiff is entitled to some discovery. The general rule in these cases is that the defendant shall not be compelled to produce his own title deeds, but that rule is very much confined to title deeds relating to real property. I do not mean to say that title deeds of tithes would not fall under that head; but in a case where the rector files his bill, and his primâ facie title to the rectory is admitted, but the thing put in issue is whether his right to receive tithes in kind has been modified or defeated by some custom or conveyance in former time, and entitles him only to 40l. a year, it cannot be denied that all the matter which establishes that must have a very great relation to his title. It is proposed to modify this motion so as to exempt all those deeds that appear upon the schedules to relate to the defendant's title to the manor, or to the lands, or to any title of inheritance, and to apply it only to those **[29]** sorts of documents which are surmised by the bill to refer to certain contracts between the rectors and the patrons for the time being, under which the custom as to this 40l. is said to have grown up. Now, if there be any documents in existence that would throw any light on the origin of that custom, and if at the same time I should say that the rector is not entitled to have a discovery of those documents, what would be the result? That on the hearing of the cause the defendant would not produce those documents, but only such as might prove the custom without any qualification. I think, therefore, that justice requires that the motion, as modified, should be granted. The mere opinion of the defendant that the documents do not relate to the plaintiff's title cannot alter the case; because it is quite clear they do relate to his title if they have relation to the tithes at all.

It was ordered that the defendant should within a given time produce for the inspection of the plaintiff and his agents the several deeds, evidences, papers and writings, mentioned in and referred to in the first part of the second schedule of his answer, except the deeds, evidences, papers and writings forming the title to the inheritance of the manor of Ford, and lands, the tithes of which are claimed to belong to the defendant: and except the deeds, evidences, papers, and writings, forming the alleged title to the inheritance of such tithes: and except also the copies of documents in public courts or depositories for writings. Liberty to the plaintiff and his agents to take copies of or extracts from the documents so to be produced.

[30] Feb. 25th, 1836.—The defendant not having produced, as the plaintiff conceived, all the documents which he was bound to produce under the foregoing order, a motion was now made for the production of all the briefs and a number of leases (apparently leases of lands within the manor, and occasionally of the tithes) comprised in the first part of the second schedule of the defendant's answer. The briefs appeared to relate to a variety of suits; but among them was a suit instituted in Chancery, in the year 1683, by Jenkins, who was lessee under the rector of the tithes of part of the lands now belonging to the Marquess of Waterford, against Blake, who was then lord of the manor of Ford. In that suit the same defence was made as on the present occasion, and the bill was dismissed. It did not appear from the Register's book that that decree was taken by consent, nor on the other hand, though the names of several counsel were mentioned, that any evidence was read at the hearing. The object of obtaining the briefs was to find out under what circumstances that bill was so dismissed.

Mr. Boteler and Mr. Lowndes, for the motion. There is reason to believe that in the suit of *Jenkins* v. *Blake* the plaintiff examined several witnesses who completely disproved the defence there set up, which was the same as the present. Why the evidence in that case was not read does not appear; but if, as suggested by the bill, the rectors were in the habit of giving resignation bonds, that circumstance would operate to prevent them from enforcing their demands. The briefs might throw considerable light upon these matters. [The Lord Chief Baron. What use could you make of a brief in evidence?] The observations on a brief are the statements of the party who delivers the brief; they are his declarations. Suppose a defendant in a tithe suit to have declared that he held the tithes upon lease, but that he was anxious that the lease should assume the **[31]** appearance of a modus; that declaration would be evidence against him. Suppose, again, instead of making a declaration, he had given instructions to counsel for drawing his answer to that effect, and the answer

had been filed; would not that be evidence against him? [The Lord Chief Baron. Instructions to counsel to consent would be evidence to shew how it happened that a cause had been so disposed of; and so far they would be evidence against him. I doubt, however, whether any other instructions would be evidence against him. They are drawn up by his attorney. According to some recent decisions, cases stated for the opinion of counsel may be ordered to be produced for the inspection of the opposite party. But I doubt the authority of those decisions. In the older cases on this subject, the party seeking the production of such statements had a direct interest in them.] A case stated for the opinion of counsel may lead the party to the sources of evidence. Though not itself evidence, it may be valuable for the purposes of discovery. [The Lord Chief Baron. Then you are not at liberty to ask for your opponent's title deeds, but you are at liberty to ask for the case which may disclose his whole title. I am aware that a case has been sometimes ordered to be produced without the counsel's opinion; as if that made any difference. Is there any principle in that? In the recent case of *Bolton* v. *Corporation of Liverpool*,(*a*) it was decided by the Vice-Chancellor that two cases laid before counsel many years since, by the town clerk of the corporation, might be produced for the inspection of the plaintiff. I had an opportunity of investigating the authorities on which that decision was made, and I found that they were all cases **[32]** in which the party seeking the production had a direct interest in the documents sought for. I recommended an appeal to the Lord Chancellor, who was struck with the reasons for the appeal, but thought himself bound by the authorities to confirm the Vice-Chancellor's decision. I cannot see, however, how these cases could, under the circumstances, be evidence against the corporation.] At all events, if the plaintiff is entitled to the cases, he is entitled to the briefs. In the case mentioned by your Lordship, Lord Brougham considered a case and a brief in the same light. Now here, one or two cases have been produced by the defendant, in which the case of *Jenkins* v. *Blake* is adverted to, and it is stated that no evidence was given by the plaintiff. The fact is, however, that the plaintiff examined eight witnesses. It may be material, therefore, for the plaintiff to shew that the party must have known the statement to be false, and that it was made for fraudulent purposes. An order might be made for the production of the briefs with the exclusion of particular parts. As to the leases, they are not amongst the deeds excluded by the order, not being title deeds affecting the inheritance in the lands and tithes. It appears in some of the early leases that the tithes were not leased with the lands; and it is material to the plaintiff to see how the variation in that respect arose.

Mr. Swanston and Mr. Purvis, contrà. There is no case in which the production of briefs has been ordered by a Court of equity under circumstances like the present. Upon what principle does the plaintiff apply for their production? On the sole ground that they may be evidence in his favour: but that alone is not a sufficient reason for their production. If the bill in *Jenkins* v. *Blake* had been dismissed by consent, it would have so appeared by the decree. If it was not dismissed by consent (and by the form of the decree it may be inferred that it was **[33]** not), the briefs in question cannot be admitted in evidence to contradict the record. [The Lord Chief Baron. Suppose a decree made many years ago, apparently not by consent; might not living witnesses be called to prove that the decree was collusive, and that the cause was never heard? I remember a case in which a decree made a hundred years ago was proved to have been collusive. The suggestion here is that a succession of payments of 40*l.* have been obtained by a succession of collusive acts between the patron and the rector, and that statements have found their way into a Court of equity for the purpose of giving colour to the patron's right. Now, if the plaintiff could shew that one mode of attempting to establish that right was to file a bill and get it dismissed, as if upon the merits, would not that be evidence to shew a systematic plan of accumulating evidence for that purpose? The records must speak for themselves. There is no suggestion in the bill that any fraud was practised upon the Court in this case. In a case like that of *The Duchess of Kingston* (20 How. St. Tr. 358), evidence might well be admitted to shew that the judgment of a Court had been obtained collusively,

(*a*) Heard before the Vice-Chancellor on demurrer, 24th of May, 1831, when the demurrer was overruled. The defendants appealed from this decision, and the case was heard before Lord Brougham, on the 29th of August, 1831, when his Lordship affirmed the Vice-Chancellor's decision. The case upon demurrer is not reported.

but not in a case like the present, where the bill makes no charge, and the parties give no evidence whatever of fraud in obtaining the decree. If there be no ground for such a suggestion, is a note on the brief of counsel to be admitted to impeach the record? The observations of Lord Brougham, in *Bolton* v. *Corporation of Liverpool*, are peculiarly applicable to this case. "The plaintiff," says his Lordship, "does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some de-**[34]**-fect in the corporation." In a subsequent part of his judgment he treats the production of a brief as a proposition too absurd to be thought of; and observes that if such a practice was allowed, no man would be safe. In the present case the Court is called upon to presume that the briefs contain evidence that the decree in a certain cause was obtained by fraud. Having made that presumption, the Court is to frame an order under which that may be proved to be true, which has been already presumed to be true. Why should the Court make any such presumption? Besides, the production of documents of this nature leads to this result—that although what a client states to his solicitor cannot be used in evidence against him, yet, if the solicitor take the statement in short hand, and copy it out and lay it before counsel, it will in that shape be evidence against the client.

With respect to the leases, the production of them, if it assisted the plaintiff at all, could only do so by means of impeaching the defendant's title. We do not dispute that a plaintiff in a Court of equity is generally entitled to a discovery of documents which aid his title; but there are several exceptions to the rule. One exception your Lordship has already acted upon, in not allowing the production of the defendant's title deeds. Another is that the plaintiff has no right to call on the defendant to give any evidence of his title for the mere purpose of impeaching it. Now, the sole object of the plaintiff in calling for these leases must be to impeach the title of the Marquess as lessor. Besides, leases are muniments and evidences of title. Suppose the property had descended from heir to heir for a long series of years, the leases would be evidence of the possession and freehold. It is said they do not convey the freehold, and therefore are not within the exception to the order; but that argument would apply to a lease for a year.

[35] Mr. Boteler, in reply. Instructions given to counsel are not in the nature of confidential communications. Besides, the notes of counsel on the briefs, though not in themselves evidence, may lead to the production of most material evidence. The notes of counsel are not confidential. This is altogether a new species of case. Such a series of collusion as the bill suggests is seldom offered to the consideration of a Court. The decree in *Jenkins* v. *Blake*, as it stands, is not in the usual form, and on the face of it leads to a suspicion that no evidence was read at the hearing of that cause. The leases do not concern the title, but only shew how the persons in possession dealt with the land.

THE LORD CHIEF BARON. When this case was first before me, I was not insensible to the argument that the title of the rector to tithes was simply his possession of the rectory, and that he had no occasion to seek any other evidence of title, and that the onus of proving that he had no title rested on the defendant. But it appeared to me that the defendant, who claimed the tithes in this case, being the patron, probably could claim them under the rector only, and therefore might have documents in his possession forming part of the evidence of the rector's title; and, as far as the plaintiff's motion extended to such evidence, I thought it only reasonable that he should have it, but that I should protect the defendant from producing the evidence of any title paramount to that which the rector might claim. Now, it seems from certain cases that have been already produced that proceedings have taken place, more than a century since, between the rector and the patron, in respect of these tithes, and the plaintiff now calls upon me to make a further order for the production of the briefs in a cause which was either consented to or adjudicated in this matter more than a hundred years ago, and also for the leases which have been granted by the **[36]** defendant and those under whom he claims, to the occupiers and tenants of the property for which the tithes are sought. Now, no case has been cited where a party has been held to be bound to produce a brief upon a bill of discovery filed against him. It is dangerous to lay down a universal rule upon the subject. I can imagine a case

where it might be necessary to order the production of a brief, but it must be a strong case. What has been stated for the plaintiff furnishes evidence sufficient to dispose of the decree, to which allusion has been made, without ordering the production of the briefs in that cause; and I think that the argument which has been urged on the other side is just, namely, that I am necessarily called upon to presume collusion, in order to allow of their production. If a brief could be made evidence in support of the plaintiff's title, that might be a ground for its production; but it cannot be used as evidence. I can see nothing of this sort which can be evidence for the plaintiff, unless it were instructions to counsel on the back of the brief, to consent. I do not see that I can carry it further than that; and I shall not make a precedent for so doing. Even the cases in which consent briefs have been produced have been considered as of doubtful authority.

Then as to the leases, they are undoubtedly evidence of the defendant's title. I do not see what use the plaintiff could make of them. All he could do would be to throw a doubt on the defendant's title. To shew in what way the patrons have granted those leases is not material to the plaintiff's case. I think, therefore, that I cannot comply with this application. The plaintiff has already had quite as much assistance as he ought to have.

Motion refused.

[37] After the preceding motion had been disposed of, some further deeds and papers were discovered by the agent of Lord Waterford; upon which his Lordship, having obtained an order for that purpose, filed his supplemental answer, with two schedules annexed, setting forth a list of all the documents in the defendant's custody. Some of these had been already produced, the others the defendant objected to produce. Amongst the latter documents were the following: namely, certain letters stated in the schedule to be confidential, and apparently written by solicitors to their clients, owners of the manor, in relation to former suits for tithes within the manor of Ford; court-rolls for the manor of Ford during the year 1658, and several succeeding years; maps, described as seventeen old maps or plans, and surveys of several parts of the Ford estate, and a modern map of the Ford estate; and the answer of J. H. Delaval, formerly a lord of the manor, to a bill in Chancery, brought by George Marsh, clerk.

Mr. Boteler and Mr. Lowndes now moved for the production of the documents above specified, observing that the question as to the confidential letters must be put upon the same footing as that of cases submitted for the opinion of counsel. Upon that point they cited *Radcliffe* v. *Fursman* (2 Bro. P. C. 514, Toml. ed.), *Preston* v. *Carr* (1 Y. & J. 175), *Beresford* v. *Newton* (1 Younge, 377), and *Bolton* v. *Corporation of Liverpool* (3 Sim. 467; 1 M. & K. 88); and observed that in the latter case Sir L. Shadwell, and afterwards Lord Brougham, had taken a distinction between old and new cases, and that the same distinction was admitted in **[38]** *Hughes* v. *Biddulph* (4 Russ. 190), *Vent* v. *Pacy* (id. 193), *Garland* v. *Scott* (3 Sim. 396). [The Lord Chief Baron. I do not think it material whether such communications relate to a cause now in progress, or to matters which took place on former occasions. In *Bolton* v. *Corporation of Liverpool*, Lord Brougham was, I believe, of that opinion, but thought himself bound by the authorities to adhere to the distinction.]

Mr. Swanston and Mr. Bagshawe, contrà, objected to the production of the letters, and cited *Bligh* v. *Berson* (7 Price, 205), *Wilson* v. *Foster* (1 M'Clel. & Y. 274), *Purcell* v. *Macnamara* (Wigram on Discovery, 209), *Greenough* v. *Gaskell* (1 M. & K. 98), *Richards* v. *Jackson* (18 Ves. 472), *Aldridge* v. *Heathcote* (1 Madd. 236). They also cited and commented upon Lord Brougham's judgment in *Bolton* v. *Corporation of Liverpool*, observing that although his lordship adhered to the distinction which had been drawn by the Court below between old and new cases submitted to counsel, yet his reasoning was applicable to both sorts of cases; that in fact the distinction was quite arbitrary, and disclosures equally dangerous might be made in one case as in the other. [The Lord Chief Baron. Some years ago the Corporation of Liverpool brought an action against a freeman of the city of London to recover certain toll dues. The case, which was a very important one, was tried at bar. At that time the Corporation of Liverpool had a town clerk of the name of Brown, who had a high notion of the antiquity of that corporation, and also of his own learning, and upon that occasion he laid a case before counsel, stating that the town dues existed by prescription. The Corporation of Liverpool succeeded in their **[39]** action, but in point of fact it was not their title which was tried, but the right of the freemen of

London to resist the payment. Afterwards, when the corporation brought their action against Bolton, he having obtained some notice of this and another case of a like nature, filed his bill for the purposes of getting a discovery of those cases, his object being to shew the inconsistency of the corporation in claiming their tolls on each occasion in different rights. The Vice-Chancellor decided that those cases might be produced. The defendants, by my advice, appealed from that decision to Lord Brougham, but he dismissed the appeal.(*a*) I own I think that case went too far. Communications of that nature are strictly privileged. You are aware that Lord Hardwicke held that the same privilege which a client had as to confidential communications with his solicitor extended also to a conveyancer, in regard to title deeds. That opinion was brought into question before Lord Tenterden, who, on one or two occasions, did not regard it, but latterly thought it was right.] The counsel for the defendant then contended that the other documents sought for ought not to be produced: the court-rolls, because they formed part of the defendant's title, and if they could in any way evidence the title of the plaintiff, it ought to have been so charged in the bill; the maps, because they were protected from production by the terms of the order; and the answer, because it was a private document, which had not been filed, or even signed. They also said that it was not sufficient for the plaintiff to shew that the documents related to the matters in the bill, without shewing also that they related to the plaintiff's title: *Chapman* v. *Severn.*(*b*)

Mr. Boteler, in reply. If a plaintiff calls for the production of a title deed, he must shew that it relates to **[40]** his own title; but a similar rule does not apply to other documents. The plaintiff here is entitled to the production of the court-rolls and maps, on the authority of *Firkins* v. *Lowe* (M'Clell. 73). Upon the subject of the production of cases and confidential communications, *Stanhope* v. *Roberts* (2 Atk. 214) is in point. [The Lord Chief Baron. There, Roberts prepared the deed for both parties.] But Lord Hardwicke in that case approved of the prior decision by Lord King; and Lord Eldon, in *Richards* v. *Jackson*, acted on those authorities. The distinction between old and new cases is a sound one. If these communications had been made in contemplation of the present, or even of any similar suit, they might have been protected; but, as it is, they are not entitled to protection. [The Lord Chief Baron. The privilege of the solicitor is the privilege of the client. It would be worth nothing, if you could file a bill against the client and make him disclose what the solicitor cannot.]

THE LORD CHIEF BARON. It is disagreeable to be called upon to review the decisions of eminent persons, but, if I am bound to give an opinion, I must say that the order to produce confidential communications in respect to matters of fact relating to a party's title, have proceeded upon a principle which it is not necessary to extend. Many of the cases which have been cited for the plaintiff do not go the length contended for; certainly not the case in Vesey, because there both parties were interested directly in the motion; and, under such circumstances, that case and others have established a precedent which we cannot overcome. As to the decision of Lord Brougham and of the Vice-Chancellor, I should say that the statement for counsel which they ordered to be produced was as much protected as that which they refused. What is **[41]** the principle upon which these cases depend? The reason why Courts, both of law and equity, refuse the production of confidential communications is, not for the advantage of the attorney, but the privilege of the client. A man, inops consilii, goes and states his case to his solicitor on the very ground that it will not be revealed; but all such confidence will be destroyed if it be known that a statement of that nature can be revealed at any time. A bill of discovery is in aid of the plaintiff in establishing his title, even in cases where it may depend upon the defendant's having none; but it is not established that an inquiry may be made by the plaintiff as to the defendant's title. Would it be endured that a bill should be filed in a Court of equity suggesting that a defendant had in his custody a deed which was not duly stamped, and which was, therefore, void, and ought to be discovered? Then, if you cannot ask for the defendant's title deeds to discover the defects of his title, by the same reasoning you cannot ask him to disclose what he has said to his counsel or attorney respecting those defects. The cases have been pushed to a length which the circumstances upon which they were decided will not justify.

(*a*) See ante, p. 31, note.(*a*) (*b*) Not reported.

Let us consider in their order the several documents in question. First, as to the maps: they can be no evidence of the defendant's title, but they may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff's claims. They can be no evidence to establish the defendant's right either to the manor or the tithes; and therefore his saying that they relate to his title, and not to the plaintiff's, is not sufficient.

Next, as to the court-rolls; if they had constituted the title of the defendant to any particular land which he had in the manor, then he would not be bound to produce them; but I consider them only as a collection of court-rolls which he holds for the benefit of others. In one sense, no doubt, they may be evidence of his title; but if [42] you file a bill of this nature against the lord of the manor, it is not sufficient for him to say I have the court-rolls, but they are evidence of my title, and therefore I will not produce them, for they do not relate to the defendant so as to prejudice his title.

Then, with respect to the answer: that is not a confidential communication; it was meant to be exhibited publicly. If the defendant had gone further, and said it was an answer which he had projected, but which he had afterwards resolved not to make, that would have been another thing. But I consider that a bill relating to these tithes had been filed, and that this was an answer to that bill. The defendant himself states it relates to the matters contained in the plaintiff's bill. That, therefore, is not to be considered a private document; it was prepared for the Court; and unless it had been shewn in evidence that it had been matter of doubt whether it should become public or not, I do not see how he can refuse to produce it.

Then as to the letters; I think Mr. Boteler has gone further in support of the production of those documents than this particular case required. They are stated to be confidential letters between client and solicitor. If they had been stated as relating to the defendant's title, I should have said they ought not to be produced; but, as it is, it may be a question whether or no they are not confidential letters relating to the means by which the rector, whether by resignation bonds or otherwise, was prevented from claiming his title; in such case they do not relate to the defendant's title, but to the plaintiff's. I shall order their production, saving as they relate to the defendant's title as communicated to his solicitors. These, I think, he is not bound to produce.

Motion granted as to the court-rolls, maps, answer, and (so limited) as to the letters.

[43] HAYWARD *v.* CONSTABLE AND ANOTHER. Feb. 25th, 1836.—Where a decree had been obtained in Chancery for the general administration of a testator's assets, a bill previously filed in this Court by an annuitant under the will against the executors was dismissed; and as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree.

James Robinson, by his will, dated 27th August, 1832, bequeathed various legacies and annuities, amongst which was an annuity of 20l. to the plaintiff, Mary Hayward; and he appointed the defendants his executors. Upon the testator's decease, which took place in 1832, probate of this will was litigated in the Ecclesiastical Court, and an appeal was made to the Privy Council; but the will was ultimately established, and probate granted to the defendants in June, 1835. On the 2nd February, 1836, the plaintiff filed the present bill against the executors, charging that they had admitted assets sufficient to pay one moiety of the legacies, and had in December last offered to pay her one-half her annuity in the following January, though, in fact, they had paid her nothing; and praying that an account might be taken of the testator's assets, that the annuity might be secured for her benefit, and the arrears paid.

On the same day on which this bill was filed, the plaintiff's solicitors wrote to the defendant's solicitors, stating that they had instructions to file the bill, and requesting them to appear and accept subpœna. An answer was returned on the following day, stating that the defendants' solicitors had written to their clients, and the moment they received their reply they would write again to the plaintiff's solicitors. On the 11th February, they wrote again to the plaintiff's solicitors, stating that the

plaintiff's suit was unnecessary, as the residuary legatees had already filed a bill in Chancery against the executors, to which the latter had put in their answer; and that, as that suit comprehended all that was sought by the plaintiff's bill, no further steps on her part were necessary.

It appeared that the bill in Chancery was filed on the 8th February; that the answer of the executors was filed **[44]** on the 11th; and that on the 12th, a decree was made at the Rolls for a general administration of the testator's assets.

A motion was now made that all proceedings in the suit in this Court might be stayed, in consequence of the decree in Chancery, the defendants' solicitor stating upon affidavit that he believed the plaintiff well knew that the executors had been hindered from administering the estate in consequence of the litigation in the Ecclesiastical Court, she having been a witness against the will on that occasion. The defendant had tendered the costs of the proceedings in this Court up to the present motion, but that offer had been refused.

The plaintiff's solicitor, in opposition to the motion, swore to his belief that the suit was an amicable suit, and had been instituted in consequence of the suit in this Court.

Mr. Barber and Mr. J. Russell, for the motion. It is laid down in *Pott* v. *Gallini* (1 S. & S. 209) that where there is a prior decree, and a second suit for the same accounts and no further relief than can be had before the Master in the first suit, the proper course is to move that the proceedings in the second suit may be stayed, and that the plaintiff may go before the Master in the first suit. Now, here a decree has been obtained by the executors sufficiently comprehensive to give the plaintiff that relief which she requires. The circumstance that her suit was instituted first is immaterial; nor is it material that the suit in Chancery was instituted at the instance of the defendants. It is every day's practice for executors to file a bill to restrain harassing actions, and the same principle applies here. There is no suggestion that the executors were guilty of neglect. Besides, the Court will not stop the suit of residuary legatee at the instance of another legatee. Many **[45]** more inquiries will be made in that suit than in this. Costs of the proceedings here have been tendered up to the present time; in a common case the plaintiff would have a right to costs up to the time of notice of the decree.

Mr. G. Richards and Mr. Wood, contrà. The plaintiff has an advantage in this suit which she would not have in the suit in Chancery. Generally speaking, a decree operates as a judgment for all persons who have a benefit under the will. But, here, the plaintiff stands much in the same situation as a creditor at law who has obtained judgment de bonis propriis against the executor, in which case a Court of equity will not restrain execution: *Terrewest* v. *Featherby* (2 Mer. 480). The plaintiff has filed her bill, to which the defendants have put in an answer, admitting assets sufficient to pay a moiety of the legacies and annuity. She has a right, therefore, to move that the money be brought into Court, and that the fund be set apart to meet her annuity. She prays that relief by her bill. Besides, the decree in Chancery has been obtained by a mere manœuvre, the defendants' solicitors representing that the moment they heard from their clients they would write again. They, however, purposely delayed writing, and in the interim filed their bill. [The Lord Chief Baron. I assume that they filed their bill in consequence of your notice that you had instructions to file yours; but is it not reasonable for an executor, if he finds himself sued by a creditor or legatee either at law or in equity, to file a bill to bring the whole matter before the Court?] If the plaintiff cannot sustain this suit, she is, at all events, entitled to her costs up to the time when she had notice of the decree: *Jackson* v. *Leaf* (1 J. & W. 229); and also, under the circumstances, to the costs of this application.

Mr. Barber, in reply.

[46] THE LORD CHIEF BARON. If the defendants are willing to pay a moiety of the arrears, I shall dispose of the bill at once. If they are not willing to do that, I shall only stay the proceedings. [It was here stated that the defendants would pay the arrears.] The probate of this will was only established in June last, until which time the executors could do nothing. The plaintiff certainly filed her bill with sufficient despatch. She could have no reasonable doubt as to the conduct of the executors, and therefore it was rather a harsh measure to commence this proceeding. Neither am I prepared to condemn the executors for filing their bill in Chancery. My opinion is that, upon payment of a moiety of the arrears of the annuity, the bill

must be dismissed. I think the plaintiff is entitled to the costs of the suit, but not to the costs of this application.

Order accordingly.

LOVELL v. HICKS AND OTHERS. Feb. 2nd, 3rd, June 20th, 1836.—Agreement for the purchase of part of the profits of a patent, which turned out to be a mere bubble, set aside as having been obtained by fraud and misrepresentation, and so much of the purchase money as had been paid under the agreement ordered to be repaid.—Semble, that joint-owners of a patent are answerable for losses occasioned by their co-adventurers, only to the extent of their respective shares.

[S. C. 5 L. J. Ex. Eq. 101. See further, p. 472, post.]

The defendants being joint owners of a patent for "An economical apparatus or machine to be applied to the process of baking for the purpose of saving materials," entered into an agreement with the plaintiff for the sale to him of a licence to use the patent within a limited range in the neighbourhood of Birmingham. The plaintiff, who had paid 3000l. under this agreement, now brought his bill to have it set aside for fraud, alleging that the defendant Hicks had represented to him that, by means of this apparatus, bread might be baked in the ordinary manner so as to save the spirit, and realize a large profit; that to give colour to these representations Hicks had made various experiments be-**[47]**-fore the plaintiff and others, which appeared to produce that result; that on the faith of these representations and experiments the plaintiff had entered into the agreement in question, but that he had since found that the apparatus effected no saving in bread baked in the ordinary manner, and that, in the experiments which had been made, Hicks had fraudulently, and unknown to the plaintiff, introduced a particular sort of ferment, and likewise spirits, by which means he had apparently succeeded in the undertaking, but had in fact grossly deceived the plaintiff. The bill charged the other defendants with being participators in the fraud.

The evidence in support of the plaintiff's case is fully detailed and commented upon in the judgment.

Mr. Knight, Mr. Ching, and Mr. Blunt, for the plaintiff, in the course of a long argument, which was chiefly addressed to the facts of the case, referred to *Small* v. *Attwood* (1 Younge, 416, 460), and the cases there cited; and contended, on the authority of *Colt* v. *Wollaston* (2 P. W. 154) and *Blain* v. *Agar* (2 Sim. 289), that it was not necessary to shew that Hicks had been guilty of direct misrepresentation; for that, if it could be proved that he had merely gulled the plaintiff, it was sufficient to enable the Court to set aside the agreement. They also contended that the other defendants were answerable for the fraud of Hicks, as their agent or co-partner.

Mr. Wigram and Mr. Heathfield, for the defendant Hicks and another defendant. It cannot, perhaps, be said that a bill to recover money merely on the ground that the party paying the money was deluded will not lie in a Court of equity. But, with the exception of *Blain* v. *Agar*, there has been no case since that of *Colt* v. *Wollaston* in which the general proposition has been laid down **[48]** that, because a fraud has been practised, therefore a party can come into equity bringing, as it were, an action of deceit. Suppose a horse-dealer uses an art to conceal a defect—will a bill lie? To bring a case of this kind into a Court of equity, the circumstances of concealment must be such as will afford ground for equitable relief. For instance, when an estate has been conveyed away under circumstances of fraud, you cannot recover it at law, but must come into equity. *Small* v. *Attwood* was a very complicated case, and is no authority on this occasion. Attwood had sold an estate to the iron company, on the representation that he was making iron at a certain cost. He had suppressed certain stock-papers which would have shewn the truth. Beyond that, he had put the company into possession; and a long time elapsed, namely, from November to June, during which they were working as Attwood's agents. That, therefore, was a case of account, and of complicated circumstances, and on that ground distinguishable from the present. As to *Blain* v. *Agar*, it is a case which cannot be supported upon any principle, unless upon this—that it was a suit calculated to dispose of one general right applicable to many cases, and to prevent a multiplicity of suits. That explanation may give it some authority, but otherwise it goes the length of establishing that any one may

come into a Court of equity for damages. Admitting, however, the authority of that case, it is optional with the Court either to grant relief, or leave the parties to their action.

The present case cannot be supported as one of misrepresentation. In the several cases on that subject the fraud complained of was, not that the party had given a warranty, but that he had stated or suppressed some fact which would operate on the mind of the purchaser: *Lisney* v. *Selby* (2 Lord Raym. 1118), *Dobell* v. *Stevens* (3 B. & C. 623; 5 D. & R. 490), *Edwards* v. *M'Leay* (Coop. 308). **[49]** In all those cases the difference between the fact and the representation was the measure of the damages. What takes place afterwards is nothing. In *Dobell* v. *Stevens*, suppose the trade had fallen off after the sale, the vendor would not have been answerable for that; nor is the defendant in this case answerable for the failure of the project. Besides, the plaintiff is bound by the written contract. In *Pickering* v. *Dowson* (4 Taunt. 779, 786) the Judges held that, where a contract for the sale of chattels is reduced into writing whatever parol representations may be made, the writing alone binds the parties. The observations of Sir Thomas Plumer in *Clowes* v. *Higginson* (1 Ves. & B. 528) tend the same way. [Alderson, B. There is a clause in Lord Tenterden's Act (*c*) upon which some difference of opinion has been entertained by the Judges, and which seems to be founded on the same view of the subject.]

Lastly, even supposing that Hicks made a representation with a fraudulent intent, if the other party upon finding out the fraud did not take immediate steps to have his contract rescinded, his remedy is at an end: *Campbell* v. *Fleming* (1 Adol. & Ell. 40), *Dyer* v. *Hargrave* (10 Ves. 505). Here, there is evidence to shew that the plaintiff stood by to see how the patent would work, and finding that it did not answer his expectations, filed this bill. He did not act solely on the representations of Hicks, but made various inquiries on the subject after he had seen the experiments. It is immaterial, therefore, what were the views of Hicks if the plaintiff obtained such information aliunde as induced him to join in the undertaking. The case of *Lisney* v. *Selby* is applicable to that point. In any view of the case, Hicks is not the agent for the other defendants, so as to make them answerable for his acts beyond the amount of **[50]** their respective shares. In that respect they stand in a situation similar to that of part-owners of ships, who are not answerable for the acts of each other except in regard to repairs.

Mr. Lynch, for a defendant of the name of Smith, contended that, as his client had received none of the monies, and had entered into an agreement of which the plaintiff had notice, not to be answerable for any loss, no decree could be had against him.

Mr. Knight, in reply.

In the course of the argument Alderson, B., observed that it was incumbent on the plaintiff to shew active fraud in the defendant with a view to misrepresent; and for that purpose to shew that the baking experiments made by him were false experiments, and effected by means of an extraordinary ferment.

June 20th.—ALDERSON, B. This was a bill filed by the plaintiff, Edward Bourne Lovell, against the defendants, Robert Hicks, Octavius Henry Smith, Ralph Watson, and William Todd, praying that the agreement made the 3rd of March, 1832, may be set aside on the ground of misrepresentation and fraud, and may be delivered up to be cancelled; and that the defendants may be directed to repay to the plaintiffs the sum of 3000l. received by them, with interest, and may be restrained by injunction from bringing any action to recover the remainder of the money, 2000l., due under the agreement. The question has been very fully and satisfactorily discussed by the learned counsel on both sides, who have most ably assisted the Court in coming to a conclusion, by laying successively before it all that could properly be urged on behalf of their respective clients; and the Court is much indebted to them for that assistance.

[51] The question resolves itself into this—whether the plaintiff can make out in fact such a misrepresentation and such fraud as entitles him, after the acquiescence, for some time at least on his part, to come to a Court of equity to rescind his contract —and, if so, then against whom, and to what extent is he entitled to relief? I do

(*c*) 9 Geo. 4, c. 14, s. 6. See *Lyde* v. *Barnard*, 1 Mees. & Wels. 101; 1 Tyr. & G. 250.

not think that there is any very material difficulty in the principles by which my decision must be governed. They are laid down by Lord Lyndhurst in his very able judgment in the case of *Small* v. *Attwood*, and I believe are such as cannot be doubted or impugned. Although that decision is now undergoing review in the House of Lords, I do not conceive that this part of it is or can be shaken. If the contract be founded on fraudulent misrepresentations, such as would in a Court of law be sufficient to support an action on the case, it may in a Court of equity be rescinded. Now, the fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted. This is the nature of the case on which the plaintiff relies; and I do not doubt that if this be made out to my satisfaction, the plaintiff ought to be relieved, unless indeed he has, after full knowledge of the truth, persisted in the contract previously made.

Starting, therefore, from these principles, I proceed to examine the facts in this case which appear in evidence; and, although I am not insensible of the disadvantage which a Court of equity labours under in not having the benefit of oral examination, which I own I have long thought might with great advantage be given to it, to be exercised by it at its discretion, and applied to such parts of a case only as might be found after discussion to require it; yet, when I compare the counter-balancing advantage **[52]** of long and calm deliberation, and of dispassionate inquiry which a Judge possesses, who can at leisure weigh all the circumstances, with the sudden and hasty decision of a jury at Nisi Prius, even though assisted by oral examination, I have no doubt that, upon the whole, in nice and complicated questions such as this, I should not do real justice to the parties by directing an issue.

It appears that, on the 9th June, 1830, a patent was taken out; and that, on the 29th December, 1830, a specification was filed of the nature and mode of carrying into effect the invention for which the patent had been previously obtained.

The claim in the patent was of an invention of an economical apparatus or machine to be applied to the process of baking, for the purpose of saving materials; and in the specification it is stated that "such apparatus bakes the bread, and collects a certain spirituous vapour, which is always disengaged from fermented dough during the process of baking the same into bread, and which vapour is usually dissipated and lost; but by the refrigeratory or condensing part of the economical apparatus or machine, the said vapour is condensed into liquid materials, containing spirit or alcohol, and from which materials useful spirituous liquors may be drawn by the processes usually practised for the rectification of raw spirits." In another part of the specification it is distinctly stated that the flour having been previously converted into dough and duly fermented, and then made up into loaves according to the usual method, the loaves are introduced into the oven, &c. And again, at a subsequent part of the specification, the following statement occurs:—"The liquid materials thus saved by my economical apparatus or machine during the process of baking fermented dough into bread, is a diluted spirit, from which a useful spirit may afterwards be extracted by the usual process of rectification. The alcohol, which constitutes the value of the materials saved by my **[53]** economical apparatus or machine, is produced in the process of fermentation which the flour or dough has undergone in the manner usually practised for preparing dough for bread. That alcohol has been hitherto dissipated in vapour and totally lost; but my aforesaid economical apparatus or machine being applied in the process of baking such dough into bread, the said alcohol is saved and collected; and although it is intermixed with water and other liquid matters which are evaporated from the dough at the same time, the liquids so saved are useful materials for the rectifiers of spirits to extract fine spirit from." I have referred more particularly to these parts of the specification, in order to shew the grounds on which I have clearly arrived at the conclusion that this invention purported to be one for obtaining spirit by means of a patent apparatus for baking bread of the ordinary description, fermented in the ordinary method. I can feel no doubt on this subject.

In March, 1832, after a negotiation, to which I shall advert, the agreement in question was executed, under which 3000l. has subsequently been paid. By that agreement Robert Hicks, the original patentee, together with Mr. Smith, Mr. Watson, and Mr. Todd, who had intermediately obtained an interest with Hicks

under an assignment of it, granted their licence to the present plaintiff, Mr. Lovell, to exercise the patent within the town of Birmingham, and a limited circle round it, in consideration of 1000l. then paid, and of the further sum of 4000l., to be paid by certain instalments. Now, the plaintiff says, he was induced to make this agreement by certain fraudulent misrepresentations made by Robert Hicks.

In June, 1831, it appears that a letter was inserted in the *Staffordshire Advertiser*, signed by a miller of the name of Pratt, in which a very favourable account was given of the new invention. This letter, it is said, was corrected as to some of its details by Mr. Hicks, and in **[54]** particular it is stated that the representation that three bushels of flour would produce eighteen pints of liquor, containing 20 per cent. of alcohol, was expressly made by Hicks, he having altered Pratt's original draft of the letter from 18 per cent. to 20 per cent. in his own handwriting. This fact depends on the testimony of several witnesses. [His Lordship here commented on their testimony.] On the other hand, there is the distinct denial of these circumstances by Hicks in his answer; and very powerful observations have been made on the probabilities of the case, and on the credibility, as to this part of it, of the plaintiff's witnesses. And it is contended with great force that it is quite obvious that the expression "alcohol" in the statement, if made, was clearly in the course of the negotiation understood by all parties to mean proof spirit, and not alcohol in the strict chemical use of this word, and to this latter part of the defendant's argument I fully accede; but the weight of evidence appears to me to be in favour of the plaintiff as to the representation.

The next fact adduced by the plaintiff relates to a meeting at the Stork Inn, in Birmingham, at which he was present. There a sort of experimental baking took place; and similar representations were made by Hicks, which seem fairly enough proved. Then come two meetings at Bilston between the plaintiff and Hicks, at both of which similar representations were made, and Pratt's letter was read by the plaintiff. Then follows the journey to Chelsea, at which the apparatus belonging to the defendants was shewn to the plaintiff, and he had an opportunity of examining the results, and a portion of the spirits thereby produced was delivered over for him to inspect and examine.

All these circumstances which I have thus cursorily gone through took place before the agreement in question; and it is not unfair to conclude that these were in truth the circumstances which induced the plaintiff to enter into **[55]** that agreement. What, then, are these circumstances? They appear to me to amount to this:—Here is a clear statement by Hicks that he was in possession of an apparatus for baking ordinary bread, whereby the spirit therefrom produced would be saved. Here is a statement also that the spirit so produced amounts to a quantity, either of 18 pints, at 20 per cent. alcohol, produced by three bushels of flour; or if I state the defendant's case most favourably, at all events to a highly advantageous amount. And there is also a performance of experiments in the plaintiff's presence, first at Birmingham, and afterwards at Chelsea, and in town, by which he is induced to believe that such representations are in substance true.

Then, if so, are the other facts such as to satisfy me that this was not a true statement, and that Hicks knew all the time that it was false? That is the conclusion at which, after much consideration, I have been obliged to arrive. In the first place, I think that it is proved on the part of the plaintiff that the bread baked was not substantially bread of the ordinary description. There may be, no doubt, though that is not very satisfactorily made out, great differences of practice in preparing bread, as to the ferment used; but there is no balance of testimony as to the point that the particular ferment used by Hicks varies from all those hitherto in use most materially, and precisely in those respects which would produce a favourable result in those experiments which might be made to shew off the new process. Nor do I think that any doubt can reasonably be entertained on the evidence before me, that ordinary bread, baked according to the patent process, will produce no advantageous results to the parties.

If these facts were known to Mr. Hicks, every experiment becomes of itself a fraudulent misrepresentation. Now, the circumstances satisfy me that Mr. Hicks must have known this. I cannot well account, except on this supposition, for the peculiar care and watchfulness over the **[56]** ferment which was secretly prepared by him when used, and for the peculiar secrecy which, according to the plaintiff's evidence,

was observed at the time of the experiments made in the presence of the committee at Bilston. Indeed, when I observe the great secrecy as to the ferment, compared with the ostentatious openness as to the other parts of the process, I think it shews plainly enough that Mr. Hicks must have been conscious that in this respect he was practising a deception on the plaintiff and the other persons. All the testimony, with the exception of that of one witness, seems to me uniform as to this; and I am by no means satisfied with the testimony of that witness.

I do not think it necessary to refer to the circumstances of the addition of the spirits to the liquor produced from one experimental baking. There is some contradictory evidence as to the fact. If it were entirely true, this would be an act of very gross fraud on the part of Mr. Hicks. The witness for the defendants who speaks to this point does not deny very improper conduct, but only exculpates Hicks from having personally participated in it. The whole transaction is suspicious.

The other parts of the case, however, are clear. If, indeed, the question had depended merely on the misrepresentation as to the extent of the profits, and it had appeared that the results obtained, varying as they do as to the amount of spirit produced, were all that the plaintiff relied on to prove fraud, I should not have thought that a strong case had been made out. If the bread actually baked had really been ordinary bread, or if the attention of the purchaser had been called to the fact of its not being prepared in the ordinary way, either before or during the early experiments, even after the agreement of the 3rd March, 1832, I should have been disposed to think, either that no fraud had been practised, or that, at all events, even if there had been fraud, he had persisted much too long after full knowledge of the facts to be entitled to re-[57]-lief. But it seems to me that from the beginning he is misled by the patent and specification, and that the defendant Hicks must have been fully aware of the delusion under which this bargain was made.

I do not rely on the mere failure to produce the quantity of spirit originally stated by the projectors. I do not think that the plaintiff acted on such representations taken literally. The experiments made, with which he expressed his satisfaction, shew this, I think, to have been the case. But I think that, throughout, he and those with whom he acted thought, and had reason to think from the representations made, that they were purchasing an apparatus for baking ordinary bread; that they were to compete with ordinary bakers on vantage ground, and that the quantity of spirit to be produced (which I allow must be taken to be proof spirit) was to be their means of profit. This, I think, was the state of facts under which the bargain was made; and if the main fact was known to Hicks not to be true, what were all the statements he made, and the fallacious experiments which he himself knowingly exhibited, and knowingly permitted the other party to make and to see, but so many laborious frauds practised on his part upon the plaintiff? I am satisfied, therefore, that fraud has been made out so far as Hicks is concerned; and I do not think that, after full knowledge of it, the plaintiff has ever acquiesced in the bargain. I am not at all satisfied that he ever knew the ingredients of the ferment till the receipt was delivered to him on the 5th December, 1832. It is clear that he was not a baker; and the period when he first knew the extent of the misrepresentation would be, not the time when the receipt was first given to him, but that when he first knew, or reasonably might have known, that the ferment was substantially different from those in common use. That time does not appear; and this suit was commenced in February, 1833. I think, therefore, that the plaintiff is, on the whole, entitled to relief.

[58] But then the other defendants are not affected directly or indirectly with that fraud, and only have received their proportional shares of the money through Hicks. As to one of them, Mr. Smith, it is further proved that he had no interest, except as a nominal party to the agreement; that he had received no part of the plaintiff's money, and that the plaintiff had full knowledge of these facts when the money was paid.

The relief, therefore, to which the plaintiff is entitled, appears to me to be this: That the agreement be cancelled, and that the defendants be injoined from pursuing any action on it against the plaintiff; that the Master should inquire how much of the 3000l. has been respectively received by Hicks, Watson, and Todd, and that each of these parties should be decreed to repay what has been received by him, with interest at 4l. per cent.; that, as against Mr. Smith, the bill be dismissed with costs;

that the plaintiff should have his costs against the other three defendants, and also be repaid by them the costs he pays to Mr. Smith.

Decree accordingly.

BROOKSBANK AND ANOTHER *v.* SMITH. Feb. 16th, 24th, 1836.—In cases of mistake, the time of limitation, which by analogy to that prescribed by the 21 Jac. 1, c. 16, is held to bar the remedy in Courts of equity, begins to run from the time of the discovery of the mistake.

[S. C. 6 L. J. Ex. Eq. 34. Commented on, *Ecclesiastical Commissioners* v. *North Eastern Railway*, 1877, 4 Ch. D. 845; *In re Robinson; M'Laren* v. *Public Trustee*, [1911] 1 Ch. 509. And see 4 Y. & C. Ex. 567.]

Elizabeth Brame, widow, being entitled to a sum of 1000l., 3l. per cent. Consols, in reversion, expectant upon the decease of Eliza Stevens, by her will, dated in January, 1815, bequeathed the same to her six children, by name, their executors, administrators and assigns, to be divided between and amongst them, share and share alike: provided that if any of her said children should die in her lifetime, leaving issue or children, the share of any child so dying should not lapse, but go and be paid to such issue.

Elizabeth, one of the children of the testatrix, married the defendant, John Smith, and died in May, 1818, in the **[59]** lifetime of the testatrix, leaving her husband and three children surviving her. The testatrix died in July, 1818, and Eliza Stevens, the tenant for life, in June, 1827. Upon the death of Eliza Stevens the trustees of the stock transferred the same to the several parties who appeared to be interested under the will, and amongst others to the defendant, whose wife, they were informed, had survived the testatrix. In December, 1833, the trustees had notice for the first time that the children of Elizabeth Smith claimed a one-sixth share of the 1000l. stock bequeathed by Elizabeth Brame, and upon a further investigation of the circumstances it appeared that their claim was well founded.

In consequence of this discovery, the trustees, in June, 1834, filed the present bill to compel the defendant to refund the share which had been paid to him under a misapprehension of his interest. Part of this had been disposed of by the defendant, who was in poor circumstances, but there remained a sum of 100l. stock, which the plaintiffs identified as the residue of the share so transferred.

The defendant, by his answer, relied on the Statute of Limitations.

Mr. Barber and Mr. Heathfield, for the plaintiffs, contended that the objection arising from the Statute of Limitations could not avail the defendant; that in cases of fraud the statute did not operate as a bar in a Court of equity until after the expiration of six years from the discovery of the fraud; and that the same rule must apply in cases of mistake. They cited *South Sea Company* v. *Wymondsell* (3 P. W. 143), *Hovenden* v. *Lord Annesley* (2 Sch. & Lef. 634), and *Whalley* v. *Whalley* (3 Bligh, 12).

Mr. Chandless and Mr. James Russell, for the defendant, observed that no authority could be cited to shew **[60]** that any analogy existed between cases of fraud and mistake in matters of this nature.

Mr. Barber, in reply.

Feb. 24th.—ALDERSON, B. On looking at the cases I think that the plaintiffs are entitled to a decree. Here, there is stock transferred by them as trustees, and by mistake. On the whole, I am satisfied that it was a mistake of fact, and the bill is to re-transfer the remainder of that original stock so transferred, the fund being clearly identified, and consequently the party having a special lien upon it.

Then is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind Courts of equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this, Courts of equity differ from Courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud. Here, therefore, the statute was not applicable, for the mistake was first discovered within six years before the filing of the bill. I think, therefore, that the decree should be for the

plaintiffs, but without costs; and as they have offered to take the 100l., which is the whole of the stock that remains, I think they should be bound by that offer.

Decree accordingly.

[61] PERROTT *v.* BRYANT AND OTHERS. April 21st, May 5th, 1836.—Where a bill was brought for the customary tithes of oysters, alleging the customary payment to be in the owners and occupiers of boats employed in the fishery, and usually moored within the parish: Held, that it was not necessary to make the dredgers for the oysters, who had no interest in the boats, but who shared in the profits of the oysters, parties to the bill.—Oyster dredgers agreeing to receive from the owners of the boats, who were their employers, a stipulated share of the profits arising from the sale of the oysters, held not to be co-adventurers with the owners. —The circumstance that property situate on the sea-shore, between a sea-side town and the sea, has not been assessed to the poor's rates of the parish in which the town is situate, is very slender evidence of the property not being within the parish.

[S. C. 6 L. J. Ex. Eq. 26.]

Bill by the impropriate rector of the parish of Oystermouth, in the county of Glamorgan, against certain of the inhabitants of that parish, being owners and occupiers of boats moored within that parish and employed in the oyster fishery, for the customary tithe of oysters within that parish.

The bill alleged that the parish of Oystermouth adjoins and extends into the sea, and has been time out of mind a fishing place, and that there has been in the said parish an immemorial custom, that every inhabitant of the said parish, and others, being proprietors or occupiers of any oyster-boat or boats, or any boat or boats used or employed in the taking or carrying of oysters, which have been usually tied, moored, or kept within any part of the said parish, when not used, have immemorially paid, and by custom ought to pay, to the owners of the said rectory for the time being, the tithes of all oysters brought in from the sea in such boat or boats, and removed therefrom and laid on the perches within the said parish; and also of all oysters brought in such boat or boats into the sea within the said parish, and removed from such boat or boats into ships or other vessels without being landed or laid upon the said perches.

The defendants, by their answers, denied the custom of tithing oysters, as laid in the bill, or that there had been any immemorial custom in the parish of Oystermouth relating to the tithes of oysters, or to any payment in lieu thereof. They admitted, however, that payments had been made in respect of such tithes, but insisted that, as that had been done solely through intimidation, they were not bound by any evidence of such payments. They admitted that the parish of Oystermouth adjoined the sea, but stated **[62]** that they did not know or believe that it extended into the sea. They denied that they moored their boats within the parish, inasmuch as they moored them beyond low-water mark.

The defendants then alleged that for many years past their boats had been employed in dredging for oysters in the open sea of the British Channel for many miles distant from the parish of Oystermouth; that the oysters so taken had from time immemorial generally been brought to and discharged upon perches, which were small slips of ground marked out on the sea-shore considerably below high-water mark, but somewhat above the mark of low-water at spring tides, but below low-water mark at neap tides, for which perches small sums were paid by way of acknowledgment to the lord of the manor, by the boat-owner. They further stated their belief that the perches were not within the parish of Oystermouth; and they added that the oysters were sometimes not landed at all on the perches, but transported from the boats to the ships at sea, and far beyond low-water mark.

The defendants then stated the mode of payment for the oysters, and division of the profits, as follows:—That the captains of the vessels purchased the oysters from the boat-owners, generally giving 11s. per thousand for the best, and 9s. 6d. per thousand for the inferior oysters; and that the gross amount produced by such sale was divided between the owners of the boats and the crew or dredgers in manner following: that is to say, for the best oysters the boat-owners got 2s. 6d. per thousand and the dredgers or crew of the boat (who were generally four in number) 8s. 6d.

per thousand; and that for the inferior oysters, the boat-owners got 3s. per thousand, and the dredgers or crew 6s. 6d. per thousand. That in general the dredgers or crew were not paid by the boat-owners until the oysters were reckoned and delivered on board the vessels purchasing the same; and should the whole stock **[63]** of oysters deposited on the perches (which at times consisted of many weeks' taking) be killed by frost, which often happened, or by any other accident, the dredgers always bore their proportion of the loss, having no claim on the owners of the boats. The defendants submitted that, under these circumstances, the dredgers or crew were necessary parties to this suit.

The cause now coming on for hearing, the depositions of many witnesses were read for the plaintiff, proving the custom within the parish of Oystermouth of payment by the owners of the dredging boats of every tenth hundred of the oysters brought in and laid on the perches as tithe, and that this tithe was formerly taken in kind, and afterwards by composition. Depositions were also read as to the custom of paying tithe of the oysters shipped at sea, and as to a composition which had been entered into in respect of this tithe. The plaintiff likewise gave evidence by reputation, that the parish of Oystermouth extended into the sea; and proved that the perches were situate on the shore, between high and low-water mark, adjoining the town of Oystermouth.

Evidence was read for the defendants, with a view to shew that the payments which had been made for tithe had only been obtained by extortion. The witnesses on that side also deposed to their belief that the perches were not within the parish of Oystermouth, never having been assessed to the poor-rate; and that it never was understood or reputed that that parish extended into the sea, or at all events beyond high-water mark.

Mr. Boteler having opened the case for the plaintiff,

Mr. Stuart, for the defendants, took the objection (already raised by the answer) for want of parties, contending that the dredgers or crew of the boats ought to have been made defendants; that the sale of the oysters was **[64]** made by the owner or occupier of each boat for the benefit of all the parties concerned—namely, himself and the dredgers; that the adventure was a joint adventure for all, for the profit of all, and at the risk of all. He cited *Coppard* v. *Page* (Forrest, 1; 2 E. & Y. 494).

Mr. Boteler, Mr. Simpkinson, and Mr. W. Eagle, for the plaintiff. The defendants rest their objection for want of parties on general rules of pleading, entirely overlooking the nature of the custom laid, which is that when the oysters are laid on the perches the tithes accrue, and that the owners of the boats are the parties to set out those tithes. The owners can no more complain of that than of the oysters being washed off the perches. *Coppard* v. *Page* was not argued upon this ground. There, it does not appear that any special custom with reference to the person who was to pay was alleged by the bill; and, therefore, the general rule that all parties interested in resisting the demand must be made parties would apply. All the parties interested were those who were bound to pay; and the case was the same as where lands are occupied by joint-tenants, and a bill is brought for tithes against one only. Here it is not alleged that the tithes are paid by the dredgers, but by the owners and occupiers of the boats, a class of persons distinctly recognised and defined by the defendants as well as the plaintiffs, and understood to be the persons who have the absolute ownership, or who at least are the lessees of the boat. There are several cases in which customs of this nature have been similarly stated: *Gwavas* v. *Teage* (1 Wood, 203; 1 E. & Y. 528). [Alderson, B. It does not appear that the objection was taken in that case. No crew was interested in the matter. In general the crew are paid by a proportion of the fish, as in the whale fishery.] *Gwavas* v. *Kelynack* (2 Wood, 285; 2 E. & Y. 1) and *Wells* v. **[65]** *Harris* (3 Wood, 385) are authorities for the plaintiff. Even laying out of the question the mode of stating the custom, it would be highly inconvenient to require the dredgers to be made parties, who are changing from week to week and from day to day. In *The Hastings case* the question was argued, not upon any specialty in the custom, but upon the inconvenience of making so many parties.

The other objection raised by the defendants is that the parish of Oystermouth does not extend into the sea; and, consequently, that their boats are not moored, and the perches are not situate, within the parish. It is indisputable, however, that the boundary of a parish on the sea-shore is, not high, but low-water mark, and that the Admiralty have no jurisdiction over the shore at low-water mark. If a body is found

on the shore between high and low-water mark, the Admiralty coroner does not sit. The accident that the perches have not been rated to the relief of the poor cannot affect the general rule of law on this point. [Alderson, B. The fact of the perches having paid tithes is strong evidence of their being within the parish; far stronger than their having been assessed to the rates would have been.] Lastly, the defendant's denial of the custom will not make it imperative on the Court to direct an issue: *Gwavas* v. *Teage* (1 Wood, 203), *Beresford* v. *Newton* (1 Cromp. Mees. & Rosc. 901).

Mr. Stuart, Mr. G. Richards, and Mr. W. M. James, for the defendants. Nothing has been said on the other side to invalidate the case of *Coppard* v. *Page*. It is said, indeed, that here the custom affects particular parties only—namely, the owners; but that is not admitted by the answer, which states the owners and the dredgers to be co-adventurers, and jointly interested in profit and loss. **[66]** There may be a custom for particular parties to pay, and those parties may employ the dredgers, but it does not follow from this that the latter are not affected by the custom. [Alderson, B. You must shew affirmatively that the dredgers are within the custom, and interested in this matter.] If there be a right of contribution, the proper parties must be before the Court. It is not competent for the Court to dispose of such a case as this without bringing before it those who have a right to an account. [Alderson, B. I doubt whether in the most favourable view for the defendants, that which is stated to be an interest in the dredgers is more than a mode of receiving their wages.] Next, there is no allegation of a good and valid custom; or, if there be, no proof has been given that the payments which have been made were made in conformity with the custom. Besides, the plaintiff ought to prove a custom undisputed and uncontested. On the contrary, the defendant's evidence is strong to shew that the payments have been obtained by extortion. Moreover, bills alleging all sorts of customs have been filed. Here, the tithes are alleged to be payable by the proprietor or occupier; a loose mode of expression, which, if applied to a modus, would never have been admitted. An owner and lessee of a boat are as distinct as a proprietor and farmer of land. Besides, it is doubtful from the evidence who is to pay. Upon the question of boundary, it is well known that the land between high and low-water mark belongs to the Crown: Hale de Jur. Mar. 26. It is for the plaintiff to prove that the Crown has been deprived of its original right. There is no evidence of that fact. Besides, how does it follow that the place is not extra-parochial? The plaintiff has not shewn that any assessment has been made, or any rate paid in respect of the perches, and the contrary is shewn by the defendants. [Alderson, B. All the parties who paid tithes for the oysters on the perches did so on the supposition that the **[67]** perches were within the parish. If they were extra-parochial, the tithes would be in the Crown. The custom, at all events, is so uncertain, that the Court will allow the parties to try their right by action: *Foxcraft* v. *Parris* (5 Ves. 221; 2 E. & Y. 487). The legal right ought properly to be established at law: *Northleigh* v. *Luscombe* (Ambl. 12); *Mayor of Reading* v. *Winkworth* (5 Price, 473).

Mr. Boteler, in reply. The dredgers are merely paid by their employers in a particular manner, and that does not make them liable for these tithes. The party liable to pay is the party who has the boat in his possession during the season, either as absolute owner, or in any other character. Of the parochiality of the spot in question there is no doubt. It is not less within the parish because it may belong to the Crown, or a private person's royalty may extend there.

May 5th.—ALDERSON, B. There are two questions in this case—one, whether the present defendants are the proper parties to this suit, or whether others also ought to have been joined. The second—whether, supposing that to be so, the plaintiff has sufficiently established his right to the tithe claimed by him—that of oysters.

It is undoubtedly clear that the plaintiff must make all the individuals who have an interest in the subject-matter of the suit, parties to it, in order that the decree may put an end finally to the litigation between them, by concluding all those whose interests are thereby affected. The question, however, is whether this has not been done? The present defendants are admitted to be the owners of the boats, the produce of whose **[68]** fishing is sought to be tithed: but they say that all the crews of the respective boats are also jointly interested in the fish taken, and ought to have been added as parties to the record. Before I accede to an objection which would produce so inconvenient a result to both parties, I ought to be clearly satisfied as to the fact.

In the case cited to me of *Coppard* v. *Page* (Forrest, 1), this was clearly made out. There, the adventurers in each fishing boat shared jointly as partners the profits and losses of the adventure, according to agreed proportions. But here, the fact is very indistinctly stated in the defendants' answers, and is not more distinctly made out by the evidence. I should conclude, from the facts appearing on the evidence, that this is really only a mode of calculating the amount of wages due to the dredgers from the owners of the boats, and that the former take no interest in the fish themselves, which wholly belong to the owners of the boats. If this be so, then there is no necessity for making them parties to the record. Besides, this is a tithe claimed by custom; and the special custom, if established (and unless that be so, the plaintiff has no claim), lays the burthen of the tithe on the owners or occupiers of the boats alone. Upon the whole, I think this objection fails.

Then, is the custom proved?—for, unless it be so, there is an end to the plaintiff's case. The evidence is all one way; and, although there is undoubtedly a larger proportion of witnesses who prove the taking of tithe of oysters from the perches, yet there is quite a sufficient body of testimony to satisfy me as to the other branch of the custom also—that of taking the tithes of oysters brought within the parish by boats, and sold.

Then, are these perches within the parish? and are the boats moored there? This is, in truth, but one question; for, as the boats are moored nearer to the shore **[69]** than the perches, it would follow that, if the perches were within the ambit of the parish, the mooring places must, in all probability, be so too. Now, according to the plaintiff's witnesses, who state the boundaries of the parish, both are included therein; and the defendant's witnesses do not, in fact, negative that statement, for they only say, argumentatively, that they do not think they are within the parish, inasmuch as, although profitable property, they have never been rated to the poor. But this is not at all a strong circumstance; for the omission to rate property may have arisen from various causes, as well as from the property not being parochial. On the other hand, under a custom to tithe oysters brought into the parish, the tithes of oysters placed on these perches have, for upwards of sixty years at the least, been taken without dispute. Lord Hale says that the land between the ordinary flux and reflux of the sea may be parcel of a vill or parish, and that the ordinary means of proving it are by perambulations, common reputation, known metes and divisions, and the like. Here, the whole ground in dispute is within the limits of the ordinary tides.

Upon the whole, then, the evidence satisfies me that these perches and mooring places are within the parish, and that the custom to take tithes of oysters is proved as laid in the bill; and, as there is no valid objection as to the want of proper parties, there must be a decree as prayed, with costs.

Decree accordingly.

[70] LORD CRANSTOWN *v.* GOLDSHEDE AND ANOTHER. April 13th, 1836.—A defendant in contempt for want of an answer, cannot move to have the bill dismissed, even upon the terms of giving the plaintiff all the advantage of a decree: his proper course is to move to set aside the attachment.

[S. C. 5 L. J. Ex. Eq. 23.]

The bill was filed to restrain the defendants from bringing trover for a promissory note originally given to them by the plaintiff, but now in his possession, and likewise to restrain any other action or actions which the defendants might bring against them in respect of the note. An attachment, for want of an answer, had issued against the defendant Goldshede. The other defendant had put in a disclaimer.

Mr. Bacon, for the defendant Goldshede, now moved that upon payment of costs the bill might be dismissed, and that the attachment and all further proceedings thereon might be stayed; he having discontinued the action and paid the costs of it.

Mr. Hayter, contrà. The defendant cannot make this motion till he has cleared his contempt by putting in an answer. An answer may be useful to the plaintiff, because, though the defendant may have discontinued this action he may bring another. Besides, although the other defendant has disclaimed, exceptions may be taken to that disclaimer, and he may be made to answer. In cases of this nature the Court will go no farther than preventing a decree from being taken against the

defendant; they will not order the bill to be dismissed. This is not a motion relative to the contempt itself, and therefore cannot be entertained so long as the contempt remains.

Mr. Bacon, in reply. The object of the motion is to shew that the defendant ought not to be compelled to answer; in effect, therefore, his motion does relate to the contempt. He has discontinued his action, and offers all that the plaintiff could ask, or the Court could give him by means of a decree. He has, therefore, a right at once to **[71]** put an end to this suit: *Boyes* v. *Ford* (4 Madd. 40); *Praed* v. *Hull* (1 S. & S. 331), *Wilmot* v. *Maccabe* (4 Sim. 263), *Bishop of Derry* v. *Tyler*.(*d*)

THE LORD CHIEF BARON. In general it would be most unreasonable and unjust if the Court, upon mere technical grounds, could not put an end to a suit at the instance of the parties. But there is a great difficulty in so doing where the party who makes the application is in contempt. In cases of contempt the Court proceeds on one general rule. It might in the present case be expedient to deviate from the general rule; but, on the other hand, that deviation might lead to greater difficulties. The motion cannot be entertained in its present shape. The party should have moved to set aside the attachment upon taking a decree against him, and payment of costs. Any party may come to set aside an attachment on terms; therefore, unless some terms can be agreed upon, the motion must be dismissed.

Order by consent; the parties entering into terms.

[72] BRADSHAW *v.* BRADSHAW. April 22nd, 1836.—Testator devised an estate in Jamaica to trustees upon trust, so long as Robert B., the second son of his daughter E. B., should be under the age of twenty-one years, to pay and apply 150l. per annum out of the rents and profits for his maintenance and education, and subject thereto upon various other trusts, in favour of his daughter E. B., and his said grandson Robert B.; and, subject to all those trusts, in trust for the said Robert B. for life, with remainder to his first and other sons in tail male, with remainder in moieties in favour of H. C. and R. C., the second and third sons of his daughter I. C., and their issue. The testator also devised his estate in England in trust for his said daughter E. B., for life, with remainder to his said grandson Robert B. for life, with remainder to his first and other sons in tail male, with remainder to the third, fourth, fifth, and every other son of the said E. B., severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, and that of her second son Henry: Held, under the circumstances, that this was a mistake in the name and not in the description of the devisee; and consequently that Henry, and not Robert, was entitled to take under these devises; and parol evidence was admitted to explain the ambiguity.

[S. C. 6 L. J. Ex. Eq. 1. Discussed, *Doe d. Hiscocks* v. *Hiscocks*, 1839, 5 M. & W. 363. Applied, *Bernasconi* v. *Atkinson*, 1853, 10 Hare, 350. Referred to, *Gillett* v. *Gane*, 1870, L. R. 10 Eq. 34; *Charter* v. *Charter*, 1874, L. R. 7 H. L. 381. *In re Garland; Garland* v. *Beverley*, 1878, 9 Ch. D. 219. And see 4 Y. & C. Ex. 567.]

(*d*) In Ch. July, 1834.—The bill in this case prayed that the defendant might be decreed to deliver up a certain bond to the plaintiff to be cancelled, and that satisfaction might be decreed to be entered up on the record of the judgment.

An attachment and commission of rebellion having issued against the defendant, for want of an answer, a motion was made on his behalf that he might be at liberty to deliver up the bond to the plaintiffs to be cancelled; and that thereupon, and upon the defendant's paying the costs of the plaintiffs, and of all other parties to the cause, and upon his undertaking forthwith, at his own costs and charges, to enter up satisfaction upon the record of the judgment, the writ of attachment and commission of rebellion might be discharged, and all further proceedings in this cause might be stayed.

The motion was opposed on the ground that the defendant was in contempt, and therefore could not be heard until he had cleared such contempt by putting in his answer. But his Honour the Vice Chancellor, after argument, overruled the objection, and made an order in favour of the defendant.

John Blagrove, Esquire, by his will dated the 3rd February, 1824, gave and devised all his estates in the island of Jamaica, with the slaves thereto belonging, unto trustees, their heirs, executors, administrators, and assigns, upon trust to manage those estates for the term of three years from the day of his death, and out of the rents, issues, and profits thereof, to pay during the said term certain annuities to which his wife was entitled under her marriage settlement, and to stand possessed of the residue of the rents and profits accrued during the said term, upon the trusts thereinafter mentioned. And he did thereby further declare that from and after the expiration of the said term of three years, his said trustees, their heirs and assigns, should stand and be seised and possessed of his said plantations and estates in the island of Jamaica, in trust, in the first place, for better securing the annuities payable to his wife, and subject thereto upon the trusts following; that is to say, as to his two-third parts of the plantation and estate called Cardiff Hall, upon trust that they the said trustees should from time to time, so long as Robert Blagrove Bradshaw, the second son of his dear daughter Eliza, the wife of James Bradshaw, should be under the age of twenty-one years, by and out of the rents and profits of the said last-mentioned hereditaments, pay and apply the yearly sum of 150l. for and towards his maintenance and education; and from and after his said grandson, Robert Bradshaw, should attain his **[73]** said age of twenty-one years should, during the joint natural lives of his said daughter Eliza Bradshaw and his said grandson Robert Bradshaw, out of the said rents and profits, pay unto his said grandson or his assigns, the yearly sum of 300l., for his and their own use and benefit, and pay the residue of the rents and profits to his daughter Eliza Bradshaw, for her separate use during her life; and the testator declared that, after his said daughter's decease, the trustees should stand seised and possessed of the last-mentioned hereditaments, upon trust out of the rents and profits to pay the annual sum of 150l. for the maintenance of his said grandson, Robert Blagrove Bradshaw, until he should attain his said age of twenty-one, and after that period the annual sum of 300l. until he should attain the age of twenty-five, the surplus rents to accumulate in the interim; and he directed that when and as soon as the said Robert Blagrove Bradshaw should attain the age of twenty-five, but not sooner, he should be let into the possession of the whole of the rents and profits of the last-mentioned premises; and, subject to the trusts aforesaid, he declared that his trustees should stand possessed of the said last-mentioned premises, in trust for the said Robert Blagrove Bradshaw for life, with remainder to his first and other sons in tail male; with remainder, as to one undivided moiety, in trust for his grandson, Henry Coore, second son of his daughter Isabella Coore, widow, for his life, with remainder to his first and other sons in tail male; with remainder to his grandson Richard Coore, third son of his daughter Isabella Coore, for life; with remainder to his first and other sons in tail male; with remainder to the right heirs of the testator. The other undivided moiety was limited in the same manner, except that Richard Coore took first under that series of limitations. A power of jointuring was then given to Robert Blagrove Bradshaw.

The testator then declared that the trustees should, **[74]** after the expiration of the said term of three years, stand seised and possessed of his plantation called the Orange Valley Estate, other part of his Jamaica estates, upon certain trusts, for the benefit of his daughter Isabella Coore, and for the maintenance and education of his two grandsons, Henry Coore and Richard Coore, and, subject thereto, in trust for his said grandson, Henry Coore, for life; with remainder to his first and other sons in tail male; with remainder to his grandson, Richard Coore, for life; with remainder to his first and other sons in tail male; with remainder to his said grandson, Robert Blagrove Bradshaw, for life; with remainder to his first and other sons in tail male; with remainder to the testator's right heirs.

The testator then declared that his trustees should, subject to the said term of three years, stand possessed of the estate called Upper and Lower Magotty, upon certain trusts, for the benefit of his daughters Charlotte Parkin and Ann Caroline Blagrove, and his grand-daughter, Charlotte Elizabeth Parkin, and, subject thereto, in trust for Charlotte Parkin for life, with remainder to her first and other sons in tail male; with remainder to Robert Blagrove Bradshaw for life; with remainder to his first and other sons in tail male; with remainder to the testator's right heirs.

The testator then gave and devised to the same trustees and their heirs, his messuage and lands called Great Abshott, situate at Titchfield, in the county of Hants,

upon trust, to pay the rents and profits thereof to his said daughter Eliza Bradshaw, during her life, for her sole and separate use; and after her decease, he declared that his trustees should stand seised of the last-mentioned hereditaments, in trust for his said grandson Robert Blagrove Bradshaw, and his assigns, for his life, with remainder to his first and other sons in tail male; with remainder to the third, fourth, fifth, and every other son of the said Eliza Bradshaw, severally and successively in **[75]** tail male; with remainder to the right heirs of the testator. And the testator declared his mind and will to be that an inventory should be made and taken by his executors, as soon as conveniently might be after his decease, of all and singular his household goods and furniture, plate, linen, books, and china, which should be in, upon, or about his said messuage or tenement called Great Abshott, at the time of his decease. And he gave and bequeathed the full use and enjoyment of the articles and things comprised in such inventory to such person or persons who should for the time being be entitled, under the limitations aforesaid, to the possession and enjoyment of the same messuage or tenement; the said articles and things to be considered as heir-looms; and to attend and follow the said limitations as far as the rules of law and equity would permit.

The testator died in 1824, leaving his daughter, Eliza Bradshaw surviving him. At the time of the testator's death she had three sons; Robert Blagrove Bradshaw, who was her eldest, not her second son, as stated in the will; Henry, who was her second son, and Frank. She never had any other sons. Robert Blagrove Bradshaw died in 1827, aged ten years, never having been married. The testator also left his daughter Isabella Coore surviving him: she died in 1831, leaving three sons; Frederick, who was her eldest son; Henry John (called in the will Henry), who was her second son; and Richard John Lechmere (called in the will Richard), who was her third son. She never had any other sons.

By the decree in this cause made in July, 1835, it was referred to the Master to inquire who was the person meant and intended by the testator, under the name and description of Robert Blagrove Bradshaw, the second son of his daughter Eliza, the wife of James Bradshaw, and under the description and name of his grandson Robert Blagrove Bradshaw.

[76] The Master having examined Mr. Pennock, the testator's solicitor, made his report in substance as follows:—

For some years previous to his death, Mr. Pennock was the solicitor of Mr. Blagrove, the testator. In August, 1821, the testator having consulted Mr. Pennock respecting his will, that gentleman prepared for him a draft will, marked E., in which blanks were left for the names of the devisees, and a note written by Mr. Pennock in the margin, "Please to insert the Christian names." This draft was sent to the testator on the 20th of August, and was soon afterwards returned by the testator with several alterations in pencil, and with a note in pencil in the testator's handwriting, as follows: "Blagrove plate to Robert Blagrove Bradshaw, eldest son of Eliza Bradshaw." The testator did not fill up the blanks in this draft; and on one or two occasions, being asked by Mr. Pennock for the names of his grandchildren, said he did not know their names, but would get them.

In October, 1821, the testator had several more interviews with Mr. Pennock respecting his will, when the latter recommended him to have it settled by counsel. The testator wishing to have the matter kept secret, it was arranged that draft E. should be copied with fictitious names, and the copy laid before counsel. This was accordingly done; the name of "Archdale" being substituted for that of "Bradshaw," "Lindell" for that of "Blagrove," and "Jones" for that of "Coore." This draft having been settled, it was again copied, the real names being inserted, and the last-mentioned draft, marked F., was signed and published by the testator as his will, on the 7th of December, 1821. Previous to such signature and publication, the testator gave to Mr. Pennock the name of Robert Blagrove Bradshaw, as the eldest son of his daughter Eliza Bradshaw, and Frederick Coore, as the eldest son of his daughter Isabella Coore, and they so appeared in the will; but many other blanks **[77]** remained, the testator not recollecting the Christian names of his grandchildren.

This will was not intended to be final, but was merely executed to meet the event of a sudden demise, and accordingly a fair copy of it was laid before counsel, with fictitious names, as before, for the purpose of a final settlement, which, however, did not then take place.

In October, 1822, the testator informed Mr. Pennock that, in consequence of the great depreciation of West India property, he should be obliged to make material alterations in his will, and he directed Mr. Pennock to make a codicil to his will of December, 1821, which was accordingly executed by the testator. On the 22nd of November, 1823, he wrote a letter to Mr. Pennock, part of which was in the words following:—"Please to make a rough draft in one section to this devise alone, in the mode I did devise, benefit to the eldest son of Mrs. Coore; draw out such interest to become the benefit of his two younger brothers, as joint-tenants, in lieu of him, Frederick, who, in this section, need not even be named. Draw it that, if one brother be minded to sell his interest in the estate for his natural life to the other brother, that he shall have liberty so to do—but to no other than to his brother in joint-tenancy. If the brother that purchases the estate shall die without male issue, the estate to devolve to his brother, the joint-tenant, and his heirs. If both these younger brothers die without male issue, such interest to devolve to the possessor and heirs of Cardiff Hall Estate, these estates lying contiguous to each other." In a letter dated the 26th November, 1823, he wrote as follows:—"We may make progress in the rough section of the devise of Cardiff Hall and Unity Estates, negroes, stock, &c., to James Blagrove Bradshaw, in failure of male issue, with power to settle 400l. to wife, and 1000l. to daughters, to devolve to the possessor of Orange Valley Estate, and Orange Valley Pen, Pear Tree Bottom, and **[78]** Bellair Properties. The possessors of these estates (if I recollect correctly) were to pay over to James Blagrove Bradshaw or his heir, 10,000l. sterling, or 7000l. to render these devises more equal in value one to the other. Now, I pause as to this bequest, thinking this or some other sum should be distributed among the joint-tenant's sisters, conceiving the Bradshaws will be amply provided for after their grandfather's decease; and more particularly that now it will be settled that Abshott Estate shall devolve to James Blagrove Bradshaw in tail male, the annuity settled upon Abshott Estate being lapse; and the devise altered in favour of J. B. Bradshaw, as just above contemplated, shall burthen this property 150l. per annum, liable to Mrs. Blagrove's annuity." In this letter the word *James* was altered into *Robert* by Mr. Pennock at his next interview with the testator.

During the discussions which took place about the time when these letters were written, the testator declared to Mr. Pennock his intention of making a provision for the second son of his daughter Elizabeth Bradshaw, in lieu of the provisions he had made for the eldest son, assigning as a reason that her eldest son would be amply provided for by Captain Bradshaw, her husband's father. The testator accordingly instructed Mr. Pennock to make the necessary alterations, and Mr. Pennock took rough notes or memorandums of the testator's instructions whilst he was with him. In these notes Robert Blagrove Bradshaw was named as the party to take the Cardiff Hall Estate in tail, and the remainder in tail in the Orange Valley Estate, subject to estates in tail male in the Coores. As to the Abshott estate, Mr. Pennock's note without the erasures ran thus: "Abshott Estate. To Mrs. Bradshaw, and after her decease, to her son Robert, remainder to his heirs in tail male, remainder to his brother in succession in tail male; he has several brothers, 2nd, 3rd, 4th."

Instructions, pursuant to these notes, were afterwards **[79]** laid before counsel for the purpose of making a new will. The same fictitious names were used as before. The instructions began with these words: "Mrs. Archdale's eldest son has an ample fortune from his paternal grandfather. The testator consequently intends to provide for her second son, Robert Lindell Archdale, who is now an infant. Throughout the instructions, Robert was named as the party to take the Cardiff Hall estate, &c., pursuant to the notes.

In pursuance of these instructions a new draft was settled by counsel, with fictitious names, as before. These names were afterwards replaced by what Mr. Pennock conceived to be the real names of the devisees; and amongst the names so changed was that of "Robert Lindell Archdale" into "Robert Blagrove Bradshaw." A fair copy was then made from the draft so altered, and that fair copy was the will, signed and published by the testator in February, 1824, and the subject of the present suit.

In addition to these facts, the Master found in substance as follows:—That the testator never had any grandson of the name of James Blagrove Bradshaw, and that the person meant to be designated by that name in the testator's letter, and the person

whom Mr. Pennock meant to describe when he interlined the word Robert in the said letter, and the person whom he meant to describe by the name of Robert Blagrove Bradshaw in his rough notes or memorandums, was the second son of the said testator's daughter, Elizabeth Bradshaw, and not her eldest son; and that the second son of Elizabeth Bradshaw was intended to be the object of the testator's bounty: that the reason why, in the draft from which the last will was taken, Robert Blagrove Bradshaw was named and described as the second son of the testator's daughter, Eliza Bradshaw, was that Mr. Pennock supposed that Robert Blagrove was the correct name of Eliza Bradshaw's second son, the [80] said former draft wills marked E. and F., in which Robert Blagrove Bradshaw was mentioned as the eldest son of the said testator's daughter not being referred to; the said draft E. having been, no doubt, laid aside as soon as the copy was made of it for counsel's perusal, and the draft marked F. having been in all probability put aside for safe custody as soon as the same had been executed by the testator.

Upon the whole, the Master certified that he found that the said Henry Bradshaw was the person meant and intended by the said testator, under the name and description in his will of Robert Blagrove Bradshaw, the second son of his daughter Eliza, the wife of James Bradshaw, and under the description and name of his grandson, Robert Blagrove Bradshaw.

To this report the defendants, Henry John Coore and Richard Lechmere Coore, took an exception, on the ground that the Master ought to have certified that Robert Blagrove Bradshaw in the Master's report, and in the pleadings of the cause named, but now deceased, was the person meant and intended by the said testator under the above name and description.

Mr. Boteler and Mr. Phillimore, for the exception. The eldest son of Eliza Bradshaw is intended to take under the will. Even if there were any doubt upon that point, Pennock's evidence is not sufficient to warrant the alteration of the name of the devisee, all through the will. The pencil note made by the testator in draft E. shews that he knew that Robert Blagrove Bradshaw was the eldest son. The purport of that note is to leave the Abshott plate to Robert; and, in his will, the testator gives the Blagrove plate to the owners of the Abshott estate. These two circumstances combined clearly shew that the Abshott estate, at all events, was to go to the eldest son. Besides, Mr. Pennock's rough note as to the Abshott [81] estate, corroborates that view of the case; he treats Robert as the eldest son, observing that "he has several brothers, second, third, fourth."

Mr. Simpkinson and Mr. G. Richards, for the report. The Master is right on the evidence; but, independently of the evidence, the true construction of the will is on the Master's finding. The question is whether the person who answers the description of the second son, or the person whose Christian name is properly stated, but who does not answer that description, is to take. It is admitted that, as this is a latent ambiguity, parol evidence is admissible to explain it.

The testator had three married daughters. By a will made antecedently to this will, he had devised his estates in the West Indies for the benefit of the eldest children of those daughters. The Cardiff Hall estate had been given to the eldest son of his daughter, Mrs. Bradshaw (a blank being left for that eldest son's name), with remainder to his first and other sons in tail, with remainder over, in default of issue, to the devisees of the Orange Valley estate. The testator not knowing the names of all his grandchildren, blanks were left in the draft of that will. Many of them were not filled up when the testator executed that will. Even the devise to the eldest son of Mrs. Blagrove remained in blank till it was interlined by Mr. Pennock, immediately before the testator executed it. It is true that there is a memorandum in pencil on that draft will, in which the testator states that Robert B. Bradshaw is the eldest son of Mrs. Bradshaw. But it is clear, from the testator's letters and conduct subsequent to his making that memorandum, that he had forgotten that Robert was the eldest son of his daughter, and that he had mistaken the names of his grandchildren, so as not to be able to furnish Mr. Pennock with materials for a second will. The letter of the 25th of November 1823, in which he speaks of making [82] progress in the devise of the Cardiff Hall estate to James Blagrove Bradshaw, there being no such person, proves both that he was unacquainted with his grandchildren's names, and also that he intended an alteration in the devise to Mrs. Bradshaw's eldest son. If he did not contemplate such alteration, what occasion was there to make progress in the devise

to him, when he was already to have the property? Besides, if he considered James to be the eldest son, he was as much mistaken in the name of the devisee on their construction, as on ours. [The Lord Chief Baron. When the testator wrote that letter, he had either forgotten that Robert was the name of the eldest son, or he meant to change the devise.] He meant evidently to give the property to some other individual. He mistook the name of that individual, though he did not mistake the description. The mistake in the name is not remarkable, for even the names of the Coores are wrongly stated in the will. They appear with single Christian names throughout.

Then, assuming that the name used by the testator was used by mistake merely, the question is whether, under all the circumstances, the party who is really the second son is entitled to take? If there were any doubt as to the evidence, the will itself is clear. The testator meant to raise two families, in whom the Bradshaw property was to remain distinct from that of the Coores: but he also meant to make the second son of each of those houses the object of his bounty. He therefore, in the first instance, devises the Cardiff estate to the second son of Mrs. Bradshaw, with remainder to the second and third sons of Mrs. Coore. He next devises the Orange Valley estate to the second and third sons of Mrs. Coore, with remainder to the second son of Mrs. Bradshaw. When he comes to the Magotty estates, he devises them differently. The reason why the second sons are preferred as to the other estates does not apply in that **[83]** instance. He therefore devises those estates to Mrs. Parkin and her children, with remainder simply in favour of Robert B. Bradshaw and his issue. When we come to the Great Abshott estate, it is clear that the testator meant all along to exclude the eldest son of Mrs. Bradshaw; because he gives that estate to Eliza Bradshaw for life, with remainder to his said grandson Robert B. Bradshaw for his life, with remainder to his first and other sons in tail male, with remainder to the third, fourth, fifth, and every other son of his daughter, Mrs. Bradshaw, in tail male. This not only shews that the second son was intended to take in the first instance, but it clears up the objection arising from the words of Mr. Pennock's memorandum. This limitation in the will corresponds with Mr. Pennock's idea that, besides the second son of Mrs. Bradshaw, there were three other sons. It is true that in the rough note or memorandum which he took at the moment, he stated them as second, third, and fourth, and in the will itself they are stated as third, fourth, and fifth, but the variation is not such as the Court will, under the circumstances, regard as important, or consider as having originated in any thing beyond mistake in the solicitor.

If the construction contended for on the other side is to prevail, it is clear that, as regards the Abshott estates, the second son of Mrs. Bradshaw must be excluded, although the third, fourth, and fifth may take. What could be the object of excluding a second son? One can understand that an elder son may be excluded, because the party may have property coming to him from another source; but that reason cannot generally apply to the case of a second son.

Mr. Boteler, in reply. We must collect the meaning of the testator to have been that Robert Blagrove Bradshaw, personally, should partake of his bounty. The **[84]** question is not whether the eldest or second son should take, but whether Robert, the person named in the will, should take, or Henry, the second son, the party described by relationship, should take. It is clear that the testator, in the first instance, knew who was Robert B. Bradshaw. Afterwards, in September, 1823, he talks of making some alteration in his will. In the first letter which he writes, he explains what that alteration is. It relates only to the devise which had before been made to Frederick. When he alludes to the Cardiff Hall estate, he speaks of the possessor of it without mentioning any alteration in that devise. It is said, indeed, that the subsequent letter proves that an alteration was intended in the devise of the Cardiff estate, because, otherwise, a rough section of that devise would not be wanted. That, however, is but weak evidence of such intended alteration. The change of the name from Robert to James might, certainly, be evidence of an intention to devise to somebody else; but, on the other hand, it might prove no more than that the testator had forgotten that Robert was the eldest son. Suppose, however, that the testator meant to substitute another person; how happened it that, when he and Mr. Pennock met again, the name of James was struck out, and Robert inserted in pencil? After all, the only material alteration intended to be made related to the

Abshott estate. That had, by the former will, been given to some persons of the name of Hawkins, and it was now intended to be given to the Bradshaws. There is no evidence, either by the letters or otherwise, that the devise of the Cardiff Hall estate was to be altered. The argument that the testator meant to favour the second sons of each house entirely falls to the ground, when it is considered that, in the first will, there were the same limitations to the eldest sons of each house.

It is clear, from all the circumstances, that the testator favoured that grandson who bore his own name. Through-[85]-out the whole will, till you come to the devise of the Abshott estate, Robert B. Bradshaw is only once described as the testator's second son. In all other parts he is called his "said grandson." In this, the testator makes a distinction between that grandson and the Coores, who are several times named as the second and third sons of Mrs. Coore. The same inference may be drawn from what took place in the communications between the testator and his solicitor. How, then, was it possible that, when Mr. Pennock committed the result of these communications to paper, he should have supposed Robert B. Bradshaw to be any other than the eldest son? He could not have overlooked a name so perpetually recurring. His very memorandum proves that he did not regard him in any other light, and why he should have given instructions to counsel differing from those which he had received from the mouth of the testator it is impossible to tell. With respect to the will itself, there is nothing as regards the devisees of the Cardiff Hall and Orange Valley estates, which shew that Robert was less an object of the testator's bounty than Henry. But it is attempted to draw that inference by referring to the devise of the Abshott estate; and it is said that, if Henry takes that estate under the will, he must also take under the devises of the other estates, or the will will be inconsistent. But, whatever might be the effect of that clause under other circumstances, it is to be remembered that the whole of this will has been drawn from mistaken instructions, and therefore there is no particular reason for putting a construction on the latter clause favourable to the second son. If, according to our construction, the omission of the second son cannot be accounted for, it is equally difficult on their construction to account for the omission of Frederick. But the omission of both may be accounted for on the very ground on which they rely: namely, that the Bradshaws were amply provided for.

[86] THE LORD CHIEF BARON. If I entertained any doubt about the integrity of Mr. Pennock, or if this instrument, which was made from instructions given to him, had been prepared and executed at some distance of time from the period when the conversation took place between him and the testator, I should hardly venture, upon the parol evidence alone, to decide this point without directing an issue. But it is admitted that Mr. Pennock is a man of integrity: I must say therefore that it is probable, if an issue were directed, that the jury would draw the same inference on the subject that I have done. But the parol evidence is not the only matter deserving of consideration. The will itself furnishes observations to shew that the testator meant to provide for his daughter's second son.

It is quite clear that the testator either mistook the name of the second son to be Robert, or, if he meant Robert, he mistook him to be the second son; that is to say, he mistook either the name or the description of the individual whom he intended should take. It has generally been found, where mistakes have been assumed to have been made either in the name or description of the devisee, or the property devised, that the mistake has been made in the name and not in the description. In devises of real estate, where a testator has mistaken the name of the country where the lands lie, but yet has given such a description of them that the mistake can be explained, the description has been held to prevail over the mistake in the name. Thus, where a testator has devised lands in the county of A., which he purchased of a certain individual, to one person, and his lands in the county of B. to another person, and it turns out that the lands purchased lie in the county of B. and not in that of A., Courts of justice have gone so far as to transpose the names of the counties.

If a party means to describe a particular object which he has in view, he is more likely to be correct in descrip-[87]-tions than in names. It seems to me that the truth of that observation very much applies to the present case. It is clear that Mr. Blagrove did not know, or at least, at one time, if he ever knew, had forgotten the name of the eldest son of Mrs. Bradshaw. The devise is to Robert Blagrove Bradshaw, as the second son of Elizabeth Bradshaw. It is true that afterwards there is no

repetition of the words "second son," as applied to him, but only the words "said grandson." In the argument for the exception, the absence of that repetition has been much dwelt upon; but I know not how to place much weight in that circumstance. If the testator had repeated those words, no doubt that would have been important to shew his intention to continue in the same plan of disposition. But it is not necessary to have that evidence, because it is clear that he means the grandson whom he has before described. Then as to the Abshott estate, supposing in the absence of all evidence the question to be, who was intended to take, the second son not being named—you would say, which did he mistake, the name or the description? Evidently the name. In the last devises he mistook the name and not the description. He there devised to the second son of his daughter, by the name of Robert. Here, he devises to the second son of his daughter in the same manner; and when he comes to devise the Abshott estate in failure of issue of his said grandson Robert, he devises it to the third, fourth, and other sons of his daughter; thereby shewing that he understood he was devising in the first instance to her second son, and not to her eldest.

The testator is represented to have been an intelligent man, and I presume he read his will. If he did, he must have known that he was devising to the second son of his daughter, and that, in the ultimate devise of the Abshott estate, he was devising to the third and fourth sons of his daughter, as he had before devised to her second son. [88] If I must presume that he made a mistake one way or the other, why should I not presume that he made a mistake in the name? This is either a devise to the second son by a wrong name, or to the eldest son by a wrong description; but even if there were no evidence, I should be strongly inclined to think that the precise description of the second son was less likely to be erroneous than the name. Supposing the testator had used the words "second son," without any thing else, there would have been no doubt. Suppose, again, he had used the name of Robert only in the devise of the Abshott estate, you would have said he took him for the second son. Then does the present frame of the will make any difference?

Then with respect to the evidence. The whole argument of the party contending that there is a mistake in the description is founded on the construction of the written memorandum made by Mr. Pennock, when, as he stated, he was in communication with the testator. There would be a great deal in that argument if it stood alone; but to come at a right conclusion, the whole of the evidence must be examined. The parol evidence clearly proves that the testator made a mistake in the name of the devisee. It should seem that he originally knew nothing of the names of his grandchildren. He afterwards, it appears, knew that the name of the eldest son was Robert. Assuming that he knew that fact in 1821, what followed? In November, 1823, he wrote a letter in which he either supposed the name to be James, or from which it is clear that he did not mean to devise to the eldest son. If he meant to devise to a different person, who was that different person except the person described in the will? Assume that it was an altered devise in favour of some person not named before; who was that person but the person described in the will—namely, the second son? If the mistake be in the name, it lets in parol evidence; and Mr. Pennock declares he understood Robert to be the second son. He swears he [89] believed that to be the fact. Whether, therefore, he had the former draft before him or not would leave that belief unsuspected. At one of his interviews with the testator, conceiving that the testator had made a mistake, and had said James instead of Robert he struck out the word James and inserted that of Robert, still believing Robert, to be the second son. You have therefore the person who made the will swearing to the circumstances under which the name of Robert was inserted. All you have against that evidence is the written memorandum, which has been so much relied on. But that will not outweigh the strong evidence of Mr. Pennock. It appears to me that there is nothing in this case to explain why, if the testator meant to give the property to the eldest son, he should have given it to the second.

Mr. Pennock's evidence is of the more importance, because it is plain that he took down his memorandum at the time of receiving his instructions from the testator. The memorandums are such that no one could have made them except those who took them down. However obscure they might be, yet if he took them down at the time, and very shortly after prepared instructions from them for counsel, they would well assist his memory. It appears to me also that Mr. Pennock's account is not contra-

dicted but confirmed by Mr. Blagrove's letter, from which it seems clear that he meant to provide for those who were likely to be least provided for. In this letter he states the Bradshaws to be rich, which is an additional circumstance against construing this devise in favour of the eldest son.

Upon the whole, I think that a jury, after hearing the evidence of this gentleman who was the testator's solicitor, and who took down his instructions in writing, would come to the same conclusion as the Master.

Exception overruled.(*a*)

[90] LIVESAY *v.* REDFERN. April 28th, May 5th, 1836.—Testatrix bequeathed an annuity of 100l. to her niece for life, and charged the same upon her leasehold property in Wimpole Street and all and every her residuary personal estate and effects whatsoever, save and except her leasehold premises at R.: Held, that this was a demonstrative legacy.

[S. C. 6 L. J. Ex. Eq. 35. Applied, *Robinson* v. *Geldard*, 1852, 3 Mac. & G. 746. And see 4 Y. & C. Ex. 569.]

Elizabeth Goodlad, by a codicil to her will, after bequeathing an annuity of 100l. to trustees upon trust to pay the same by equal quarterly payments to her niece for her life, free from the control, debts, and engagements of her then present or any future husband, proceeded to provide for the payment of the annuity in the following words:—"And I do hereby charge and make the said annuity of 100l. chargeable upon and issuing and payable out of my leasehold messuage or tenement and premises, with the appurtenances, situate in Wimpole Street aforesaid, and my present and future terms, estates, and interests therein, and all and every my residuary personal estate and effects whatsoever and wheresoever, save and except my leasehold property and premises at Richmond, in the county of Surrey."

The question was whether this legacy was pecuniary, in the ordinary sense, or demonstrative. In the latter case, payment of the annuity in full would be secured to the annuitant, notwithstanding there was a prospect of a deficiency in the testatrix's assets.

Mr. Lynch and Mr. Cory, for the plaintiff. If the clause at the end of the bequest commencing with the words "and all and every my residuary personal estate," had been omitted, no doubt this would have been a specific legacy; but it will be contended that these words make it pecuniary. It is not pecuniary, but demonstrative; that is to say, it is payable out of particular property in preference to other legacies, but payable at all events; not partaking of the character of a specific legacy so far as to fail in case of the fund out of which it is primarily payable being lost. Here, the primary fund for payment is the **[91]** property in Wimpole Street, but if that should fail, the deficiency must be made up out of other parts of the estate of the testatrix. The authorities for this construction are *Roberts* v. *Pocock* (4 Ves. 150), *Acton* v. *Acton* (1 Mer. 178), *Mann* v. *Copeland* (2 Madd. 223), *Smith* v. *Fitzgerald* (3 Ves. & B. 2), *Fontaine* v. *Tyler* (9 Price, 94).

Mr. Skirrow and Mr. Sidebottom, for the defendant. In the cases which have been cited, the intention of the testator to make the legacy payable at all events, was much more apparent than it is on the face of this will. In *Roberts* v. *Pocock* the testator stated distinctly that, be the events what they might, the legacy should be paid. In *Mann* v. *Copeland* there was a manifest intention to give the 10l. a-year under any circumstances. Here the testatrix meant to do no more than enumerate particular parts of her property. The house must be sold for the payment of the legatees generally.

Mr. Bligh and Mr. Heberden, for other parties.

Mr. Lynch, in reply.

ALDERSON, B. My present impression is that this is a demonstrative legacy; but I will postpone my judgment for a few days in order to look into the authorities.

May 5th.—ALDERSON, B. In this case I thought it advisable to take time to consider whether the annuity bequeathed to the plaintiff, and charged upon the

(*a*) See *Doe d. Le Chevalier* v. *Huthwaite*, 3 B. & Ald. 632.

leasehold premises in Wimpole Street, was to have a claim upon those premises prior to the other legacies given by the will, or whether **[92]** they are all to be put on the same footing. And on looking at this will, and examining the authorities, it appears to me that this legacy is entitled to the priority claimed for it on the part of the plaintiff.

There is no doubt that, strictly speaking, this is not a specific legacy. It is a pecuniary legacy, and payable at all events; and if the leasehold premises mentioned had been disposed of in the lifetime of the testator, the legacy would nevertheless not have failed. But the cases establish that, notwithstanding a legacy may be pecuniary, yet it may still have priority if it be charged by the testator on specific property; and in that case, as the Master of the Rolls says in *Smith* v. *Fitzgerald*, the same legacy may be both specific and pecuniary. And according to the cases of *Acton* v. *Acton*, and *Roberts* v. *Pocock*, it would have priority over other legacies in respect of the property on which it is specifically charged, subject only to the payment of the testator's debts.

I think, therefore, that, as to this part of the case, there must be a decree as prayed by the plaintiff.

On the other parts of the case the parties are agreed.

Decree accordingly.

BLACKBURN *v.* WARWICK AND WIFE. April 28th, 1836.—Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears, rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor and confirmed by a deed, executed by him three years afterwards, for securing repayment of the balance to the mortgagee: Held, that these transactions were not usurious, and that the mortgagor was liable for the balance.

[S. C. 6 L. J. Ex. Eq. 17. Referred to, *Daniell* v. *Sinclair*, 1881, 6 A. C. 182.]

The defendants being seised of certain copyhold lands in right of the defendant, Mrs. Warwick, executed a mortgage of those premises, dated the 1st May, 1795, for securing to Quentin Blackburn the repayment of 1100l. and interest. In 1801 the defendants further charged the same premises with a sum of 900l. and interest, which **[93]** had been advanced to them by the same party. They at the same time executed certain indentures of lease and release, bearing date the 29th and 30th October, 1801, charging certain freehold lands with these sums. In 1802, the interest on these sums became in arrear; and although the mortgagee frequently applied for, and occasionally obtained some payments in respect of interest, yet the arrears continued to increase for several years afterwards. The mortgagee entered these arrears and payments in his books, and from time to time made rests on the arrears, and calculated interest thereon. It was alleged, but that did not appear except by the entry hereafter noticed, that settlements were come to between the mortgagor and mortgagee, at the respective times of making those rests, the mortgagee agreeing not to sue the mortgagor in consideration of interest being allowed to him on the rests.

In 1813 Quentin Blackburn died, having by his will appointed Quentin Blackburn, his son and heir-at-law, to be his executor. In November 1816, Blackburn, the son, as it appeared from an entry in his books, settled an account respecting the mortgage with the defendant Thomas Warwick. The entry was signed by Warwick, and apparently confirmed the previous settlements alleged to have been made with Blackburn, the father. Upon this settlement the sum of 1500l. appeared to be due to the mortgagee for arrears; and by an indenture bearing date 15th March, 1819, and executed by Warwick, the repayment of this sum as well as of the former sums was secured to the mortgagee.

On the 1st January, 1826, Blackburn, the son, died; having by his will, dated in 1822, devised all his real and personal estate to the plaintiffs, and appointed them his executors. A bill of foreclosure was then filed by the plaintiffs against the defendants; but shortly after the institution of that suit, the defendants proposed a compromise. This was consented to upon terms; and the **[94]** defendants then executed indentures of lease and release, dated the 5th and 6th November 1827, by which, after

reciting that 3500l. was secured by a former deed, and 500l. was due for arrears of interest, and after reciting the suit in the Exchequer, they conveyed to the plaintiffs the fee-simple of the premises in trust, in default of regular payment of the interest, for sale and satisfaction of the debt out of the proceeds. A fine was levied of Mrs. Warwick's interest in the premises.

The interest having become again in arrear, the plaintiffs, in Michaelmas Term, 1830, brought their action of ejectment to recover possession of the premises. Before judgment was obtained, the defendant, Thomas Warwick, agreed to attorn to the plaintiffs, as tenant, at 200l. a-year, which they consented to. No rent or interest, however, was paid; and, after a long correspondence between the parties, the property was put up for sale, but met with no bidder. The present bill was then filed, suggesting that the sale had been prevented by means of the defendant Thomas Warwick having spread reports reflecting on the title to the premises, and praying that the deeds of 1827 might be carried into execution under the decree of the Court.

The defence set up was that the deeds of 1816 and 1827 were usurious and void.

Mr. Simpkinson and Mr. Phillimore, for the plaintiffs.

Mr. Boteler and Mr. O. Anderdon, for the defendants. The original mortgage and further charge are not objected to, but the subsequent settlements are usurious; and even the acquiescence of the defendants in those settlements will not render them valid. The bill treats the case as if the mortgagor and mortgagee had met together and agreed to turn interest into principal; but it is clear that the books were not seen by Warwick till 1816. The balances **[95]** are drawn up in such manner as a Court of equity will not permit. Had the plaintiffs taken simple interest from 1803 to 1816, and then a new deed had been executed converting interest into principal, there would have been no cause of complaint. But, as a mortgagee cannot stipulate a priori that he will make rests from year to year and convert interest into principal, so neither is such a conversion allowable, except at long intervals, even without a previous stipulation, and with the consent of the mortgagor. This may be inferred from the opinions of Lord Thurlow (*Ex parte Champion*, 3 Bro. C. C. 436) and Lord Eldon. In *Chambers* v. *Goldwin* (9 Ves. 271) the latter learned Judge says, "There is nothing unfair, or perhaps illegal, in taking a covenant originally, that if interest is not paid at the end of a year, it shall be converted into principal; but the Court will not permit that as tending to usury, though not usury." [Alderson, B. I do not exactly see how a thing which is not usury tends to usury. It is not a very strong opinion. Does it go beyond this, that except you can infer it upon the custom between the parties, interest upon interest cannot be calculated in the case of a mortgage? If you could make out that no previous contract or arrangement had been executed, but that every thing was done in November, 1816, you might have some ground for argument; but the question is whether the Court may not reasonably infer that from time to time there were arrangements between the parties?] The accounts were kept and the receipts made out in the mortgagee's books; and, except in one instance, it does not appear that the defendant ever signed them. This is not an account between merchants or bankers, but simply between mortgagor and mortgagee. In such cases, although, as Lord Thurlow said, there is perhaps no good reason why interest upon interest should not be allowed, still it is contrary to the practice of Courts of equity to allow it. **[96]** [Alderson, B. Usury is a creature of the law, which in that respect must be obeyed, but no more. In my judgment, if taking interest upon interest is not usury, it is nothing at all but a laudable practice. If the parties have chosen to make an equity for themselves, why should I set it aside?] The defendants are in the situation of persons under the protection of a Court of equity; and being in that situation, the mortgagee has taken the account in a way he ought not to have done. In *Sackett* v. *Bassett* (4 Madd. 58), a case in many respects like the present, Sir Thomas Plomer thought the question sufficiently doubtful to direct an issue. In *Thornhill* v. *Evans* (2 Atk. 330) Lord Hardwicke held that rests could not be made while the relation of mortgagor and mortgagee existed, except upon the advance of fresh money. [Alderson, B. There is no evidence stated in that case. Is there any case where a bargain of this description has been held to be extortion, upon the mere relation of mortgagor and mortgagee; or where a Court of equity has interfered to declare the transaction illegal where the parties have agreed to take interest upon interest at a subsequent period? Here, the interest first became due in 1802; and 100l. being due, a regular agreement was made between the parties that one would not sue for

the 100l., provided the other would agree to pay the 100l. with interest. If this was done from time to time, why should it not be done? The settlements were confirmed by the deed by which the 1500l. was raised.] The deed should have been executed at the time of the last settlement. Instead of that, it was not executed till 1819, which shews that the settlement was not an act of deliberation. There should have been a deliberate act, shewing the intention of the parties at the time. Besides, **[97]** the deed states the 1500l. to be a further advance, the recital being that all interest was paid, and that the defendants had occasion for a further sum. The whole transaction savours of oppression. This is not a bill of foreclosure, but for equitable relief. The plaintiffs coming into equity must do equity. A creditor with a security and a power of sale is not entitled to the aid of a Court of equity to effectuate that sale. The plaintiffs, therefore, lay great stress upon the equitable consideration entitling them to come here for aid; but it is clear that if aid be offered, it must be upon equitable terms. If the plaintiffs have been overpaid, the Court, on the ground of oppression, will relieve the defendants to that extent, even though they may have assented to such payments: *Bosanquet* v. *Dashwood* (Ca. T. T. 38, 40).

Mr. Simpkinson, in reply. As to the alleged oppression, it does not appear that the mortgagee took any interest between the years 1816 and 1819, and then he took the deed for the 1500l. Besides, this was not an agreement extorted from a person out of possession, for Warwick was in possession of the rents and profits the whole time. Upon the question of usury, it is unnecessary to discuss the rules of equity in regard to agreements a priori; though it is difficult to understand upon what principle those rules depend. [Alderson, B. In the case of a mortgage deed given a priori, there is a scintilla of principle; for you lend your money at 5l. per cent. plus a covenant; but I do not see how any principle drawn from an antecedent can apply to a subsequent agreement.] This is a subsequent agreement to put the party in the situation in which he would have stood if the other party had paid the money when he ought to have done so. Then the deeds of 1827, which actually recite the com-**[98]**-promise of the Exchequer suit, amount to a complete confirmation of all the preceding acts of the parties.

ALDERSON, B. If I entertained any doubt upon the main question in this cause, I should take time to consider my judgment; but it appears to me that the plaintiffs are entitled to a decree, and that the only point of doubt is whether the sale of these premises has been prevented by the defendants, and if so, whether this suit having been rendered necessary by their conduct, they ought to be made to pay the costs. Upon that point I shall not give my opinion at present, but will look into the evidence. Upon the main question whether or not they ought to be compelled to pay the whole amount of 4000l. secured by the mortgage deeds, I shall give my opinion immediately.

In the year 1795, the sum of 1100l. was advanced to the defendants by way of mortgage; and on the 13th of October, 1803, an additional security was given by them to the mortgagee to the amount of 900l. The interest fell into arrear, and it appears that in November, 1816, an account of the arrears was taken between the contracting parties. The account begins on the 31st October, 1803, with a balance of arrears, upon which interest is calculated. As the whole account was signed by Warwick, he must have acknowledged that on the 31st of October, 1803, there was that sum due to the mortgagee. The whole of the rests in question proceed upon the same footing. There is a rest in 1807, another in 1809, another in 1813, and the last in 1816; in all of which calculations were made of interest upon interest; and that was carried into effect by the allowance of the party himself. Therefore, admitting those calculations to be proper, the result is a balance due to the mortgagee of 3500l., which was secured to him by express agreement.

Supposing, as is clear upon the evidence, that that account was signed by Warwick, and that he was furnished **[99]** with a copy of the agreement, what evidence is there upon which the Court can rely arising out of the relative situation of the parties as mortgagor and mortgagee, to induce it to come to the conclusion that there was any oppression in this case? There is not enough to induce the Court to come to that conclusion, even in the original state of the transactions, but more especially when they are found to be based upon a regular agreement between the parties. Then, is there any thing illegal in the agreement itself? It is said that if parties enter into an original agreement by way of mortgage, they cannot recover more than

5l. per cent. beyond the principal money, and that if they take a stipulation—that if the interest is not paid at the time, the mortgagor shall pay interest upon it until the arrears are paid—that is illegal. Now, in holding this to be the rule, I presume the Courts suppose that some advantage immediately accrues to the mortgagee under the deed, ultra the allowance of 5l. per cent. interest, and that that advantage being secured by an original stipulation, the contract savours of usury. If the rule cannot be supported on that ground, it appears to me that it cannot be supported at all. I confess I do not see why such interest might not be allowed, even where the stipulation to pay is contained in the original deed; but be that as it may, there the covenant being part of the original terms of the contract, is part of the original advantage accruing to the mortgagee, and the Courts will not sanction such a contract. So neither will the Courts allow interest upon interest where the party comes to an account with his debtor, which he afterwards seeks to enforce through the medium of a Court of equity. In that case it is considered that where parties who are entitled to the repayment of a principal sum with simple interest have neglected to enforce payment of the interest, that was their own omission, and the Court leaves them to take the consequences of that neglect, and will not give them an equity **[100]** founded upon their own laches. That rule is consistent with equity and common sense; but there is no reason why, if the parties settle the matter between themselves, and the one party gives time to the other for payment of the arrears in consideration of the allowance of interest on the balance, they should not afterwards be compelled to abide by that settlement. It seems to me, therefore, that they ought not to be permitted to come here to have such a settlement set aside. At all events, no case has been cited to that effect, and I shall not be the party to make a precedent of that nature, which if made would, I think, be contrary to equity and common sense.

In the case decided by Lord Thurlow, and cited at the bar, it is observed by that eminent authority, in reference to cases where interest upon interest is allowed, that if the parties mean that the debt should carry that interest, they must say so by their agreement. Here, the parties have said so, and have carried their intention into effect by the deed of 1819. That provides expressly for interest being in future paid; and if that is a settlement which a Court of equity ought to enforce, the subsequent deed of 1827, which is founded upon that, is a clear and valid contract between the parties, which ought to be carried into execution. The mortgaged property must therefore be sold, the balance due to be accounted for before the Master, together with legal interest.

On a subsequent day his Lordship said that he had looked into the evidence, and upon the whole he thought that the circumstances alleged respecting the prevention of the sale had not been made out so clearly against the defendant, Thomas Warwick, as to induce the Court to fix him with the costs of the suit; and his Lordship directed that each party should pay their own costs.

Decree accordingly.

[101] SMALL *v.* ATTWOOD. April 30th, May 7th, 1836.—A suit having been instituted by a company of proprietors of iron-works to set aside the contract under which they had purchased the iron-works of the defendant, and the decree having directed an inquiry as to the net profits made by the company: Held, that it was competent for the defendant, who had not been in possession for some years, to exhibit interrogatories before the Master, for the purpose of ascertaining in what manner the company had managed the concern, without setting forth any specific statement of facts.

[S. C. 6 L. J. Ex. Eq. 30.]

By the decree in this cause it was referred to the Master, amongst other things, to take an account of the rents and profits of the works, mines, and property, from the 1st day of October, 1825, allowing and deducting from the gross produce interest at the rate of 4l. per cent. per annum, upon the capital property employed by the British Iron Company in working the said mines; and the Master was to take an account of all money properly expended by the company in improvements in the said works, mines, and property, by the erection thereon of any new buildings, or the con-

struction of any new works or machinery begun before the 20th April, 1826, or by making any additions thereto: and he was also to inquire and state to the Court what part of such money was expended in respect of work done before the 20th April, 1826, and what part was expended in respect of work done after the 20th April, 1826, and the several circumstances attending such expenditure after the 20th April, 1826. And he was also to inquire and state to the Court whether any and what improper waste, spoil, or destruction had been committed in or upon the works, mines, and property, or any and which of them by the plaintiffs, or by or through their neglect or default, since the time the plaintiffs had possession. And in case he should find that any such improper waste, spoil, or destruction had been committed, then he was to ascertain the amount and nature of such waste, spoil, or destruction, and the damage thereby done; and was also to inquire and state to the Court whether the trade had been improperly carried on by the plaintiffs since they had had possession of the said works, mines, and property; and in that case he was also to inquire and state to the Court whether any and what damage had been sustained by improperly carrying on **[102]** the said trade, and the amount and nature of such damage, and the circumstances thereof. It was further ordered that all parties should produce before and leave with the Master, if required, all deeds, books, &c., in their custody, relating to the said accounts, and be examined upon interrogatories touching the same, as the Master should direct, and the Master was thereby armed with a commission as well for the examination of parties as of witnesses, touching the said accounts.

Very long and minute interrogatories having been exhibited in pursuance of this decree on behalf of the defendant, and the Master having certified that he had allowed those interrogatories, exceptions were taken by the plaintiffs to the Master's certificate in that respect. The exceptions were taken seriatim, applying to each interrogatory successively, and were seventy-two in number.

The first interrogatory which was the subject of exception, was as follows:—Was there any ironstone, coals, and other minerals, or any or either of them, in stock on the estate in the pleadings of this cause, called the Wolverhampton Colliery, on the 30th of September, 1825, and has not the said estate, since the 30th September, 1825, yielded or produced or had raised thereout divers quantities of ironstone, coals, and other minerals, or any or either of such particulars. Set forth a full, true, and particular account of all ironstone, coals, and other minerals respectively, which were in stock on the said estate on the 30th of September, 1825. Set forth a full, true, and particular account of all ironstone produced, raised, or gotten out of the said estate since the 30th of September, 1825, distinguishing the quantity gotten during each of the pays or periods between one pay-day and another pay-day; and distinguishing the kinds, natures, or sorts of such ironstone, and the quantity of each sort so gotten during each of the said pays or periods and the respective **[103]** charter prices at which the same were respectively gotten during each of the said pays or periods. Set forth a like account of all coals produced, raised, or gotten out of the said estate since the 30th of September, 1825, distinguishing the quantity, &c. [in the same words as before]. And a like account of any other minerals which may have been produced, &c., distinguishing, &c. [in the same words as before].

The third interrogatory contained very minute inquiries as to the quantity of ironstone which had been recovered from the Wolverhampton Colliery, distinguishing the kinds, natures, and sorts, the times when, the prices at which, and the names and addresses of the persons or firms to whom the same had been so sold; distinguishing between the calcined and the uncalcined ironstone, &c.

The fourth interrogatory contained inquiries as to the expenses incurred and paid in respect of the Wolverhampton Colliery, other than the charter prices mentioned and required the plaintiff to set forth a full, true, and particular account of those expenses incurred and paid during each and every of the said pays or periods; distinguishing the expenses incurred and paid from those incurred, and distinguishing in such account the engine expenses and dead work, the general charges, with the respective items thereof, and the permanent salaries and expenses, with the respective items thereof, &c.

These and many other interrogatories were applied successively to the various mines which were the subject of the suit.

Mr. Knight (with whom were Mr. Wigram and Mr. Sharpe), for the exceptions. These interrogatories are unwarranted by the practice of the Court, and uncalled for

by any of the emergencies of the cause. Where a decree gives liberty to exhibit interrogatories, a party is not warranted in interrogating as to every minute article. **[104]** In the first instance the party is confined to the language of the inquiries directed by the decree. He must put his questions in these terms: If the answer is unsatisfactory, then upon a special case made and allowed by the judge, a more extended inquiry is permitted. It never was the practice for a party to be allowed at his own fancy to subdivide the questions as he chose, using every species of intricate variation: *Moore* v. *Langford* (6 Sim. 323). The question as to the quantity of ironstone, &c., obtained between pay-day to pay-day is totally irrelevant. The inquiry was only as to the net profits. [The Lord Chief Baron. This appears to be an attempt to obtain the particulars on which the net profits ought to be calculated. That is a legitimate object; the only question is whether that inquiry has been carried too far.] If the Court had intended a minute inquiry in the first instance, it would have so directed. An inquiry directed as to the net profits does not give the party necessarily a right to go into all the materials from which the minute particulars may be obtained. Besides, no ground of necessity for it has been laid, nor has any state of facts been carried in. A special case ought to have been made out, supported by a state of facts.

Mr. Wakefield and Mr. Lovat, contrà. The interrogatories are consistent with the practice of the Court, and required by the exigence of the case. We deny the proposition that, in order to exhibit minute interrogatories, it is necessary to have a state of facts. If convenient to the parties, or the Master directs it, the parties may take that course, but they are not bound to do so. How could the defendant carry in a state of facts when he was ignorant what the facts were? In this case, the parties seeking to rescind the contract have been in possession eleven years, **[105]** and by the frame of the decree they are continued in possession till the account shall be taken; this shews that the object of the defendant is not delay. His object is entirely consistent with the decree, which is not merely for an account, but directs an inquiry as to waste. That distinguishes this case from *Moore* v. *Langford*. There, it was contended, and successfully, that where misconduct is alleged on the record, but the decree is silent upon that subject, the Master is not at liberty to allow an interrogatory on that point. Here, the Court was not content with directing an account of the net profits, but it being a case of alleged misconduct, the Court directed an inquiry as to whether the plaintiffs had been guilty of waste and negligence in the management of the concern. One of the great subjects of contest has been the "yield" account: and one question is whether sufficient diligence has been exercised to obtain the proper quantity of yield. The yield varies from quarter to quarter, and from pay-day to pay-day. The cost of the pig iron depends on the yield. The defendant therefore has a right to know the quantity of yield. Another question is whether the workmen have been diligent or negligent; also, whether making pig iron by contract is not more profitable than trusting to the natural diligence and intent of the workmen. The interrogatories as to the quantity of ironstone calcined, the charter prices for the coals, &c., are most essential. The accounts cannot properly be taken without entering into these minute details; and in *Bowsher* v. *Watkins* (*a*) interrogatories founded upon the decree, and in every respect as minute as those, were allowed. As trustees for the defendant, the plaintiffs are bound to render accurate accounts, and to keep those accounts in such a manner as to enable him to ascertain their accuracy.

[106] Mr. Knight, in reply. If the questions put are beyond the probable necessity of the case, they cannot be allowed. Where, for instance, an account is required of an executor, he is bound to set forth an accurate, and, to some extent, a minute statement; but if he sets forth an auctioneer's catalogue, it will be expunged at his own expense. *Moore* v. *Langford* is in point. [The Lord Chief Baron. In that case the interrogatory did not grow out of the decree. That is the principle of the decision.] The common form in the Master's office for interrogating an executor is general. He is never asked for the specific enumeration of every chattel. It is not sufficient for a party to shew that by bare probability the question may be applicable. He is not spontaneously to harass his opponent; if this were allowed, there would be no end of vexation. This case will be most important to defendants who are generally the accounting parties. If these interrogatories are allowed, what protection can they

(*a*) Not reported on this point.

expect from the Court? In the present case no reason whatever has been given for taking the account from pay-day to pay-day. [The Lord Chief Baron. You could refer to the books for that account.] It was doubted whether that mode of answering would be sufficient. In a late case a party had carried books into the Master's office, and referred to them, and the Vice-Chancellor held that was not sufficient. The main complaint against the present interrogatories is that they call upon the plaintiffs to make calculations which are not to be found in the books. For that purpose it will be necessary to employ an accountant.

Many of the grounds on which the defendant puts this question are collateral to the present inquiry. The question of waste is totally irrelevant. [The Lord Chief Baron. I agree that, generally, where an inquiry is directed to the Master, part of which is to be extracted from one side and part from another, the party who in-**[107]**-sists on the negative must proceed upon a state of facts. Upon an inquiry as to waste, a state of facts would be necessary. Here, the circumstances are peculiar. You offer to account for the net profits which you have made during the time you have been in possession. It is part of your duty to do so, in order to justify you in the equity which you seek. But unless your antagonist has the means of ascertaining the manner in which you have managed the concern, how can he be satisfied with your statement of the net profits? It might have been sufficient, if no question had been raised about the proper mode of arriving at the net value of the concern, to have simply directed an inquiry as to the net profits; but part of the inquiry is whether there has been any waste or mismanagement. Now, how can the defendant, who has not been in possession, and cannot be presumed to be acquainted with your mode of conducting business, lay a statement upon that subject before the Master? He says, "You have offered to account to me for the net profits. In order to do that I am not only entitled to have an account of what you have made, but what you ought to have made; and therefore the question of management and skill of your servants become involved in the very inquiry of net profits." Supposing these mines to be worked by an agent, has not the principal, calling on the agent for an account of the net profits, a right to make those inquiries?] It is apprehended he has not that right without making a special statement. The defendant has made no suggestion against the fulness, fairness, and regularity of the plaintiffs' books. He ought, in the first instance, to have called on the plaintiffs to verify their books. As to the question of management, it has nothing whatever to do with the accounts.

May 7th.—THE LORD CHIEF BARON. This is a case of exceptions to the certificate of the Master, in which he has **[108]** allowed certain interrogatories to be put in. The ground of the exceptions are that the interrogatories are too minute, and may therefore operate in a way to give great delay, and render it impossible for the Master to go through the inquiry which he is directed to make, in a satisfactory manner. [His Lordship then read that part of the decree which is above stated.]

Now the Master has here a very laborious inquiry cast upon him, and one that of necessity calls upon him to enter into very minute details. It is alleged by way of objection to the interrogatories which he has allowed, that there has been no statement of facts preceding them, in order to inform the adverse party what is the allegation which the party intends to make or to maintain before the Master. Now it appears to me that this case, so far as it depends upon ascertaining the net profits, and the manner in which the work has been carried on, with some of the other particulars stated in this reference to the Master, does not require, and does not in its nature admit of, a statement of facts. How can the defendant make any statement of facts respecting the net profits, or respecting the improper mode of carrying on the trade upon these premises to which he had no access? It appears to me that so far as the Master is called upon to inquire into the net profits, or the mode of carrying on the trade, or the capital expended, or properly expended, it is not a case in which the defendant can be called upon to make a statement of facts, if such a statement were essential. That part of the inquiry which respects the permanent damage done to the premises in the shape of waste or injury existing after the premises were delivered up, may undoubtedly be made the subject of a statement of facts. But still I do not understand the inquiry here directed to that particular part of the case, or that the objection arises from any want of statement of facts upon that subject. The use, I apprehend, of a statement of **[109]** facts before the Master by either party is merely to assist the Master in his inquiry. The usual course of the Master's office is that the

parties should assist him by statements of what they want to prove, or wish to have admitted, but I do not apprehend that the party is essentially called upon to do that for the purpose of constituting the inquiry. Suppose the Master himself were left to suggest what course he would take to ascertain the particulars inquired after; what else could he do but call upon the parties to render an account of all the particulars necessary to enable him to calculate the net profits, or to ascertain the mode in which the work was carried on? I cannot, therefore, myself see any objection to this certificate of the Master.

The apprehension which might have been felt, that it might be impossible to make an answer to these inquiries, could only be that the account had not been kept in such a manner as to enable the parties to give the minute answers required. Now, assuming that to be the fact, it appears to me the Master ought to be satisfied with an answer which shall shew him that the parties bonâ fide render such an account as circumstances enable them to render, there being no intention to hold back what ought to be communicated. Let me put a case only to illustrate what I mean. The interrogatories require that the particulars shall be stated of the materials raised from the collieries and mines, and various other matters, upon every pay-day, so as to take an account from pay-day to pay-day. I will suppose that in the progress of the work—I know nothing of it, I will assume it—the habit has been to take a precise account from pay-day to pay-day, in order to ascertain and to check the quantity in hand, with the quantity that ought to be in hand, but that after the parties are satisfied that all is correct, it has not been the practice to enter the minute particulars of pay-day and pay-day in the books; but the parties being **[110]** satisfied with the checks taken at the time, have thrown the memorandums or vouchers away, and have only entered the result in the books, either monthly, quarterly, or half-yearly—on that answer being bonâ fide made to the Master, and it appearing, on reference to the books, that such was the case, the party would naturally say, we are not unwilling to render the minute account you require, but in fact our mode of keeping the account has not permitted it; we have kept them in such and such a manner, and we will render you as faithful and minute and particular an account as we can, consistently with the mode in which we have kept the account; but as we have not preserved those vouchers from fortnight to fortnight, we can make you no other answer: and it appears to me the Master ought to be satisfied with that answer. But suppose, on the other hand, it has been thought necessary for the purpose of carrying on the trade to keep the accounts in that way, and that those accounts do not exist; then the proper answer would be that the books have been brought into the Master's office, and will be verified on oath, as books kept in a certain manner; and by reference to certain pages of the book, the Master will find the particulars which are there stated, the result of which may be given in the answer. It appears to me, therefore, that no difficulty lies in the way. That an account of this nature may take some time and great attention to investigate it is undoubtedly true; but I do not see, notwithstanding the minute particulars to which these interrogatories are directed that they really go to any thing more than that which may—I do not say absolutely must—be essential, or at least highly useful, to ascertain the precise data upon which the calculation is to be made. For example, it is suggested that, from a given quantity of matter, composed of various sorts of minerals or coals—I do not pretend to know any thing of the details—you ought to extract a certain quantity of net iron. If so, how can the Master ascertain whether **[111]** the trade has been properly or improperly carried on, without the means of ascertaining the amount of the raw material as compared with the result of net produce? These interrogatories are calculated to ascertain that. If the Master, upon examining the mode in which the account has been really and bonâ fide kept—assuming the account to have been kept bonâ fide—should find the mode of keeping it does not permit the party at this distance of time to go so minutely into particulars, but yet appears to have been kept with prudence and in a manner not to deceive the party himself, he will be satisfied with the answer on that subject. He will be satisfied if the party says, we cannot give you the minute quantity of each material raised in each fortnight, but we can give you a very sufficient account of what was raised quarterly, and what was raised half-yearly, and we say we examined the checks from time to time, and we have no reason to believe that there is any defalcation, any subtraction or abuse of confidence reposed in our workmen during the period; therefore we have not had a minute account, but such as it is we give it to you. The

interrogatories do not bind the parties to answer that which they do not know; and if there has been no suppression, no fraud, no neglect, so as to render any further inquiry necessary, in my opinion the Master ought to be satisfied, and will be satisfied with the answer so given.

It appears to me, therefore, that there is no good reason for allowing the exceptions made to the Master's certificate. I think it must have been perceived when the case was argued that that was the inclination of my opinion. If I could see that for the purpose of any delay, interrogatories were put in so minute a form as were wholly unnecessary, it would have been my duty undoubtedly to resist any expedient that either side might adopt for such a purpose. But I entertain no suspicion of that sort. I can see no reason, no interest that either party should now have for delay in this case.

[112] Before I gave my judgment, I thought it right to communicate the particulars to my predecessor, who is much better acquainted with the whole history of this case than I can pretend to be, or I hope ever to be; and he stated that, upon his view of the case, he did not think the interrogatories were improper. He seemed to take the same view I did of it, and said he thought he would confirm the Master's certificate. Under these circumstances, it is a great satisfaction to have his authority for saying that the course I have taken is that which he would himself have adopted.

Exceptions overruled.

PORTER *v.* HYATT. May 5th, 1836.—A clerk in court has a lien upon the fund in Court, and also upon the decree and other documents in the cause, in respect of his fees and disbursements.

[S. C. 6 L. J. Ex. Eq. 36.]

Under an order made in this suit, which was instituted in the year 1831, a sum of money was paid into Court, and invested in the purchase of 694l. 3l. per cent. Consols, in the name of the Accountant-General, in trust to the credit of this cause. Various proceedings were afterwards had until the year 1835, when the plaintiff changed his solicitor. Upon that occasion the bill of costs of the former solicitor was paid, which bill included the usual items of fees and payments to the plaintiff's clerk in court, amounting in the present instance to about 24l.

Shortly after this transaction, the plaintiff, through the medium of his new solicitor, entered into a compromise of the suit with such of the defendants as were mainly interested, in consequence of which a motion was now made for the plaintiff, that the sum of 694l. 3l. per cent. Consols, might be paid out of Court and apportioned between him and those defendants; and that, thereupon, the bill might stand dismissed. The plaintiff's clerk in court had not, **[113]** in fact, been paid, although the plaintiff's former solicitor had received the money in the manner before stated.

Mr. Campbell, for the plaintiff, in support of the motion.

Mr. G. L. Russell for the defendants.

Mr. Simpkinson, for the plaintiff's clerk in court, opposed the motion on the ground that the money due to his client for fees and disbursements had not been paid. The fund in question has been paid into Court, in consequence of the exertions of this gentleman; and it is extraordinary if the Court cannot order its own officer to be paid his fees and expenses out of it. A clerk in court has a lien on the funds in Court, and has altogether the same privileges in the cause as a solicitor. He is, in fact, the only recognised attorney in the cause; and the circumstance that the costs have been paid to a former solicitor ought not in any way to affect him. There are several cases, both in Chancery and in the Exchequer, bearing upon this point: *Taylor* v. *Lewis* (3 Atk. 727), *Merrywether* v. *Mellish* (13 Ves. 161), *Stevens* v. *Avery* (1 Dick. 224), *Donnelly* v. *Lawley* (2 Fowler, 381), *Delay* v. *Popham* (id. 382), *Shafto* v. *Powell* (ibid.). There are also many cases in point in the minute books.

Mr. Campbell, in reply. The case of *Taylor* v. *Lewis* has no application to the present, for that was a question between a six clerk and a clerk in court. The motion stood over in order to ascertain a fact, and the matter was afterwards compromised. In the case in Dickens, a sum was actually due from the client to the solicitor. Here, the present solicitor has paid the whole bill to the former solicitor. The cases cited from Fowler are of little or no **[114]** authority. Fowler was himself a clerk in court,

and, therefore, scarcely a fair judge of the question. The cases, however, which he mentions, do not bear out his proposition, which is that a clerk in court has always a lien for his fees upon the money in Court. In one case, he mentions the taxation of Mr. Martin's bill of costs. That shews that Mr. Martin was acting not only as clerk in court, but as the solicitor conducting the cause; because the fees due to him as clerk in court would not be subject to taxation. The same observation applies to the other cases. The clerk in Court is the agent of the solicitor; he is not retained by the client: there is no privity between him and the client. He has a right of action at law and suit in equity against the solicitor for the amount of his fees: *Barker* v. *Dacie* (6 Ves. 681). If that be so, it follows that he has no demand against the client, and can have no lien as against the client. If there were a lien, it could only be through the medium of the solicitor; but, by payment to the solicitor, that lien would be discharged. [The Lord Chief Baron. Can you shew that any one can conduct a suit without the clerk in court? He is the recognised officer of the Court.] In *Farewell* v. *Coker* (2 P. W. 460) it was held that the clerk in court was not entitled to his fees, after the client had once paid them to the solicitor. That case is not distinguishable from the present. [The Lord Chief Baron. In that case there was no money in Court.]

THE LORD CHIEF BARON. How is it at law, where the attorney for the plaintiff or defendant is his agent for conducting the action; can the Court take notice of any other attorney than that attorney whose name appears on the record? I apprehend not. Then, as the Court of Chancery is not a Court of record, whom can that Court recognise **[115]** as the solicitor, and as the party acting in the conduct of the suit, but the clerk in court? The office of sixty clerk in the Court of Chancery, and of clerk in court in the Court of Exchequer, originally had this meaning, that in Courts of equity no person could employ any one to prosecute his suit, except one of the officers of those Courts. So it was upon the other side of this Court till the Court was opened. The clerks in court, and the side clerks, were the only persons the Court could notice; they could not recognise the name of any attorney, either of the plaintiff or the defendant, unless he were one of their own officers. The rule has since been relaxed. The Courts now permit suits to be conducted by professional men who are not their officers; but it is not to be considered that because the party employs a solicitor as his agent, he is exclusively an agent in every sense of the word. The solicitor is the medium of communication between the client and the clerk in court. The question then is, who has the lien on the decrees and papers and funds in Court, in the progress of a cause? It appears to me that the clerk in court, as the officer of the Court, is the person so entitled. As, originally, no person had the power of conducting the cause but the clerk in court, I think that for the present purpose he is the only solicitor the Court can look to.

If a strong case could be cited to shew that this was not so, I should be glad to look into it. The case cited from Peere Williams does not shake the principle upon which it seems to me that the right of the clerk in court depends. In that case there was no question as to any lien upon money in Court. The question was whether the Court could make an order upon a party, who had no money in Court, to pay the particular bill. The Court thought it could not do that. So, if the money had been paid here from one party to the other, the Court could make no order. All the Court can do is to give effect to **[116]** any lien that may exist in any of its officers. An attorney has a lien at law upon the judgment of the Court of law. When judgment is given on behalf of a party who has employed a second attorney, the Court will not permit the new attorney to issue execution on the judgment without seeing that the first attorney's costs are paid; because he had a lien upon that judgment. Now, what is the nature of the present motion? It is, in substance, an application by the new solicitor of the plaintiff, without the leave of the clerk in court, to have money paid out of Court, on which a lien exists. Upon the principle, therefore, which I have already stated, it seems to me that this application cannot be granted. I am very sorry for the party who suffers in this instance, but he should have made enquiries on the subject, and taken steps to see that the money was paid. If the bill had been taxed, the solicitor must have shewn that he had paid the clerk in court, or that the latter had given him credit for the amount of his expenses.

Upon the whole, it appears to me that the solicitor who has the lien on a judgment or a decree of the Court is, in the first instance, the clerk in court; and that on

that principle these expenses must be paid. It strikes me so at present. The plaintiff, therefore, must take his order, subject to the clerk in court's demand. If I see any reason to change my opinion, I will mention the matter again.

On a subsequent day his Lordship said that he adhered to his former opinion.

[117] WRAGG *v.* DENHAM AND OTHERS. May 30th, 31st, 1836.—On a bill for redemption of mortgaged property in the possession of the mortgagee, the latter will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair of the mortgaged premises.—Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the Court directed the Master to examine the bill with a view to ascertain the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done.

[S. C. 6 L. J. Ex. Eq. 38. And see 4 Y. & C. Ex. 570.]

In the year 1828 the plaintiff contracted with the defendant Denham for the purchase of two third parts of a freehold messuage and lands situate at Handley, in Derbyshire, for 350l.; and shortly afterwards contracted with some persons of the name of Hawksley for the purchase of the remaining third part. The plaintiff not being able to pay the 350l. to Denham, it was arranged that the whole of the property should be mortgaged to Denham to secure the repayment of that sum with interest. This arrangement was duly carried into effect by deeds bearing date in June, 1828. Those deeds were prepared by the defendant, Thomas Clarke, who acted as the solicitor for both parties.

In the same month of June, 1828, the plaintiff being seised of some freehold and copyhold property situate at Woodhead, in the county of Derby, by indentures bearing date the 16th and 17th of that month, reciting that there was due to one Boot, on the security of those premises, 140l., and that the defendants, Thomas and John Clarke, had agreed to pay off the same, and also to advance to the plaintiff 200l. more, it was witnessed that in consideration of 140l. paid by the Clarkes to Boot, and of 200l. paid by them to the plaintiff, the latter covenanted to surrender the copyholds, and released and conveyed the freeholds to the defendants Thomas and John Clarke and their heirs, in trust to sell the premises, and out of the proceeds of the sale to reimburse themselves their costs and expenses; then to repay themselves the 340l. with interest; then to repay Denham his 350l. with interest, and to pay the surplus, if any, to the plaintiff.

In 1830 the interest on these mortgages being greatly in arrear, the defendants turned the plaintiff and his **[118]** family out of the premises, sold the crops, and took and retained possession of the property. The Woodhead property was advertised for sale, but no sale was effected.

The plaintiff now brought his bill to redeem both mortgages, charging that the defendants had been guilty of gross negligence in the management of the property while in their possession, and ought to be made answerable for the damage done through their neglect; charging also that the money stated to have been advanced by the defendant Clarke was the alleged amount of his bill of costs, but was in fact not justly due to him from the plaintiff, and that in fact no bill of costs had ever been delivered; praying accounts of the rents and profits of all the premises, that the defendants might be chargeable for damage done from non-repairs, and that Clarke's bill might be taxed, &c.

The defendants by their answers admitted that the premises were out of repair, but ascribed it to the conduct of the plaintiff and an attorney whom he had lately employed, who, as they alleged, had done various acts to stop the sale of the property, and had thereby prevented respectable tenants from hiring it. The charge in the bill respecting the mortgage made to the Clarkes was explained thus: that 140l. was advanced by them to pay off Boot's mortgage; 126l. 17s. to pay the Hawksleys for their one third of the Handley premises; and 78l. 16s. 5d. for Thomas Clarke's bill of costs. The defendant Clarke also insisted that before the plaintiff executed the mortgage deeds of the 16th and 17th June, 1828, he carefully inspected the bill of

costs, and made no objection to any item therein; but the defendant did not recollect whether he had delivered to the plaintiff a copy of his bill of costs.

The cause coming on for hearing, the plaintiff gave evidence of bad husbandry and want of repairs on the premises since August, 1830, when the defendants took possession. In reference to the Handley property, one **[119]** witness swore that a field of about three acres and a half was fallowed in the summer of 1831, and laid down on such fallow, and that three crops following the fallow had since been sold therefrom; and that the fourth crop was a hay crop, which was then growing thereon; and that the greater part of the remainder of the farm which should have been fallowed had not been so, but had been hardly cropped, without an adequate quantity of manure laid yearly thereon. It was also proved that the barns and out-buildings on the freehold premises were in a tenantable state of repair in 1830; but since that time they had become very ruinous for want of necessary repairs, the wet being allowed to get in. In the judgment of the witnesses, the Handley property was in August, 1830, worth 16*l.* per annum, but now not above 9*l.* per annum. The Woodhead property was not so much depreciated.

Mr. Spence and Mr. Hall, for the plaintiff, submitted that special directions ought to be given respecting the deterioration of the property, and that Clarke's bill of costs ought to be taxed, 78*l.* being an exorbitant charge. Besides, it did not appear that any bill was properly delivered. [Alderson, B. No doubt the bill ought to be looked at by the Master. The attorney prepared the mortgage in his own favour, and part of the consideration money is paid over to his own client.]

Mr. Twiss and Mr. Hayter, for the defendants, Denham and Clarke. No enquiry as to specific mismanagement ought to be allowed. If specific waste had been committed on the premises, as, for instance, by pulling down a house and selling the materials, such an enquiry would have been essential, but that does not apply to mere depreciation arising from bad husbandry. [Alderson, B. In *Hughes* v. *Williams* (12 Ves. 495) Lord Eldon says **[120]** that "if the mortgagee can be shewn to be guilty of such gross negligence as comes up to the description of wilful default, he ought to be answerable for it." The question is whether there has not been here such gross negligence as to occasion depreciation; not merely whether there has been mishusbandry. What is alleged by the witness as to the manner of cropping the land appears to be gross misconduct in the mortgagees.] The question is not between landlord and tenant, but between mortgagor and mortgagee. The tenant is under a contract with his landlord for the proper management of his farm, but the mortgagee is in no such situation. If, failing to obtain his principal and interest, he gets possession of the premises, he ought not to be responsible for any thing beyond fraud. As to the bill of costs, it is clear that unless it contains a taxable item it ought not to be submitted to the Master for taxation. [Alderson, B. It is in the nature of a bill of costs which has been paid; and I think the Master ought to look at it.] If it is submitted to him with a view to surcharge and falsification, the plaintiff ought to point out the particular items which he objects to.

Mr. Shadwell, for another defendant.

Mr. Spence, in reply, contended that it could not be consistent with the duty of a mortgagee in possession, so to manage the property, that when the mortgagor came to redeem it was not worth half its value. He cited *Russell* v. *Smithies* (1 Anst. 96) as shewing the principle on which cases of this nature rest, although there, under the circumstances, the decision was in favour of the mortgagee.

ALDERSON, B. There is no dispute that the account will be taken, generally, in the ordinary manner. The decree will direct the Master to take an account of the **[121]** principal money and interest due to the mortgagees, to charge them with the rents and profits received by them since they took possession, and to take an account of the crops sold by them since that period; and upon making all due allowances, the Master will and ought to deduct from the monies found to have been received from the sales the expenses of the sales, and all necessary expenses which the mortgagees incurred to obtain a transfer from the purchasers of the crops of the monies due upon such sales.

The next question is whether I ought to direct the Master to enquire into the amount of the bill which formed part of the consideration for the mortgage executed by Wragg to his attorney. I think I ought; because it appears to me that Clarke and Wragg being in the situation of attorney and client at the time these transactions

took place, Wragg's assent to the bill of costs was not such an assent as ought to preclude him from an enquiry upon the subject before the Master. At the same time it would be unreasonable to require Clarke now to enter into evidence of business done for his client; and the only question will be whether, if the business were done, the charges are fair and reasonable. If the Master thinks that they are not so, he must make a deduction in that respect.

Then comes the important question, whether I ought to charge the defendants with the deterioration in the value of the premises since the period when Clarke took possession. It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in Anstruther. There the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the mean time in the ordinary way. I think, also, that a mortgagee ought not to be charged exactly **[122]** with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee: gross negligence is sufficient. The question therefore is, whether the fact of gross negligence is sufficiently established in this case to enable me to direct the enquiry asked for by the plaintiff. Upon that point I should like to look more minutely into the evidence, because if the Master be directed to make that enquiry, there will be considerable additional expense. If upon examination of the evidence I should come to the conclusion that a primâ facie case of gross negligence is made out, I must direct the enquiry. If, on the other hand, I should be of opinion that there is not sufficient evidence of that fact, of course the principle of law will not apply.

On the following day his Lordship said that he had looked through the evidence, and upon the whole he thought he ought to direct an enquiry as to whether the deterioration in the value of the premises had arisen from the gross negligence in the mortgagees for want of proper repairs and proper cultivation. As to the other point respecting the bill of costs, his Lordship thought that the Master ought to look at the bill with a view to consider the propriety of the items, upon the assumption that the business had been actually done.

Decree accordingly.

[123] EDWARDS *v.* EDWARDS. May 25th, 1836.—Quære, whether it is a good and reasonable custom that upon the death of a tenant in possession of lands holden of a manor for lives, the next life in reversion for which the estate is holden shall be entitled to enjoy the estate; and if such custom be good and reasonable, whether, where a party takes a grant of such lands for the life of himself and his grand nephews and dies, the grant shall operate as an advancement for the grand nephews, so as to rebut a resulting trust in favour of other parties claiming under the purchaser.

[S. C. 6 L. J. Ex. Eq. 79.]

Farmer Edwards, deceased, holding certain copyhold lands for lives, under the Dean and Chapter of Winchester, as lords of the manor of Honiton, in the county of Wilts, agreed to surrender the same, for the purpose of substituting two new lives for two of the original lives. The proposed lives were those of John and James Edwards, who were his great nephews. Farmer Edwards having paid part of the consideration money, died; and the agreement was carried into execution by James Edwards, his brother and personal representative, who paid the residue of the consideration money. James Edwards died, and under his will the present plaintiff, Edward Edwards, claimed the property, and took possession of part of it. John Edwards took possession of the other part; and also brought an action of ejectment to recover the part which was in the possession of Edward, alleging an intention in Farmer Edwards to provide for his great nephews; and also alleging a custom in the manor, that after the death of the tenant in possession of an estate holden of the

manor for lives, the next life in reversion for which the estate is holden shall be entitled to enjoy the estate.

The present bill was filed to restrain the action, and the plaintiff had obtained the common injunction.

Mr. Spence, for the defendant, now moved to dissolve the injunction, the defendant having put in his answer. He also submitted that, as the custom under which the defendant claimed could not be disputed, the Court would give him the immediate benefit of a judgment, so as to enable him to establish his legal title for the purposes of this suit, without the expense of prosecuting the action. **[124]** The legal title of the defendant was recognised in *Edwards* v. *Fidel* (3 Madd. 237). This is purely a question of equity; namely, whether the defendant can rebut the resulting trust of which the plaintiff claims to have the benefit. It is conceded that the onus of rebutting that resulting trust rests upon the defendant.

Mr. Tenant, contrà. The defendant has no equity, for he admits that he never paid a farthing for the property, and no legal title, because the custom set up is unreasonable and bad. The case of *Edwards* v. *Fidel* is overruled by *Lewis* v. *Lane* (2 M. & K. 449).

Mr. Spence, in reply. *Edwards* v. *Fidel* was only cited as recognising the legal title of the defendant. The opinion there given as to the validity of a custom which excludes resulting trusts, is not relied upon here; for it is admitted that the defendant must rebut the resulting trust. *Taylor* v. *Alston* (2 Cox, 96, cited) will probably govern the present case. [The Lord Chief Baron. The customs in Wiltshire are peculiar. That which you state is a curious one, for it precludes the common law right of holding in joint-tenancy.]

THE LORD CHIEF BARON. I cannot, under present circumstances, consent to allow the defendant the benefit of the judgment; but, as the title at law is disputed, I see no reason why I should preclude him from going to trial. Therefore, the injunction must be dissolved as to that; but let there be an injunction to stay execution till the question in equity is settled.

[125] LORD GLENGALL *v.* EDWARDS. May 7th, 1836.—Upon a bill of discovery in aid of a defence to an action on a bill of exchange, if the defendant in equity is interrogated as to the consideration given for the bill, he must answer not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given.

This was a bill of discovery in aid of a defence to an action brought against the plaintiff on two bills of exchange, which had been given by the plaintiff to the defendant's father.

The father died in March, 1832, and the defendant took out letters of administration of his father's effects, and possessed himself of the books and papers of the deceased. The defendant, however, by his former answer to the bill, alleged that he had not come into the possession of these bills of exchange as his father's administrator, but had received them from his father for valuable consideration. He admitted, however, that he had assisted his father in his business, and knew the state of his affairs.

The case made by the bill was that from 1821 to 1828 the plaintiff had employed the defendant's father as his tailor, and that he had frequently paid him by means of bills, drawn by the plaintiff on his agent, but that the plaintiff had never had any dealings with the defendant's father except as his tailor, and that all accounts between them had been long since settled and paid.

The plaintiff having amended his bill by interrogating the defendant more closely as to the consideration for which these bills were given, exceptions were taken to the answer for insufficiency.

Per Curiam. In an action brought against Lord Glengall on these bills, he must shew, first, that the bills were without consideration in the hands of the deceased, and, secondly, that they were without consideration in the hands of the plaintiff at law. It was long doubtful whether a defendant might not throw the onus of prov-**[126]**-ing consideration on the plaintiff, by shewing that it was an accommodation bill; but it has lately been held that you cannot do that. In this case, if the defendant had

answered—I hold the bill proprio jure, and know nothing about my father's affairs—that would have been a complete answer; but the defendant goes further than that. He answers in such a manner as to shew that he can rely on both points at law: he is, therefore, bound to give the plaintiff an explicit answer on both points. It is clear that when a bill of discovery is filed against a person who brings his action on a bill of exchange, and the plaintiff in equity puts questions as to the consideration, the defendant in equity is bound to state, not only the consideration which he gave for the bill himself, but that which he knows another to have given.

The Court was then about to allow the exception; but it appearing upon an examination of other parts of the defendant's answer, that he had stated upon the whole what was sufficient to meet the plaintiff's ends,

The exception was overruled.

Mr. Simpkinson and Mr. E. Montague, for the plaintiff.

Mr. Temple and Mr. Kenyon Parker, for the defendant.

[127] JANSON *v.* SOLARTE. May 14th, 1836.—Upon a bill of discovery in aid of a defence at law, and an injunction to restrain the proceedings at law, the Court will not dissolve the injunction before the coming in of a defendant's answer, upon presumptive evidence of his death, if that evidence, though strong, be qualified by circumstances tending to a contrary conclusion.—Answer read as an affidavit of a fact, and affidavit admitted to contradict the answer upon that fact. Policies of insurance having been effected by a certain firm on goods alleged to have been purchased and shipped by them in September, 1829, and an action having been brought on those policies, the underwriters filed a bill of discovery against the firm, alleging that no such purchase had been made; and afterwards obtained an order to amend their bill, upon a suggestion, supported by affidavit, that the firm had not sufficient capital to make the purchase: Held, that such permission to amend did not authorize the underwriters to introduce into their bill inquiries as to the general solvency of the firm, or as to its dealings and transactions from the commencement of the partnership in 1827.—The underwriter has a right to the most extensive discovery relative to the particular transaction which is impeached, but the Court will interpose to prevent him from making general inquisitorial inquiries.

[S. C. 6 L. J. Ex. Eq. 75.]

The bill in this case was filed by the plaintiff, on behalf of the underwriters at Lloyd's, against the defendant Solarte, and two other persons of the names of Santemarie and Santos, for discovery, and for a commission to examine witnesses abroad in aid of the defence to an action brought against the plaintiff by Solarte on two policies of insurance. The policies were effected on certain goods and doubloons, alleged to have been shipped at Bordeaux, on board a vessel which sailed from that place on the 4th of September, 1829, and was lost on the 15th of the same month. The interest was averred to be in the defendants Santemarie and Santos, who at the time of the alleged shipment were merchants and partners, resident at Bordeaux.

The bill was filed in February, 1830. In April, 1836, the defendant Santos put in a very full answer, in which he stated that, in consequence of the loss of the property insured and other severe losses, he and his partner were obliged, in February, 1830, to borrow a large sum of money in order to continue their payments; and that, as a security for the sum borrowed, they assigned the policies in question to the lenders of the money. He further stated that he and his partner afterwards stopped payment; that in March, 1831, their failure was declared by the Tribunal de Commerce at Bordeaux, and that syndics or assignees of the estate and effects of the partnership were duly appointed by that Court: that considerable discussion took place in the French Courts as to what was to be considered the precise legal time of the failure, and that it was ultimately decided by the proper court of appeal that the failure took place on the 20th of April, 1830. The defendant then stated that, owing to these proceed-**[128]**-ings and other circumstances which he mentioned, he had been unable to put in his answer at an earlier period.

The plaintiff having obtained the common injunction, a motion was now made to

dissolve it as against the defendant Santemarie, who had not answered, but who was not to be found. In support of the motion, the following statement was read from the answer of the defendant Santos:—That Santemarie left Bordeaux for London in November, 1829, for the purpose of settling with the underwriters, at which time he was in a very bad and infirm state of health, and was of a consumptive habit, and afflicted with spitting of blood, for which complaint a cold climate, such as England in the winter season, is particularly unfavourable. That the defendant was informed that, shortly after Santemarie arrived in London, he found his complaint so much increased by the nature of the climate that he was under the necessity of quitting England. That he went from thence to Nice, and from Nice to Genoa, where the defendant received a letter from him in March, 1830. That since that time the defendant had received no letter from him, but was informed during the last year by Mr. Doris, a broker at Bordeaux, that Santemarie had gone from Italy to Rio Janeiro, and had died there; but by what means Mr. Doris obtained such information, and whether the same was true or not, the defendant could not set forth. That from the circumstances before mentioned, and from no communications ever having been since received from him, either by the defendant or any other person at Bordeaux, the defendant was fully persuaded, and had no doubt, that Santemarie had long since died, it having been the opinion of the defendant and other friends of Santemarie's, at the time he quitted Bordeaux for England, that he would not recover from his disease; and that it would in no very long time occasion his death.

In answer to this statement, the affidavit of Mr. Wil-**[129]**-liams, the agent of the plaintiff's solicitor, was read. The deponent stated some slight circumstances, tending to shew that Santemarie had not gone to Genoa. He however added that he had in his possession letters, in the handwriting of Santemarie, and which had been sent to his correspondents at Paris, bearing the date and postmark of Geneva, and dated at several times in 1830. The last date was that of the 4th September, 1830. According also to the deponent's information and belief, Santemarie had at the time of making this deposition several children and relations living near Perpignan and at Barcelona; and in January, 1830, when the deponent was at Bordeaux, a nephew of Santemarie, who attended at the counting-house of the firm at that place, corresponded with his uncle at Geneva.

Mr. Simpkinson, Mr. Sidebottom, and Mr. Heathfield, for the motion. There are many cases where, though it be known that a defendant is alive, the Court will dissolve the common injunction before the coming in of his answer. The cases on that subject are collected in *Bowles* v. *Orr* (1 Y. & C. Ex. 464). Those of *Montague* v. *Hill* (4 Russ. 128) and *Vandam* v. *Munro* (2 Anst. 502) are likewise in point. But here we contend that the defendant Santemarie is dead. There is every evidence of that fact, short of a burial certificate, and Mr. Williams's affidavit does not contradict the answer in any material point. Besides, supposing him to be alive, he has assigned his interest, or, at all events, his interest ceased on the bankruptcy. [The Lord Chief Baron. It does not signify in whom the interest is vested. The plaintiffs in equity have a right to discovery, and the only question is whether Santemarie can make a discovery.] Santemarie having assigned his interest, his answer could not be read on the trial of this action: *Imperial Gas* **[130]** *Company* v. *Clarke* (1 Younge, 580). [The Lord Chief Baron. According to that argument, if any one of the defendants in equity assigns his interest you can only go against the others.]

Mr. G. Richards and Mr. J. Russell, contrà. The only question is whether Santemarie is dead. If he is dead, it will be difficult to say, even then, how the injunction is to be dissolved—if he is alive, the underwriters are entitled to his answer. It has been argued that the answer of Santemarie could not be used in the King's Bench, although he assigned his interest subsequently to the action. If that be so, parties have only to make a fraudulent shipment, and then to assign their pretended interest. In some of the cases, an assignment has been made for a valuable consideration before the proceedings commenced. That was the ground of Lord Lyndhurst's decision in the case of *The Imperial Gas Company*, but no ground of that nature exists here. The answer of Santemarie is required for the purpose of clearing up several points upon which Santos is silent. As to the allegation of his death, it is singular that his partner should be unable to make a more explicit statement on that subject. In some cases injunctions have been dissolved on the coming in of the answer of one defendant; but those cases are not applicable here, and *Bowles* v. *Orr* is in favour

of the plaintiff. Such a motion as the present must be founded on very special grounds: *White* v. *Steinwacks* (19 Ves. 84).

Mr. Simpkinson, in reply.

THE LORD CHIEF BARON. I think it is conceded by the counsel for the defendants that this application is founded on what is said to be a ground of exception to a general **[131]** rule. Where a party is dead, I admit that must be taken to be a good ground of exception. Other circumstances also may lead to the same result; but each case must depend on its own peculiar circumstances. Now, what is the evidence here to satisfy me of the death of this defendant? If it depended entirely on the answer of the defendant Santos, I should say it was reasonable evidence of his death. It is even consistent with the affidavit to a certain extent, for the party who makes the affidavit does not swear to any belief that Santemarie is alive. True; but the affidavit qualifies the facts from which the defendant Santos draws the inference of his death. On the one hand, it is said that Santemarie was in ill health and obliged to go to London; that he went from thence to Genoa, from which place the defendant heard from him for the last time in March, 1830; and that the defendant afterwards heard from his brokers that he had gone to Rio Janeiro, and died there. I should say that these were reasonable grounds for presuming that he was dead. But, on the other side, the evidence is qualified thus: It appears that this gentleman came to England to expedite the proceedings in this cause, and that he afterwards quitted England and went to Genoa; and he might have been at Genoa in March. From the answer, you would suppose that he had never been heard of by his correspondents at Paris since that period, but he was heard of at Geneva so late as September. Besides, he had relations, of whom an inquiry upon the subject might have been made.

Now it is admitted, as to the case itself, that Santemarie was a person who had information to give. I do not say whether it was material or not. It is sufficient, I think, under present circumstances, to shew that information might have been obtained from him. My opinion therefore is that the motion must be refused. I will not say whether there is not sufficient strength in the facts stated **[132]** by the defendant to support the presumption on which he relies, if those facts stood alone; but being explained, and something being thrown into the case, from which it appears that Santos might have known with more certainty the fact of this gentleman's death, I must say that I think a jury, weighing the evidence on both sides, would scarcely come to the conclusion insisted upon by the defendant. It appears, therefore, to me that I ought not, upon such facts, to be so satisfied of the death of this party as to refuse the discovery which the plaintiff seeks.

I ought to mention that, as the bill was filed in February, 1830, and Santemarie was at Geneva in September of that year, and the bankruptcy did not take place till 1831, I do not see why the defendants should not have put in their answer before the Tribunal de Commerce at Bordeaux interfered to make them bankrupts.

Motion refused.

Jan. 13th, 1837.—The object of this suit being to ascertain the truth of the alleged purchase and shipment by the defendants Santemarie and Santos, the original bill contained charges to the effect that the whole case made in support of the action at law was false; that no such property as that comprised in the policies had in fact been purchased or shipped by those defendants; that the goods which they pretended to have purchased amounted in value to more than 175,000 francs, and that a large portion of them were alleged to have been paid for by bills drawn and accepted by the defendants at very long dates, whereas in fact the defendants, in August and September, 1829, were in very bad credit, and could not **[133]** have procured credit for 10,000 francs on their bills. The bill also charged that by the papers which they had delivered to the company it appeared that they had not purchased doubloons to the value mentioned in the second policy. The bill then contained many minute inquiries as to the time and manner in which the alleged purchases were made, and the names of the several vendors and consignees.

According to the answer of the defendant Santos, which purported to be a full explanation of the several matters inquired after by the bill, the goods comprised in the first policy were paid for by cash, and in every other possible manner; but the doubloons were, for the most part, purchased by giving credit in account to the vendor, and by means of accommodation bills.

The plaintiff, conceiving that the circumstances disclosed by the answer, and other circumstances within his knowledge, afforded the means of further discovery, moved for and obtained an order, in July, 1836, that he might be at liberty to amend his bill without prejudice to the injunction. The motion was supported by the affidavits of the plaintiff's agents, Mr. La Vie and Mr. Williams, stating further circumstances with a view to shew that this was not a bonâ fide purchase; suggesting also, that such circumstances might be proved by an inspection of the defendants' books, and of the correspondence between them and the parties to whom the doubloons were alleged to have been consigned. Amongst other things, the deponents stated their belief that the partnership of Santemarie and Santos was not possessed of sufficient capital to make the alleged purchase.

The order of July, 1836, was qualified by a direction that the amendments should be made within a month, and that they should be confined to matters suggested by the affidavits of La Vie and Williams, and such matters as might arise from the inspection of the books.

[134] The plaintiff amended his bill, introducing into it a variety of new charges, to the effect that Santemarie and Santos entered into co-partnership in 1827, and that from the books of the partnership it would appear that they were insolvent and incapable of making the pretended shipment. That they had numerous books, consisting of rough-books, cash-books, books for bills payable, for bills receivable, &c., and that they ought to set forth a full list and statement of all such books, and of all books used in their business during the years 1827, 1828, and 1829, and who were the book-keepers, and where the books now are, &c. That the defendants were insolvent long previous to the pretended shipment. That they commenced their business with a small capital, and had not sufficient to purchase the doubloons; and so it would appear if they would set forth what capital they had when they commenced partnership, and if the same consisted of cash, what cash—and if of goods, what goods—and if of bills of exchange, who were liable thereon—and if of debts, from whom due, and where the debtors now live or are to be found. That the defendants carried on business with a daily loss; and so it would appear if they would set forth what sums of money &c. were paid, and what received, to and by them between the 31st December, 1827, and the 31st December, 1829, and what was the capital in hand at those respective times, and of what the same consisted. That they ought to set forth the amount of goods bought by them in each and every month between the 31st December, 1827, and the 31st December, 1829, and when and of whom the same were bought, and to whom sold, and where delivered; and for how much the same were sold, and when, where, and by whom the same were paid for. Similar charges were made as to bills of exchange received and paid by the firm between the respective times above mentioned. In addition to these and many other charges of a like nature, the bill contained charges more **[135]** immediately bearing upon the subject of the purchase, namely, in relation to the accommodation bills, and the correspondence between the defendants and their agents and the alleged consequences.

Mr. Simpkinson, Mr. Sidebottom, and Mr. Heathfield, now moved that the amended bill might be taken off the file for irregularity, contending that the amendments were not within the terms of the order, and that, independently of the order, they were impertinent and inquisitorial; that the plaintiff had already had an inspection of the defendants' books so far as related to this transaction, and had no right to ask for a general inspection of the books, or for an account of the dealings of the partnership from its commencement; that it was not alleged, either in the original bill or in the affidavits that the firm was insolvent at the time of the shipment; that the statement in the affidavits as to the defendants wanting capital to make this shipment was not sufficient to warrant a general charge of insolvency; and that such a charge, even in an original bill, would have been impertinent, and not called for by the justice of the case.

Mr. G. Richards (with whom was Mr. J. Russell), contrà. The plaintiff had a right to ascertain whether the defendants had the means of purchasing the doubloons. He had also a right to the inspection of the entries in the books, in order to see from whom the doubloons were alleged to be purchased, and to call the party named in those entries to contradict the fact. Many of the books of 1829 refer to those of former years. With respect to the charge of insolvency, the order gave the plaintiff power to examine as to the matters mentioned in the affidavits, and amongst those

matters was the defendants' want of capital. The only way in which the defendants could shew that they had capital, was by giving an account of **[136]** their dealings and transactions since 1827. The doubloons were purchased by means of accommodation bills. [The Lord Chief Baron. Unless the defendants said that they purchased them with their own capital, it is immaterial whether they purchased them with borrowed money or not.] At all events, accommodation bills do not form a portion of the capital of a house, though money may be raised upon them. Now in the books they may appear as bills taken in the ordinary course of trade, whereas the plaintiff may shew the contrary. Upon this point, therefore, the plaintiff is entitled to an inspection of the entries in the books. He is also entitled to a full discovery of the correspondence with the consignees.

Mr. Simpkinson, in reply.

THE LORD CHIEF BARON. I have some recollection of this order: I hope that I was not the means of misleading the parties. The order was settled by the learned counsel on both sides, and I supposed that the object of it had been understood and agreed upon. I conceive that in limiting the amendments to the facts suggested by the affidavits, and to an examination of the books, it was not intended to give the underwriters a more general power of discovery than they had before. They were to confine their inquiries to matters put in issue by the answer to the original bill. It was not intended to submit the parties to a general inquisition, such as the answer could not have justified, as to the dealings and transactions of the firm.

Nothing is more difficult to ascertain, and nothing more dangerous than to limit, the right of underwriters to discovery. It has been considered, at all times and in all countries, that in cases of this nature the underwriters are entitled, not only to a discovery of all the circumstances attending the original contract, but to the whole history **[137]** of the adventure and loss. Therefore it is very difficult, and, perhaps, dangerous, to limit the power of the underwriters in that respect. If, for example, upon a bill of discovery by underwriters, the assured stated by their answer that they had shipped the goods in question, and had purchased them with part of their spare capital, and by some subsequent fact it became known to the underwriters that they had no spare capital, but had been in the habit of borrowing money to sustain their credit, then the inquiry whether they were insolvent at the time of the alleged shipment might become important, and such a fact being discovered would justify an amendment of the bill, in order to ask the defendants how they could reconcile that with their original statement; so that there may be cases where an inquiry, as to the insolvency of the assured at a particular time, may be important. Now, according to my recollection of the original answer—but my memory in these respects is very deceitful—I thought it had stated that the defendants had purchased the doubloons with their own capital. That was my impression, and I requested Mr. Richards to read it, for the purpose of shewing that such was its purport. I find, however, that the answer does not say that, but leaves that matter in ambiguo. It says that the doubloons were purchased of a house with whom they had a running account, and that for some they gave credit in account, and for others they paid by means of bills. It is not material, therefore, whether they were obliged to borrow the money for that purpose, for such facts as those are quite consistent with their having made the purchase. The true question is whether they shipped these goods. If they had said these were superabundant goods of their own, they would have put their insolvency in issue; but under the circumstances I think that all the questions as to their insolvency are immaterial, inquisitorial, and not justified except by a very extreme case indeed.

[138] With respect to the entries in the books, the general rule is that the underwriter has a right to the inspection of every thing relating to the particular transaction in dispute. If there be any doubt as to the purchase, or the shipment, or the value of the goods, or on any question as to false papers imposed on the underwriter, he has a right to the inspection of the books of the assured in relation to those individual matters, but not in relation to matters not connected with the transaction. If by his answer the defendant makes any other matter material to the inquiry, then he makes it the subject of an amended bill; but otherwise the underwriter has no right to an inspection of the entries, beyond the individual transaction in which he is interested. Here, all the grounds for suspicion of the fidelity of the entries are fair subjects of amendment in any matter relating to the purchase, or, to go a step further,

to the mode by which the bills are acquired, by which the defendants say they made the purchase. I should think such inquiries relevant, as arising from the facts put in issue by La Vie's affidavit. He raises the question, whether the facts as stated in the answer in relation to the purchase of the goods are true. But any question which does not so arise is immaterial, by the same rule as that which I have just now stated in regard to the question of insolvency.

Another question is as to the accommodation bills. As to that I confess it does not appear to me important what were the particular bills which were given for the purchase. Suppose they were accommodation bills; still, if they were handed over to the sellers, it is equivalent to a payment. The important inquiry is whether they knew to whom they gave and from whom they received those bills. At the same time there would, even then, be a distinction between accommodation bills given to support the credit of the house generally, and the like bills given **[139]** for this particular transaction. In the former case the inquiry would be more limited than in the latter.

The inquiry as to the correspondence with the consignees is properly introduced into the amended bill. The correspondence with those persons may be very important, to shew whether any shipment was made to that house or not; whether, in truth, it was the same house or not to which the consignment is alleged to have been made. And upon the question, whether this was a bonâ fide purchase, the correspondence respecting it, and the books of that house—if the defendants have any controul over it—would be important. At all events, I cannot say that such an inquiry, so far as it relates to this transaction, is unimportant. If it goes to entries beyond this transaction, then it is unimportant.

Having stated this, I presume there will be no difficulty as to the mode of dealing with the bill.

MORRIS *v.* KEARSLEY. June 3rd, 1837.—Upon the death of one of two partners, intestate, the personal representatives of the deceased partner agreed to sell his moiety of the real property of the partnership to the surviving partner, and at the same time stipulated that they would furnish him at their own expense with an abstract of their title to that moiety: Held, that they were bound to furnish the usual abstract of title, and not merely the letters of administration under which they acted in relation to the intestate's personal estate.—Declaration, that real estate, held for partnership purposes, is in the nature of personal estate.

Henry Robinson carried on the business of a brewer for many years, at Wigan and the adjoining places, in partnership with several persons in succession. The business was very extensive, and the partnership was possessed of considerable real estates of every species of tenure, some of which were held by the partners as tenants in common, and others by one or more partners in trust for the partnership. Some time after the establishment of this business the defendant Kearsley entered the firm, and he and Henry Robinson were the only partners at the time of Robinson's death. The partners were then interested in the business in equal moieties. Robinson **[140]** died in August, 1833, intestate, leaving two children only, namely, George, his heir-at-law, and Ann, the wife of Thomas Morris.

Soon after the intestate's death, George Robinson was found a lunatic, and Mr. and Mrs. Morris were appointed joint committee of his estate. Letters of administration of the intestate's personal estate were also granted to Mrs. Morris.

Upon the death of Robinson, Kearsley agreed to purchase Robinson's moiety of the brewery business, and of the property belonging to the partnership; but doubts being suggested whether Robinson's interest in the real property of the partnership had descended to George Robinson, as his heir-at-law, or to Mrs. Morris, as his personal representative, it was arranged that a suit in equity should be instituted for the purpose of determining that point. At the same time an agreement was executed, by which Morris and his wife, in their characters of committee and administratrix, agreed to sell, and Kearsley agreed to purchase, all the moiety or share late of Henry Robinson (and which was then vested in them the said Thomas Morris and Ann, his wife, and George Robinson, or one of them), of and in the fee simple and inheritance, and all other the estate and interest in the several freehold, copyhold, lifehold, and

leasehold hereditaments mentioned in the schedule to the agreement, and which were the property of the partnership, and also the interest late of Henry Robinson in the partnership chattels, subject to a stipulation for making void the agreement, so far as regarded the real property, and for an abatement of the purchase money, in the event of the court declaring that the real property descended upon George Robinson, as the heir-at-law of his father. The agreement also contained the following clause:—"And the said Thomas Morris and Ann, his wife, do hereby promise and agree to deliver unto the said John Hodson Kearsley, on or before the first day of August now next **[141]** ensuing, at their own expense, an abstract of their title to the said moiety, share, estate, and interest, late of the said Henry Robinson, deceased, of and in the said freehold, copyhold, lifehold, and leasehold hereditaments and premises hereby by them agreed to be sold as aforesaid. And it is hereby agreed by and between the said parties hereto, that the said John Hodson Kearsley shall purchase the said moiety, share, estate, and interest, late of the said Henry Robinson, deceased, of and in the said freehold, copyhold, lifehold, and leasehold hereditaments and premises, subject to all defects or imperfections of title subsisting before the commencement of the title of the said late Henry Robinson, deceased, and not occasioned by any act done by the said Henry Robinson, deceased, or by any person or persons claiming under or in trust for him. And the said Thomas Morris and Ann his wife shall not be required to produce the title of the superior or ground landlord of the said leasehold premises, or any part thereof, nor of any surrendered lease thereof."

The present suit having been instituted for the purpose mentioned in the foregoing agreement, the Court, by an order made on further directions in November, 1835, declared that the several lands, hereditaments, and premises belonging to the partnership, ought to be considered in the nature of personal estate, and that George Robinson was a trustee, on behalf of the partnership, of such part of the premises as were vested in him as heir-at-law or customary heir of Henry Robinson. And the Court further ordered that the agreement should be specifically performed; that an account should be taken of what remained due in respect of the purchase money; and that upon the plaintiffs, according to the provisions of the agreement, delivering to the defendant Kearsley, at their own expense, an abstract of their title to the moiety, share, &c., late of Henry Robinson, deceased, in the real property, and executing proper conveyances, the defendant **[142]** should pay what should be found due from him upon taking the aforesaid account.

Mr. Spence and Mr. Sutton Sharpe now moved that the plaintiff might be ordered, within ten months, to deliver an abstract of title to the freehold and copyhold property in the pleadings mentioned; and they insisted that, under the terms of the agreement, it was intended to furnish the usual abstract of title, and not merely an abstract of the plaintiff's own title, derived from Henry Robinson by means of the letters of administration. This is clear from that proviso in the agreement by which the plaintiffs are exempted from the necessity of delivering an abstract of the landlord's title to the leaseholds. Besides, an abstract of their title is an abstract of all the deeds which give them the property. Such an abstract is necessary, because the defendant has a right to call upon the vendor for a title free from incumbrances, such as unsatisfied mortgages or outstanding terms.

Mr. G. Richards, contrà. The words of the agreement do not bear out the proposition contended for on the other side. Robinson and Kearsley being partners in trade, it was necessary, for the purposes of their trade, that this freehold and copyhold property should be conveyed to them. When that was done, the partners were bound to see that a good title was made to the property. There is no reason, therefore, why another title should be made, anterior to Robinson's. Under such circumstances, and the plaintiffs being, in equity, both the real and personal representatives of Robinson, the words "their title" can only mean their title subsequently to Henry Robinson's death. That consists of their being committee of the estate and person of the lunatic, and administratrix of the intestate's personal estate. The proceedings in the lunacy and the letters of administration **[143]** are the evidence of their title. Besides, it is expressly stipulated that Kearsley shall take the property subject to the defects in Robinson's title. That distinguishes his title from the plaintiff's. [The Lord Chief Baron. That very clause shews that the title of Henry Robinson was to be assigned by them. Then how can you make good your contract, without shewing that Henry Robinson had a title?] We have not contracted to shew that Henry Robinson had

a title. Whatever Robinson had, Kearsley bought. He took Robinson's title for better, for worse.

Mr. Spence, in reply, observed that some of the property was purchased before Kearsley joined the firm, as to which he could have had nothing to do with accepting the title.

THE LORD CHIEF BARON. The defendant, having formerly paid a sum of money on receiving a conveyance of a part of what was partnership property without an abstract of title, may now have good reason to say that he wishes to have an abstract. He may wish to have such a title as may enable him to part with the property to a purchaser. The stipulation that the title shall be made "at the expense" of the vendor seems to me to shew that the parties had some object of this kind. Besides, suppose a man make a contract to purchase all the interest of A. B. in certain premises, without a warranty of title at all: it is enough to say, take my title, such as it is; but it would be hard to find any meaning in these words, unless more was meant than what has been suggested by the plaintiffs. It cannot, I think, be seriously urged that the other party meant to have nothing but the letters of administration; and if not, to what extent must I limit the terms of the agreement? The defendant says that, in contracting with Mrs. Morris, as administratrix of Henry Robinson, he meant that she should give him the usual **[144]** abstract of title to Robinson's estate at her own expense: I think she must. Unless Henry Robinson had some title, the administratrix had no title: and it is clear that in various parts of the contract reference is made to his title. I think it a considerable question whether, if his moiety had been purchased, subject to a mortgage, the defendant, under the terms of this agreement, would be obliged to take the property subject to that mortgage. Surely he ought at least to know whether such was the fact.

Motion granted.

ANONYMOUS. June 3rd, 1836.—Defendant in contempt, living within the rules of the King's Bench, ordered to be committed to the Fleet.

[S. C. 6 L. J. Ex. Eq. 69.]

The defendant, who was in contempt, was living in great luxury within the rules of the King's Bench.

Mr. Elderton moved that he might be turned over to the Fleet, observing that a party cannot have the benefit of the rules of the King's Bench when committed for a contempt. He cited *Lanquit* v. *Jones* (1 Str. 87) as being analogous to the present case.

The Court ordered him to be committed to the Fleet charged with this contempt, and other contempts in other causes.

[145] THE REV. GEORGE HALL *v.* EDWARD FARMER AND FRANCIS WILLIAMS. May 5th, June 28th, 1836.—Vicar's bill for great and small tithes of an ancient park, which had been disparked and thrown into cultivation, dismissed; there being no evidence of perception or of receipt of compositions for tithes by the vicars in respect of the lands within that district, although it was proved that compositions for tithes had been regularly paid to the vicars in respect of the other lands in the township in which the park was situate.—A terrier without date, and bearing the signatures of various persons, having no addition or designation affixed to their names, is admissible in evidence on behalf of the vicar, if produced under circumstances shewing it to be a genuine document.

Bill by the vicar of Tenbury, in the county of Worcester, with the chapelry of Rochford annexed, for an account and satisfaction of the great and small tithes of that portion of a district called Sutton Park, which lies in the township of Sutton, and within the parish of Tenbury.

The parish of Tenbury consists of four hamlets or townships; namely, Tenbury Town, Tenbury Foreign, Borrington, and Sutton, otherwise Sutton Sturmey. The district called Sutton Park lies partly within the chapelry of Sutton, and partly within the chapelry and parish of Rochford. The former part consists of about 425 acres, the latter part of about 200 acres. In the year 1718 that part of Sutton Park, which

lies within the chapelry of Rochford, was disparked and thrown into tillage; and Mr. Read, who was then vicar of Tenbury with Rochford, filed his bill against Wollaston, the owner of that part of Sutton Park, claiming the great and small tithes of those lands; and he obtained a decree. Subsequently to that decree, these tithes were regularly enjoyed by the successive vicars of Tenbury and Rochford.

The present bill, after stating the above facts, and charging that the other portion of Sutton Park (lying within Tenbury) had been some years since disparked, and that the occupiers thereof had offered to the vicar 7l. as a compensation for the tithes, which had been refused, prayed an account of the great and small tithes of that portion against the defendant Farmer as occupier. The defendant Williams was charged as owner of the lands in question, and as claiming an interest in the tithes by virtue of some alleged grant or conveyance.

The defendants, by their joint and several answer, denied the plaintiff's right to the tithes sought by the bill, **[146]** insisting that the defendant Williams was entitled to the tithes of the lands in question, as parcel of the impropriate rectory of Tenbury. They denied the allegation in the bill as to the 7l. composition. By his further answer, the defendant Williams alleged that the tithes in question were granted by King Henry 8th, in the 31st year of his reign, as parcel of the rectory and church of Tenbury, to Richard Andrews and Nicholas Temple, and have been since severed from the rectory, and become vested in this defendant by divers good and effectual conveyances and assurances in the law; or that, in case the same were not so severed, and have not become so vested as aforesaid in this defendant, the primâ facie right and title thereto are now vested in the impropriate rector of the said rectory and church, save and except so far as his right to receive the same is or may be affected by the statute, &c. (2 & 3 Will. 4, c. 100), and not in the said complainant.

The cause now came on for hearing.

Mr. Boteler, Mr. Simpkinson, and Mr. Bethell, for the plaintiff.

Mr. Beames and Mr. W. Eagle, for the defendants.

The plaintiff produced no endowment of the vicarage of Tenbury, there being no document of that nature to be found amongst the records of the bishop of Hereford. In order to supply that deficiency, and in support of the plaintiff's case generally, extracts were read from Pope Nicholas' Taxation, the Ecclesiastical Survey of 27 Hen. 8, and the Parliamentary Survey. The plaintiff also produced two terriers, marked X and Y, which were in the following terms:—

Article 67, Tenbury.—Item, to this article we present Sir Thomas Lucy, Knight, to be the right and lawful patron of the vicarage. There is a chapel belong-**[147]**-ing to it called Rochford. What quantity of glebe belongeth thereto we know not. There is not any glebe but the churchyard, neither arable, meadow, or pasture. A vicarage house, a kitchen, a barn, with other houses of office. No common or pasture for sheep, but in the common fields. Some little hay the vicar hath, but not of all the parish; and the tithe-corn of the township of Sutton. And for other privileges we know of none. [Here followed the signatures of divers persons.]

Teamburie, July 25th, 1637.—A true terrier of the vicarage of Teamburie, taken by us, whose names are underwritten. Imprimis, one vicarage house; 2nd, one barn; 3rdly, one hemp blocke; 4thly, two gardens; 5thly, one portion of tithe from Sutton; 6thly, privy tithes from the rest of the parish. [Here followed the signatures of the vicar and churchwardens.]

In order to prove the date of the first terrier, the plaintiff produced a book from the archives of the bishop of Hereford, called Scorie's Extracts. In addition to the foregoing documents, he gave in evidence the proceedings in the cause of *Read* v. *Wollaston*.

The parol evidence for the plaintiff was to the effect that all tithes, except for hay and clover, were reputed to be payable to the vicars of Tenbury by the occupiers within Sutton Township, except Sutton Park. The plaintiff also proved that a composition for all tithes except the tithes of hay and clover had been paid to the vicars of Tenbury by the occupiers of lands in Sutton situate without the park; but he failed to prove any payment of tithes or of composition for tithes by the occupiers within that part of the park which was the subject of the present suit.

On the part of the defendant, the proceedings in a suit of *Gwynn* v. *Croydon* were given in evidence, by which it appeared, that in 1778 the vicar of Tenbury filed his bill against the then occupier of Sutton Park, for the great **[148]** and small tithes of

the remaining portion, and that the cause being heard upon bill and answer, the bill was dismissed.

Upon the plaintiff's counsel offering to give in evidence the terrier marked X, the defendant's counsel objected to its admissibility. This document was produced by a clerk of the bishop's registrar at Hereford, and had been taken by him from the depository of the records of the Bishop's Court. It was, as has been already seen, without date, and although signed by various persons, it did not appear in what character they signed it, no designation being given to any of them. It was proved by other documents that Sir Thomas Lucy was patron of the vicarage in 1570.

Objected for the defendants. This is no terrier. It is without a date, and it does not appear that any of the parties who signed it were either churchwardens, vicar, lord of the manor, or even resident within the parish. We do not deny that it is produced from a proper depository, but it is a mere solitary extract, and the office from which it comes is not an office for terriers only. It appears to be a return to some commission, which was not directed to proper persons or under proper authority. The commission itself must be produced to make an inquisition of this sort admissible in evidence: 1 Phill. Evid. chap. 5, Inquisition; B. N. P. 228; *Austin* v. *Nicholls* (12 Vin. Abr. Evidence [A. b. 42], pl. 2), *Hardcastle* v. *Smithson* (Ambl. 41; 2 E. & Y. 96).

For the plaintiff. This is stated by the officer of the registry to be a terrier. Before the terriers of 1602 and 1603 were drawn up, it was the practice for the bishop to send round inquiries as to the property of the clergyman in each parish, and the parishioners made their return. **[149]** This is not like a private document, for it was drawn up in pursuance of a general custom, and the registrar having received it, we may presume at this distance of time that the signatures were by the proper parties. Besides, the defendants have precluded themselves from making the objection, because in their admissions they call it a terrier. They admit that the two paper writings marked X and Y contain true copies of two several terriers. The contents of the document afford internal evidence of its being a terrier.

For the defendants, in reply. Upon ejectment brought at Worcester by the vicar of Tenbury for some glebe land within the parish, the defendant having offered the present document in evidence, the plaintiff objected that it was not a terrier, and that if it was to be produced as an answer to an inquiry, the document containing the inquiry must be put in or accounted for; and Coleridge, J., who tried the cause, rejected the evidence.

ALDERSON, B. I entertain some doubt upon this point. It appears to me at present that the question does not turn upon whether this is a terrier or not. It is an ancient document, taken from the proper quarter and under the proper authority. A terrier is only one form of that species of document. The question is, whether this comes under circumstances sufficiently authenticating it as a genuine document. It is not necessary to produce the inquisition in these cases, if, without doing so, it appear satisfactorily to be an answer to a commission issuing under proper authority. I think that it is admissible in evidence here. At the same time I have no doubt that it was properly enough rejected at Nisi Prius, for in the trial of the ejectment which has been mentioned it would not bind the parson if not signed by himself or his predecessors.

The evidence was received.

[150] Upon the merits of the case, the counsel for the plaintiff commented on the different nature of the defence now set up from that which was resorted to on the former occasion in the case of *Read* v. *Wollaston*. They then proceeded to contend that the vicar's title to the tithes now claimed, sufficiently appeared from the several documents which had been produced, taken collectively; namely, from Pope Nicholas's Taxation, the Ecclesiastical Survey, and the two terriers. They relied upon the case of *Donnison* v. *Elsley* (1 M'Clel. & Y. 1), contending that, though the instrument produced for the plaintiff in that case was somewhat more explicit than any of the documents now produced, yet, upon the whole, that case must be considered as governing the present. The terrier of 1637, giving the vicar all the tithes in Sutton, and privy tithes in the rest of the parish, must be considered as conclusive on the subject. If not, it was inconsistent, not only with the other documents, but also with the usage within the parish; for it was clear that the vicars of Tenbury had received the tithes of Sutton generally, though not from this park. But the non-perception

of tithes from this park was explained by the circumstance of its having been a deer-park, and not having been brought into cultivation till of late years. [Alderson, B. The second terrier would not be inconsistent with the idea of two portions in Sutton, one in the vicar, and one in somebody else. The word "tithes" mentioned in that terrier means all sorts of tithes, as distinguished from privy tithes, but still only a portion.]

For the defendants. It is necessary for the plaintiff to recover by the strength of his own case. The documents on which he relies are vague and of little authority. The Ecclesiastical Survey is no guide as to the nature of the things which it enumerates, but only as to the aggregate **[151]** amount of the receipts, and then it must be confirmed by usage: *Tamberlain* v. *Humphreys* (4 Gwill. 1345; 3 E. & Y. 1367). Here the usage is directly adverse to the claim now set up, founded on the Ecclesiastical Survey. If that document is intended to comprise the tithes of the park, the usage is against it. As to the terriers, the first, being without date and signed by persons who do not describe themselves, is of little or no weight. The other was signed by the vicar, an interested party, asserting his own rights. He however did not put his rights so high as the present plaintiff, claiming only one portion of tithes in Sutton. The proceedings in the case of *Read* v. *Wollaston* have no application here, having reference solely to the tithes of lands in Rochford. This estate is more than 400 acres, and it is not pretended that tithe was ever paid for it. Perception in one part of a parish is not evidence of it in another part; *Armstrong* v. *Hewitt* (4 Price, 216; 3 E. & Y. 835). The case of *Gwynn* v. *Croydon* (4 Wood, 588), as it really occurred, and not as it is stated in Wood, is an authority greatly in favour of the defendant. That cause was heard on a bill and answer, and the bill was dismissed. The other authorities cited for the defendants were *Lady Dartmouth* v. *Roberts* (16 East, 334; 2 E. & Y. 655), *Cunliffe* v. *Taylor* (2 Price, 329; 3 E. & Y. 743), and *Masters* v. *Fletcher* (1 Younge, 25).

Mr. Boteler, in reply, observed that the plaintiff in *Gwynn* v. *Croydon* was only compelled to go to a hearing after he had left the living and some one else had been instituted.

June 28th.—ALDERSON, B. In this case, which was a bill filed by the vicar of Tenbury, claiming the great and small tithes of a farm in the parish of Tenbury, I now propose to give the judgment of the Court.

[152] The land in question is part of an ancient park, situate partly within the parish of Rochford and partly within the township of Sutton in the parish of Tenbury. It appears that in 1718 a bill was filed by the then vicar, who was also rector of Rochford, claiming the tithes for that part of the park then lately broken up into tillage, which was situate within Rochford, and on that occasion the claim was established. In 1778 a similar claim was made in respect of the remaining part within Sutton, then also broken up into tillage, but with a different result. There, the vicar's bill was dismissed. Since that, and up to the time of the present suit, no perception of tithes has been had, nor is there any evidence whatever of any perception of tithes from the land in question. No endowment has been produced. But it appears from the old documents which have been produced that there was from time immemorial a vicarage, and that an endowed one, and that the endowment was valuable; and from the Ecclesiastical Survey it appears that the endowment was of great and small tithes, to some extent at least. There are then two terriers produced in evidence by the vicar, the first about the year 1573, by which it appears he was entitled to the tithe corn in the township of Sutton; and the second, dated in 1637, by which he is stated to have one portion of tithes for Sutton, and privy tithes for the rest of the parish. This is the whole documentary evidence in the case.

The parol evidence is uniform, that, with the exception of the lands in question, all the rest of the township of Sutton is liable to pay great and small tithes (unless in some particular instances, where moduses are claimed) to the vicar of Tenbury. Now, if I am asked, what is the inference which under these circumstances, upon the whole evidence, the Court ought to draw, I have no difficulty in giving an answer. That ought to be the inference, which is consistent with the whole evidence, if possible. And it appears to me that all may be consistent **[153]** with the supposition that the vicar was originally endowed with the great and small tithes within Sutton, but not with the tithes from the lands in question. The language in the terriers is, indeed, more susceptible of the extended signification contended for by the vicar; but the non-perception of

tithes since this part of the land was first disparked in 1729, and the suit in 1778, appear to me far more cogent evidence. I am always desirous to give effect, if possible, to a long course of usage, where no rule of law or clear documents lead to another conclusion.

The bill must be dismissed with costs.

Decree accordingly.

HALL *v.* GODSON AND OTHERS. SAME *v.* WHEELER AND OTHERS. SAME *v.* CLEE AND OTHERS. June 20th, 22nd, 28th, 1836.—The words "privy tithes" are generally synonymous with "small tithes;" therefore, although the Ecclesiastical Survey appeared to distinguish between privy tithes and small tithes, yet this was held to be explained by a subsequent terrier, which mentioned privy tithes, in contradistinction to tithes in general, as being payable to the vicar; and, under these circumstances, supported by evidence of former vicars having regularly received payments called "privy tithes," although those payments had been in some instances made for houses only, and in other instances omitted altogether, and although some portions of the small tithes were proved by the defendants to have been conveyed away: Held, that the vicar was entitled to a decree for small tithes.

[Affirmed, 1840, 7 Cl. & F. 744.]

In these suits, the plaintiff, as vicar of Tenbury, claimed against the defendants, as occupiers within that parish, the tithes in kind of all titheable matters and things other than and except the tithes of corn and grain, yearly coming, growing, &c., within the respective hamlets or townships of Tenbury Town, Tenbury Foreign and Berrington; and the tithes in kind of all titheable matters and things coming &c. within the hamlet or township of Sutton Sturmey.

By his amended bills, the plaintiff charged that the church of Tenbury was anciently appropriated to the foreign or alien monastery of Lyra, and afterwards to the monastery of Shene, and that the vicarage was created or endowed within time of legal memory; and that long after such endowment the rectory of the said church, and the tithes belonging thereto, were granted by King **[154]** Henry the Eighth unto certain persons, by whom or by those claiming under them divers grants, sales, alienations, and assurances have been made of the tithes to which they were entitled under or by virtue of the said grant, arising from divers portions and parcels of the lands lying within the said townships of Tenbury Town, Tenbury Foreign, and Berrington; but that all such grants, sales, alienations, and assurances have been of the tithes of corn and grain only, and not of any other tithes; and that the persons to whom and by whom the said royal grant, and such other grants, &c., have been made, have never taken, or enjoyed, or affected to be entitled to any other tithes than the tithes of corn and grain only. That under and by virtue of some of such grants, &c., some of the defendants have taken or enjoyed the tithes of some parts of the lands within the said three townships of the said parish, but that they have never received or claimed to receive from such lands any other tithes than the tithes of corn and grain only, or some composition or money payment in lieu thereof. That in respect of other tithes within the said three townships, compositions were anciently made with the vicars of Tenbury, and certain money payments in lieu thereof made to such vicars by the occupiers of lands, gardens, and orchards within Tenbury Town, Tenbury Foreign, and Berrington, in respect of such lands, gardens, and orchards, under the name of privy or private tithes, and which payments have occasionally varied in amount, and have never been made except in respect of lands. That the name privy or private tithes was intended to represent the tithes belonging to and received by the vicar, by way of distinction from those belonging to the community of the religious house to which the rectory was appropriated, and that no tithes called privy tithes were ever paid to the rectors of the said parish before the endowment of the vicarage. That payments under the name of privy tithes have been **[155]** paid to former vicars of Tenbury, in respect of all the lands occupied by the defendants, and that they ought to set forth an account thereof. That the plaintiff has always refused to receive the same, inasmuch as the same through neglect have for many years been suffered to continue at amounts much less in value than the

tithes for which they are paid. That the defendants, if they shall deny that the plaintiff is entitled to the tithes hereby claimed, ought to set forth who is or are entitled thereto, and how and by what title; and whether any person or persons has or have ever, and when, received, taken, or enjoyed the same.

The defendants by their answer denied the plaintiff's right to the tithes of all the titheable matters &c. within Sutton Sturmey, or to the tithes of all or any of the titheable matters within the rest of the parish of Tenbury. By their further answers, they admitted that the rectory of Tenbury was formerly part of the possessions of the monastery of Lyra. That upon the suppression of the alien monasteries, it became part of the possessions of the monastery of Shene, and that upon the dissolution of the monasteries, it became vested in the Crown. They stated that, in or about the 35th year of the reign of Henry VIII., the rectory, and the tithes and appurtenances thereto belonging, were, with divers lands and hereditaments, granted by the Crown to Richard Andrews and Nicholas Temple, and the heirs and assigns of the said Richard Andrews, for ever, at the yearly rent of 16s.

The defendants further stated their belief, that upon or soon after the appropriation of the said rectory of Tenbury, and the tithes and appurtenances thereof, to the said abbot and convent of Lyra, a vicar of Tenbury was nominated and appointed, and a vicarage created and endowed with the great and small tithes of the said hamlet or township of Sutton, otherwise Sutton Sturmey, or some part thereof; except a certain part of the said last-mentioned **[156]** township called Sutton Park; but that the said vicarage was not endowed with the tithes of any titheable matters or things arising, growing, or renewing within the townships of Tenbury Town, Tenbury Foreign, and Berrington, or any of them; but that all the tithes, as well great as small, of the last-mentioned townships remained appropriated to the abbot and convent of Lyra; and ultimately became vested in Andrews and Temple, as before mentioned. That Andrews, the grantee from the Crown, sold and disposed of the rectory of Tenbury and the tithes thereof, including all and singular the tithes of the townships of Tenbury Town, Tenbury Foreign, and Berrington, to certain persons, who were also the owners of the lands comprised in the last-mentioned townships. That after such sale and conveyance, those owners, and their descendants, and the purchasers from them respectively, and their tenants, held and occupied their farms and lands freed from the payment of all tithes whatsoever, and that the owners and their descendants, and persons claiming under them, sold the said lands either together with the tithes thereof, or freed from the payment of all or any tithes in respect thereof. That the farms and lands of which the respective defendants were owners or occupiers, were purchased by their ancestors, or by the persons under whom they respectively derived title, and that they now held their farms and lands together with the tithes of the titheable matters thereof, or else freed and discharged from the payment of all tithes whatsoever. The defendants further stated their belief that no tithes in kind, or any compensation or satisfaction for tithes, had of right been payable, or had ever been paid, by any of the owners or occupiers of lands in the townships of Tenbury Town, Tenbury Foreign, or Berrington, to the vicars of Tenbury; but that all such tithes had of right been payable and paid to or retained by the impropriate rector of the rectory of Tenbury, or the persons to whom **[157]** the tithes or the portions of the said tithes had from time to time been sold and conveyed, or the persons claiming or deriving tithes under them respectively.

With respect to the privy tithes, the defendants alleged that for a great many years past certain small payments had been made by some, but not by all the occupiers of houses, farms, and lands, in the said townships of Tenbury town, Tenbury Foreign, and Berrington, to the vicar for the time being of the said vicarage of Tenbury, in the name of "Privy Tithes," and which payments had, as the said defendant believed, been from time to time made in the nature of personal tithes, or oblations, or obventions, and not as moduses or compositions for the tithes of any titheable matters or things had, grown, or produced within the said hamlets or townships, or any of them, such payments having been made by the occupiers of houses only, as well as by the occupiers of houses and lands.

The plaintiff being unable to produce any endowment, recourse was had to the same ancient documents and terriers (*a*) as were produced, on his behalf, in the last

(*a*) See ante, p. 146.

cause. Those documents, particularly Pope Nicholas' Taxation, the Ecclesiastical Survey, and the Parliamentary Survey, were likewise read for the plaintiff, with a view to shew the value of the vicarage. The Ecclesiastical Survey was to the following effect:—

Magister Richardus Shute, vicarius perpetuus ecclesiæ habet in decimis prædialibus videlicet garburum et fæni et unius molendini vicariæ suæ prædictæ communibus annis pertinentibus	x.	viii.	viii.
In libro suo comput' Paschat' privatarum decimarum comm. ann.		xx.	
[158] In quatuor diebus oblat' et aliis oblationibus comm. ann.		xxx.	
In decimis ovium venalium comm. ann. . .	xxiii.	iiij.	
In mortuaris comm. ann.		iij.	iij.
In minoribus decimis viz. porcorum, anserum, canapum, lini, ceræ, et mellis ac aliorum consimilium comm. ann.		xxx.	vi.
Item in emolument' et p'ficuis capellæ de Rochford comm. ann.	v.	vi.	viii.

The plaintiff likewise produced the grant by Hen. VIII. of the rectory of Tenbury to Andrews and Temple, with a view of shewing that it was a grant generally of the rectory with its appurtenances, and did not affect the vicarage. He also produced a great number of receipts for privy tithes, given by Mr. Rocke, the late vicar of Tenbury, in many of which those tithes were expressed to have been paid in respect of particular lands and houses.

The parol evidence for the plaintiff was to the effect that in the three townships no other tithes had ever been demanded or taken as great or rectorial tithes, besides the tithes of corn and grain: that the tithes which had been conveyed from one owner to another within these townships, were invariably those of corn and grain only: that tithes, called privy tithes, had been annually paid to successive vicars, in respect of particular lands and houses: that Easter offerings were collected annually for the vicar, but that the privy tithes were independent of the Easter offerings, and were collected at a different time of the year, namely, at Whitsuntide, after due notice of such collection had been given in church: that tithes, however, or money-payments for tithes, had not been paid to the vicar by the owners generally within the three townships, in respect of their lands.

[159] The documentary evidence for the defendants comprised, in addition to the before-mentioned surveys, a grant, dated in 1416, from the Crown to the priory and monks of East Shene, of all lands, tenements, tithes, &c., of the rectory of Tenbury, together with the advowson of Tenbury. The before-mentioned grant by king Henry VIII. to Andrews and Temple, which was of the rectory and church of Tenbury, with its appurtenances, and all lands, tenements, meadows, feedings, pastures, glebes, tithes, oblations, obventions, pensions, profits, commodities, and emoluments thereto belonging, and also the advowsons, donations, presentations, free dispositions, and rights of patronage of the vicarage of the church of Tenbury aforesaid, and the chapelry of Layones and Rochford; the terrier X (see ante, p. 346) (for the purpose of shewing that Sir Thomas Lucy was patron of the vicarage of Tenbury, which it appeared from other sources that he had acquired in right of his wife, Joyce, the daughter of Thomas Aston, Esq., who died in 1546, and who was tenant of the lands comprehended in the royal grant); an inquisitio post mortem, 10th September, 1601, of Joyce, the widow of Sir Thomas Lucy; an inquisitio post mortem, June, 1606, of Sir Thomas Lucy, the son; a licence, 22d April, 1621, 19 Jac. 1, to Sir Thomas Lucy, a descendant of the before-mentioned Lucy and Alice his wife, to alienate the rectory and tithes generally. The defendant then gave in evidence certain conveyances made by the last-named Sir T. Lucy and Alice his wife, by one of which certain lands in Tenbury Town, together with the tithe of corn, grain, sheep, flax, and hemp, and all tithes, great and small, belonging thereto, were conveyed to Richard Milwood, Rowland Corbett, and Richard Huite, and their heirs; and by another of which the parsonage and lands adjoining, together with all tithe of corn, **[160]** grain, sheep,

wool, lambs, flax, hemp, and other tithes whatsoever, great as well as small, growing, arising, or renewing within and upon the premises, were conveyed to the same parties. The defendants then traced these lands and tithes by a regular succession of documents into the possession of the respective parties who now hold the same, namely, Henry Williams, Esq., and the Master and Fellows of Pembroke College, Oxford. In addition to the deeds and documents necessary to deduce the foregoing titles to small tithes, the defendants gave in evidence the proceedings in the cause of *Gwynn* v. *Croydon*, and Mr. Rocke's receipts for privy tithes.

The parol evidence for the defendants was to the effect that no tithes in kind, or any composition for tithes, had ever been rendered or set out to the vicar of Tenbury in respect of the three townships of Tenbury Town, Tenbury Foreign, or Berrington; and that no moduses had ever been known to have been paid to him for such tithes: That no money payments had ever been made to the vicar by the occupiers of farms, &c., within these townships, except a stipend called privy tithes, which were paid sometimes by the occupiers of land without houses, and sometimes by the occupiers of houses without lands. The defendants' witnesses, however, admitted on their cross-examination, that it was reputed generally within the parish that the owners of the great tithes were entitled to the tithes of corn and grain only.

Mr. Boteler, Mr. Simpkinson, and Mr. Bethell, for the plaintiff. Considering the question solely with reference to the documents, the defendants' construction of them cannot be maintained. No one can come to any other conclusion than that, in Sutton, the vicar had the great tithes generally, though as to the hay there may be some uncertainty. Their hypothesis is that all the tithes in Sutton belonged to the vicar, except the tithes of Sutton Park; **[161]** and that in the other townships all the other tithes belonged to the rector, except the privy tithes. There is nothing, however, upon the documents, to support that view of the question. Then what has been the state of things, as to the enjoyment of the tithes? The vicars have received payment of privy tithes, though payment by some occupiers has been neglected, from the circumstance of the lands being cut off from the rest of the parish. The occupiers were uniformly called upon to attend the vicar on certain days and pay their privy tithes, those words being used in a sense equivalent to that of small tithes. As to the rectorial tithes, in some instances, no doubt, the tithes of corn and grain have been conveyed to the owners of the land, but that has not been the universal practice, and was not done till 1798, and then the conveyances were of tithes of the corn and grain only.

This state of things, coupled with the documents, completes the vicar's title. Unless the defendants can shew title to tithe and non-payment to the vicar, they have no defence. The plaintiff relies on evidence of receipt of tithes generally, as small tithes; and the defendants, by merely giving those tithes a new name, without producing the necessary corresponding evidence, cannot alter the vicar's rights. But, in addition to the privy tithes there are Easter offerings. This also is a rural parish, and therefore it is not probable that these privy tithes were in the nature of oblations or stipendiary payments, or personal tithes for houses. Blackstone speaks of privy tithes as synonymous with small tithes. Bl. Com. vol. i. p. 387. The plaintiff's witnesses corroborate that authority. As to the hay, it is included in the privy tithes, as tithes of lamb and wool are often received among tithes of corn and hay.

The value of the vicarage may be gathered from the documentary evidence. The Ecclesiastical Survey and Pope Nicholas's Taxation have been objected to, as not **[162]** being accurate as to value. But the defendants must shew that the inaccuracy consisted in over-valuing the living, for the inaccuracy has always been under value. At the time of Pope Nicholas's Taxation, ten marks per annum was half the value of the rectory. In the Nonæ Rolls the aggregate value of the rectory and vicarage is stated to be the same as in Pope Nicholas's Taxation, viz. 20l. The Ecclesiastical Survey is also in favour of the plaintiff, as far as it goes; not merely mentioning privy tithes, but a variety of other tithes. Can the defendants contend, in the face of this document, that the vicar is not entitled to tithes at all except in Sutton, or that these words will not pass all small tithes? What difference can it make whether the vicar's rights are specified in the Ecclesiastical Survey or an endowment. No doubt the Survey is not conclusive evidence of value, but as the terms of an endowment may be enlarged or confined by usage, so may the statements in the Ecclesiastical Survey. The Court had in several cases treated the Ecclesiastical Survey as amounting to an endowment;

Cunliffe v. *Taylor* (2 Price, 329; 3 E. & Y. 743), *Kennicott* v. *Watson* (2 Price, 250; 3 E. & Y. 690), *Armstrong* v. *Hewitt* (4 Price, 216; 1 Wil. 119; 3 E. & Y. 835). In *Masters* v. *Fletcher* (1 Younge, 36) Lord Lyndhurst differed in opinion from Thompson, C. B., as to the force of the words decimæ minores in the Ecclesiastical Survey, but in every other respect his Lordship's judgment confirms the preceding authorities. In the present case, no question upon those general words arises, because the words of the Survey are express and unambiguous. They are all uncontrolled by usage, and uncontradicted by the terriers and other documents, in which the words "privy tithes" are intended to comprehend all small tithes. [Alderson, B. Suppose it appears that payments are made in respect of small tithes, and also that the payments have been uni-**[163]**-form as far as the evidence extends,—it seems questionable whether the Court may not draw the inference of the existence of a modus, though not pleaded.] The defendants say expressly that the payments made were not moduses nor compensations for tithes. There are many cases where, though the payments have been uniform, yet the Court will not raise the inference of a modus. Here they repudiate the modus. Upon the subject of privy tithes the text writers, with the exception of Blackstone, are silent; but those words have frequently occurred in the reported cases. In *Gibson* v. *Peacock* (1 Younge, 184), the word "altarage" was held to be equivalent to minute or small tithes. In *Ekins* v. *Dormer* (3 Atk. 534; 2 E. & Y. 108) the words "privy tithes" are expressly used for small tithes.

Mr. Swanston, Mr. Godson, and Mr. Younge, for the defendants. The plaintiff's counsel call upon us to shew our title to the whole of the tithes, but they have not touched upon the essential point for consideration, namely, the title of the vicar. This is a most weak case. The demand is made without any colour of right to institute such a suit. No endowment is produced. Something is said about usage, but the only tangible foundation for it is a transaction called the payment of privy tithes. That is represented to have been made to the vicar, but on what account or for what reason is a secret. The present vicar, following his predecessors, has received various payments of this nature, though he has not received tithe of corn and grain; but it is a strange conclusion to draw from this circumstance, that the vicars are therefore entitled to every species of tithe except corn and grain. The Court will not give effect to the claim of a vicar beyond his common-law right, except upon clear evidence. There **[164]** is no common-law right to these tithes; if there is, he is bound to make it out.

That the payments which have been made to the vicar, under the description of privy tithes, are not of the character of small tithes, is clear from several circumstances. They have been made for houses without lands, and in respect of things not titheable; they have not been made by all the owners or occupiers, but by some only. With a single exception they have been uniform. In addition to this, tithes by custom in some parishes are not rateable to the poor, and that is the case in Sutton; but we shew that these payments were the subject of rate. With respect to the documents which the vicar produces, if we shew that they are consistent with our case, a decree cannot be had against us. Now the plaintiff's whole case consists in making out that privy tithes are synonymous with small tithes, and yet the Ecclesiastical Survey expressly distinguishes the one from the other. Besides, how can such a document as the first terrier, containing such an observation as it does, without respect to tithe hay, be brought forward in support of the vicar's case? The possession of the defendants is perfectly consistent with such documents as these, and your Lordship will not disturb it.

The defendants contend that privy tithes are in the nature of rent. Under the grantees of the Crown the tithes are held by various persons, amongst whom are the defendants. The grantees granted the tithes out again, some in general terms, others, including the small tithes, specifically. Here the vicar sets up a presumptive title against the actual title under the grant. He claims by payments, and he sets them up in such a manner as afford a legal presumption that they are moduses. If the vicar, therefore, has any case at all, he has proceeded in such a manner as to bar his right to tithe in kind. If he shews **[165]** only a right to a composition, it is submitted that the bill must be dismissed.

These payments, however, in whatever they originated, are not compositions for small tithes. There is clear evidence by reputation, that the lands in these three townships are free from all tithe except that of corn and grain; and the documents

produced by the vicar cannot affect that evidence. The case of *Cunliffe* v. *Taylor* has never been approved of. That of *Armstrong* v. *Hewitt* is in favour of the defendants, because, there, the Court refused to make a decree establishing the vicar's title to small tithes generally; but confined his right to those particular instances in which perception by the vicars was expressly proved. [Alderson, B. That case only shews that where a vicar stands upon usage, he cannot have relief beyond his proof of perception. Here the question turns on the meaning of the words "privy tithes," as applied to certain payments which have been received.] The defendants shew a direct title to the tithes in dispute, and not a mere presumptive title. Their title is derived from the Crown, and no usage adverse to it has been proved. The privy tithes relied upon by the vicar are evidently of the nature of these charities, as enumerated by Mirehouse (Mirehouse on Tithes, p. 102, 2nd ed.). [Alderson, B. Their strong argument is that if decimæ minores in the Ecclesiastical Survey is not the same as privy tithes, mentioned in the terrier, there is no accountiug for their being conveyed in the interim.] There is no authority, but that of Blackstone, for considering privy tithes and small tithes the same thing. The reason why writers on tithes have not defined privy tithes is that there is no instance in the case of a vicar's bill, where the words "privy tithes," standing alone, without the additional words, "minute tithes," &c., have ever been held to mean small tithes. *Ekins* v. *Dormer* (3 Atk. 534; 2 E. & Y. 108) was the case **[166]** of a rector. The words used are either "minute and privy tithes," or "small and privy tithes." It is clear therefore that the plaintiff is bound to prove an actual perception of small tithes. Having failed to do so, it follows that, as he could not under such circumstances have a decree against the rector, he cannot have a decree against the defendants, who stand in loco rectoris: *Wellis* v. *Farrer* (2 Y. & J. 217), *Wyld* v. *Ward* (3 Y. & J. 192), *Collins* v. *Gresley* (2 Y. & J. 490).

Mr. Boteler, in reply, admitted that the plaintiff's case, so far as regarded the tithe of hay, had not been made out, but he contended that, on all other points, it was strengthened by the documents which had been produced by the defendants. It was clear, from the surveys and terriers, that the vicarage was originally endowed both with glebe lands and small tithes of very considerable value, and this inference had not been rebutted by any evidence offered by the defendants. He relied on the expressions of the second terrier and the authority of Blackstone.

June 28th.—ALDERSON, B. In these cases the question also (*d*) is as to the extent of the endowment of the vicarage of Tenbury.

The older documents, as I have before stated, only shew an endowment, but not its extent or nature. The Parliamentary Survey is to the same effect. These, therefore, may be laid out of the case.

The Ecclesiastical Survey is more definite. It speaks of the vicarage as being entitled to great tithes and to one mill—to Easter dues and other oblations on the four offering days—to tithes of sheep for sale—to mortuaries, **[167]** and to small tithes, to wit: pigs, geese, hemp, flax, wax, and honey, and other like things.

Now, primâ facie, these words ought to be taken generally, as denoting a right to the tithes coextensive with the vicarage itself. But undoubtedly they may bear a more restricted sense, and may be taken to mean, if the other documents and the usage require it, a right of a more limited extent. And the next documents put in by the plaintiff clearly limit the right as to the predial tithes, to the whole or a part of the township of Sutton alone. This appears from both the terriers. As to the first of these terriers, its only effect is to make this limitation; but on the subject of the small tithes, and the extent through which they are payable, it is wholly silent. The second terrier, of 1637, is not so. It speaks of the vicar being entitled to a portion of tithes from Sutton, which I think means the tithes generally, great and small, out of the whole or a part of Sutton; and to privy tithes from the rest of the parish.

Now, what are privy tithes? I think, in their ordinary meaning, they would be the small or vicarial tithes—that is the meaning in which Blackstone uses the words. And the usage of this parish shews that they certainly are not confined to Easter offerings. For it is clear from the evidence that the vicar has Easter offerings, and also another set of payments, which are denominated privy tithes; and which seem to

(*d*) This judgment was given immediately after that in *Hall* v. *Farmer*, ante, p. 151.

have been payments made for many years by persons having lands, by persons having houses, and by persons having both lands and houses. These payments have been made very generally; and, indeed, almost universally through the three townships. There are, certainly, instances where persons have not paid; but I think those instances are not more frequent than are to be ordinarily expected from the negligent, or, perhaps, indulgent mode in which such payments have usually been collected by clergymen not willing to excite **[168]** hostility to themselves, by insisting on their extreme rights. I find no class exempted from the payment, so as to form any line of distinction between them and their neighbours. Nor do these exemptions, if they exist, appear to me to shew that these are stipendiary payments rather than compositions for small tithes. They are equally consistent or inconsistent with either hypothesis.

Then what construction is the Court to put on the expression privy tithes in the terrier? Its most natural meaning appears to me to be that which Blackstone gives to it. The usage is not inconsistent with this construction, for there is no satisfactory explanation, I think, to be found in the evidence as to the nature of these payments. They seem to me to be old compositions for the small tithes. Indeed, if the defence had been different, and the defendants had contended, admitting the vicar's endowment, that these were ancient moduses in lieu of small tithes, I might have had perhaps more difficulty in the case. But the defendants disclaim such a defence altogether, and rest upon a denial of the vicar's right to the small tithes, which they contend belong either to the rector, or were conveyed to themselves with their lands from the rector. They have traced two parcels of lands conveyed with the small tithes belonging to them—one to Mr. Williams, another to Pembroke College, Oxford. These are traced back to the rectors originally, and seem both comprised in a conveyance made by Sir Thomas Lucy and Alice his wife, to Milward and another, under a licence to alienate, obtained for that purpose from the Crown, in the reign of James the First. But the original conveyance is of the parsonage glebe and other lands, probably belonging to the rectory; and is not, therefore, such a conveyance of the tithes as materially to affect the present question. For the tithes of the lands belonging to the rectors may very probably not have been comprised in the vicar's original endowment, and yet his endowment as to the small tithes, throughout the rest of **[169]** the three townships, may have been general. These are the only instances in which any conveyances of the small tithes have been produced by the defendants. On the other hand, there is a total absence, so far as the evidence goes, of any claim by the rector to the small tithes—and unless they are comprised in the endowment of the vicar, there is no rational account to be given of them.

Upon the whole view of the evidence, I have come to the conclusion that I ought to construe the words in the Ecclesiastical Survey and the terrier of 1637 in their most natural and ordinary sense, and that, if I do so, they afford very cogent evidence that the small or vicarial tithes throughout the three townships were comprised in the original endowment of the vicar. This is in accordance with the general probabilities in such cases. It is the only reasonable explanation of the total absence of claim by the rectors of any thing beyond the tithes of corn and hay, and is not, as it seems to me, at all inconsistent with the payments proved to have been made, treating these payments, as I think they ought to be treated, as ancient compositions for these tithes, and which are not claimed by the defendants, nor indeed proved by any reasonable evidence (if the case be left as at present) to be moduses in lieu of them.

I have now, shortly, gone through the whole of the evidence. There is no disputed fact between the parties for the consideration of a jury. The whole is a question rather as to the proper conclusion to be drawn from undisputed facts. That is, properly, therefore, a question for the Court itself. I shall not therefore send the case to an issue, but decide according to the opinion which I have formed on the facts before me.

I think, therefore, that the plaintiff must have a decree for an account of the small tithes claimed by him—and with costs. As to the hay, it is admitted that the bill must be dismissed with costs.

Decree accordingly.

[170] CHESLYN *v.* DALBY. DALBY *v.* CHESLYN. June 8th, 9th, 20th, 28th, 1836. —C. for many years employed D. as his attorney, and in the course of those years became largely indebted to D. for business done and money lent. From time to time D. delivered accounts to C., but received no payments of any considerable amount from his client. C. afterwards employed other attornies. Ultimately, C. being threatened with an execution by a judgment creditor, applied to D. for his assistance, who procured the money for him by way of mortgage, but stipulated that the mortgage should stand as a security for his own debt, as well as the judgment debt. C. having assented to this arrangement, executed the mortgage deed, and also a deed of trust of even date, which was prepared jointly by D. and the other attornies of C., by which it was agreed that the mortgage should stand as a security for the amount of D.'s debt, to be settled by arbitration, and that in such settlement no prejudice should arise to D. by reason of the lapse of time: Held, that this transaction did not amount to the receiving of a gratuity by an attorney from his client, and consequently, in the absence of any fraud, was sustainable in a court of equity.—A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity.—Although a court of equity will not in general decree the specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the Master for the arbitrator, yet, where matters of account have been referred to arbitration, which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a court of equity, except upon the terms of his doing equity; and those terms may consist in his consenting to the accounts being taken by the Master.—Where accounts are referred to an arbitrator, with a special agreement as to the mode in which they are to be taken, and afterwards, upon the failure of the arbitration, the same accounts are referred to the Master, he will be directed to take them in the ordinary way, and not according to the special agreement. Therefore, where, under such circumstances, it was one of the terms of the agreement that no advantage should be taken of the Statute of Limitations: Held, that the Master was not to be ruled by that stipulation.—Quære, whether, since the stat. 9 Geo. 4, c. 14, the recital in a deed of the existence of a debt, coupled with parol evidence only as to its amount, is sufficient to take it out of the Statute of Limitations? Where a verdict is taken, subject to the award of an arbitrator as to the amount of the debt, a court of law will, under circumstances, compel the appointment of a fresh arbitrator, but not where the verdict is taken subject to arbitration generally.

[See further, 4 Y. & C. Ex. 238.]

In the year 1797, and for many years afterwards, the defendant, Thomas Dalby, was employed by the plaintiff as his solicitor, and he was also, with the approbation of the plaintiff, employed as the solicitor to the trustees under the will of the plaintiff's father. During the period between 1797 and 1818, the plaintiff became indebted to Thomas Dalby in a considerable sum of money, not only in respect of Dalby's professional services, but for various advances made from time to time to the plaintiff by Dalby and his father, and for interest due on those advances. In the year 1830, when the transaction on which these suits were founded took place, the total amount claimed by Thomas Dalby, in respect of these advances and interest, was about 4000l.

In 1818 the connection between the plaintiff and Thomas Dalby, in regard to law business, in a great measure **[171]** ceased; and from that period till the year 1830, the plaintiff, with some trifling exceptions, employed Mr. Brock as his solicitor in the country, and Mr. Hall as his solicitor in London.

In March, 1830, a judgment having been recovered against the plaintiff by one Barber, for the sum of 7000l., the goods of the plaintiff, at his dwelling-house in Leicestershire, were taken in execution under a fieri facias sued out upon that judgment. Upon that occasion the plaintiff and his solicitors, Messrs. Brock and Hall, applied to the defendants John Dalby and W. T. Dawson, for the loan of certain monies which the latter held as trustees, proposing at the same time that repayment of the loan should be secured by a mortgage of the plaintiff's real estates. The trustees, however, were dissatisfied with the proposed security, and refused to comply with

this offer. About the same time the plaintiff applied to the defendant, Thomas Dalby, for his advice and assistance; and he, as well as others of the plaintiff's friends and advisers, endeavoured to prevail upon the judgment creditor to give the plaintiff further time for payment. This application, however, was refused, and in April, 1830, the plaintiff's goods were advertised for sale in the Leicester paper.

The plaintiff being now in great distress of mind at the prospect of a sale of his effects under the circumstances before mentioned, and having a family resident with him in his house, became daily more anxious for a settlement with the judgment creditor. At length, through the influence of Thomas Dalby, he prevailed upon John Dalby and W. T. Dawson to advance to him the 7000l. by way of mortgage, out of their trust-monies, Thomas Dalby at the same time depositing with the trustees some title-deeds of his own as an additional security for the repayment of the money. This advance, however, was made upon the express stipulation that the accounts between Thomas Dalby and the plaintiff, from the year 1787, should be **[172]** immediately adjusted, and that the plaintiff should execute a security, not only for the 7000l., but for an additional sum sufficient to cover the balance due on Thomas Dalby's account. It was at the same time agreed that Thomas Dalby should forthwith deliver to the plaintiff an account of all demands, and that if the plaintiff should object to any items, the same should be submitted to two arbitrators, one to be appointed by each party with power to the arbitrators to choose an umpire, and that the security to be given by the plaintiff should be confined to the balance settled by amicable adjustment or by arbitration.

In pursuance of this agreement, arbitrators were appointed by the respective parties and by indentures of lease and assignment and release (which were prepared by Thomas Dalby), bearing date respectively the 21st and 22nd of April, 1830, and made between the plaintiff of the one part, and John Dalby and W. T. Dawson of the other part; reciting that the plaintiff, having occasion on an emergency for the sum of 12,000l., had applied to and requested the said John Dalby and W. T. Dawson to advance and lend him that sum, at the rate of interest and on the security thereinafter contained, it was witnessed that in consideration of the sum of 12,000l. paid to the plaintiff by the said John Dalby and W. T. Dawson, the receipt of which was thereby acknowledged, the plaintiff did thereby assign to the said John Dalby and W. T. Dawson, their executors &c., various leasehold estates held for divers terms of years, and did thereby release to the said John Dalby and W. T. Dawson, their heirs &c., certain freehold property, to hold &c., subject to a proviso for redemption on payment by the plaintiff to the said John Dalby and W. T. Dawson, and the survivor of them, and the heirs, executors, &c., of such survivor, of the sum of 12,000l., with interest at 4l. 10s. per cent., on the 22d of October then next ensuing. The indenture contained a power of sale by the mortgagees on default of **[173]** payment of the principal money and interest pursuant to the stipulations contained in the deed. A receipt was endorsed upon the deed and signed by the plaintiff, whereby he acknowledged to have received 12,000l.

By an indenture (prepared by Mr. Brock, but under the superintendence of Thomas Dalby), bearing even date with the indenture of assignment and release, and made between the plaintiff of the first part, Thomas Dalby of the second part, and John Dalby and W. T. Dawson of the third part, reciting the before-mentioned indentures, and that the plaintiff was indebted to the said Thomas Dalby in various sums of money, for money lent and advanced at various times, commencing in the year 1797, and for interest thereon to the then present time, and also for the amount of divers professional bills for business done by the said Thomas Dalby as the solicitor and attorney of the plaintiff, or on his account, the amount of which said several loans and bills was not yet then ascertained, and a balance was not yet struck between the said parties; and further reciting that the plaintiff was willing to pay the said Thomas Dalby the amount which might appear to be due to him upon the said accounts, commencing on the day aforesaid, such amount to be ascertained and paid in the manner thereinafter mentioned; and also reciting that upon the treaty for the loan of the said sum of 12,000l., it was contemplated that the said Thomas Dalby should have been made a party to the said indenture of release; and that the amount which should have been found to be due to him on the balancing of the said account between him and the plaintiff, should have been paid to him on the execution thereof; but inasmuch as that balance was not then yet ascertained, it had been agreed between

the parties thereto, that the sum of 5000l., part of the said sum of 12,000l., should be retained in the hands of the said John Dalby and W. T. Dawson, for the purpose of satisfying the said demand of the said John Dalby against the **[174]** plaintiff when the balance should be ascertained, and that the surplus thereof, if any, should be paid to the plaintiff; and also reciting that the plaintiff had, on the said indenture of release, given a receipt for the said sum of 12,000l., but the said John Dalby and W. T. Dawson had retained the said sum of 5000l., part thereof, for the purposes thereinbefore mentioned respecting the same, as they did thereby admit and acknowledge. It was witnessed that the plaintiff, in pursuance of the said agreement on his part, did thereby covenant with the said Thomas Dalby, his executors and administrators, that he the plaintiff would, within fourteen days after the presentation to him by the said Thomas Dalby of accounts and bills against the plaintiff, which said accounts and bills the said Thomas Dalby did thereby covenant to present within two months from the date thereof, either express his willingness to abide by and admit the same, or otherwise express his intention of submitting the same to arbitration in manner thereinafter mentioned. The deed then contained a mutual covenant between the plaintiff and Thomas Dalby in case the plaintiff should desire an arbitration, to submit the accounts to the arbitration of two persons named in the deed, who, before they proceeded to business, should choose an umpire; and it was declared that the arbitration, either of the arbitrators or the umpire, should be made within two months after the accounts should have been submitted to their or his arbitration, and should be final and binding on the parties. The deed then stated that it was thereby declared and agreed by and between the plaintiff and the said Thomas Dalby that, in settling the said accounts, the said arbitrators or umpire should begin their investigation thereof from their first commencement in the year 1797, and that the lapse of time or nonclaim by the said Thomas Dalby should not prejudice his claims; and the plaintiff did thereby empower the said John Dalby and W. T. Dawson to pay to the said Thomas Dalby, his **[175]** executors, &c. out of the said sum of 5000l. retained in their hands as aforesaid, whatsoever should be found and declared to be due to the said Thomas Dalby, either by an amicable settlement of the said accounts between the plaintiff and Thomas Dalby, or which should be adjudged to be due in arbitration or umpirage. And it was thereby further covenanted and agreed that any overplus which should remain in the hands of the said John Dalby and W. T. Dawson, out of the said sum of 5000l. retained in their hands as aforesaid, should, after discharging the balance due to the said Thomas Dalby to be ascertained as aforesaid, be paid to the plaintiff. The deed then contained a covenant by John Dalby and W. T. Dawson that they would stand possessed of the said sum of 5000l. upon the foregoing trusts.

The deeds were executed by all parties, and soon afterwards one of the arbitrators died, and another was appointed in his room, armed with the same powers as his predecessor. These arbitrators appointed Fynes Clynton, Esq., to be their umpire.

Thomas Dalby rendered to the plaintiff an account of his demands within the time limited by the deed of trust; but the plaintiff objected to that account, and it was accordingly referred to arbitration. The arbitrators, however, being unable to agree upon an award, referred the matters in difference to their umpire, Mr. Fynes Clinton, who died before any further proceedings were had in the reference.

In April, 1831, the trustees called in the mortgage money, which the plaintiff being unable to pay, they entered into the receipt of the rents of some portion of the mortgaged premises; the plaintiff, however, was afterwards restored to the receipt of those rents. In August, 1833, the interest being considerably in arrear, the trustees again called in their mortgage money, and threatened to take legal proceedings for its recovery. Upon this, the plain-**[176]**-tiff offered to pay them the sum of 7259l. 17s., which was the calculated amount of principal, interest, and costs, in respect of the sum of 7000l.; and, according to the plaintiff's evidence, a legal tender was made to the trustees of that sum. This last fact, however, was denied by the trustees, who swore that the money was only stated to them (see post, p. 191) to be in certain leathern bags, which they saw, but which were not opened before them. The plaintiff, at the same time, gave the trustees a formal notice, that he denied their right to retain the mortgage as a security for any balance alleged to be due to Thomas Dalby; because such balance was to have been ascertained by mutual agreement, or by a reference, which, by the deaths of parties, had now become impossible; but that he was ready and willing to enter into a fresh agreement of reference.

The trustees having refused to accept the plaintiff's offer, on the grounds that they had received notice from Thomas Dalby to retain the sum of 5000l., parcel of the whole mortgage sum of 12,000l., as a security of his demands against the plaintiff, the latter now brought his bill against Thomas Dalby and the trustees, praying that it might be declared that the indentures of lease and release, and the declaration of trust, so far as the same were made, or appeared to be made, as a security to Thomas Dalby, were not binding on the plaintiff; and that the declaration of trust ought to be delivered up to be cancelled; that an account might be taken of the rents and profits of the mortgaged premises received by the trustees since August, 1833, and the amount thereof deducted from the said sum of 7259l. 17s., and that upon payment of the balance by the plaintiff to the trustees, they might be decreed to reconvey, &c.

A cross bill was filed by the defendants, praying that **[177]** the trusts of the indenture of trust might be specifically executed.

The bill, in the first suit, contained statements and charges that, prior to the year 1811, all accounts between the plaintiff and Thomas Dalby had been settled and adjusted, and that all monies which, previously to that time, had become owing from the plaintiff to Thomas Dalby, had been paid and satisfied; that, when the plaintiff's effects were seized under the execution, he was greatly embarrassed in his circumstances, and had no means of satisfying the debt of 7000l.; that, under these circumstances, he applied to the defendant, Thomas Dalby, for his assistance, but that the latter purposely delayed procuring for the plaintiff the offer of the loan of 7000l. from the other defendants, the trustees, until it had become necessary for the plaintiff to accept such loan in whatever terms the same might be offered; that the terms exacted by Thomas Dalby were that the accounts of all transactions between the parties since the year 1797, should be unravelled and investigated—that the balance thereof should be computed—that the advantage of the Statute of Limitations should be waived by the plaintiff—and that the proposed security for 7000l. should be extended to secure the balance which should be so found due; that the plaintiff reluctantly consented to accept the loan of 7000l. upon these terms; that, under these circumstances, the defendant, Thomas Dalby, influenced the other defendants to offer the said loan upon terms dictated by himself, in execution of an oppressive and unjust design which he had formed, of exacting payment from the plaintiff of a large sum of money for which the plaintiff was not liable; that throughout the negotiation, Thomas Dalby acted as the plaintiff's solicitor, and made the usual charges; that he was precluded by his situation as such solicitor from accepting from the plaintiff any benefit whatsoever, beyond the usual and fair charges for his services; that he never-**[178]**-theless took advantage of his situation to exact and obtain from the plaintiff large and unfair advantages in his own favour; that the indentures of lease and release, and declaration of trust, so far as the same were originally extended to be a security to Thomas Dalby, were obtained from the plaintiff by the exercise of undue influence, and were fraudulent, illegal, and not binding on the plaintiff; or, if they had ever been legal and binding, had ceased so to be from the impossibility of carrying the arbitration into effect.

The defendant, Thomas Dalby, by his answer stated that in the year 1801 he, at the request of the trustees under the will of the plaintiff's father, delivered to them an account of several sums of money which had been advanced by the defendant and his father to the plaintiff; that a copy of this account was delivered to the plaintiff, who requested to have a more detailed account; that, in 1802, a more detailed account was delivered to him; that, in 1811 and 1813, the defendant again delivered accounts to the plaintiff, whereby it appeared that there was a balance of upwards of 2000l. due to the defendant; and that the plaintiff made no objection to these accounts at that time, and had ever since retained them in his custody. That, in 1819, a correspondence took place between the plaintiff and the defendant respecting the application of certain monies mentioned in the accounts, when the plaintiff appeared to be perfectly satisfied with the defendant's explanation, and made no objection to the accounts, but, on the contrary, paid to the defendant several sums of money after that period in reduction of the defendant's debt. The defendant then, in answer to the allegation in the bill, denied that in the year 1811, or at any other time, the accounts between him and the plaintiff had been adjusted, save by the delivery of the aforesaid accounts, or that the monies due to the defendant on such accounts had been paid, save certain items for which **[179]** credit had been given to

the plaintiff; on the contrary, he alleged that on several occasions, both before and after the delivery of such accounts, he had demanded interest of the plaintiff. He admitted that at the time of the execution against the plaintiff, the latter was much embarrassed, though, as the defendant believed, only temporarily. He also admitted that after the defendant had failed to induce the execution creditor to give time to the plaintiff, he proposed to procure the loan of 7000l. from the other defendants; but he stated that the plaintiff had, on many former occasions, requested him to procure that loan; and that the possibility and means of procuring it had often been discussed between him and the plaintiff. The defendant denied that he had insisted upon the terms stated in the bill, as a condition for procuring the loan, or that he had ever, in any manner, urged the plaintiff to comply with such terms; but he stated that in the course of the transactions the plaintiff voluntarily told him that he would settle the accounts in any manner the defendant and his brother, John Dalby, might think fit; and therefore, from such assurance, and from the intimacy which had subsisted between him and the plaintiff, and the plaintiff having frequently promised to settle the accounts, he, the defendant, fully expected he would do so, without availing himself of the technical defence of the Statute of Limitations. The defendant, however, admitted that although, in the course of the negotiation, he had not insisted upon, or even asked for, a settlement of accounts, yet his brother, the defendant, John Dalby, refused to join in advancing the loan, unless a complete settlement were made of all the transactions in question; and that, upon that understanding, which was acquiesced in by the plaintiff, the deeds were executed. In conclusion, the defendant insisted on the validity of the deeds, alleging that, at the time of their execution, and throughout all the previous transactions, it was and had been the **[180]** intention of the parties that the benefit of the Statute of Limitations should be waived by the plaintiff; and he submitted that the plaintiff was bound by the recitals in the deeds to that effect. He submitted also that the agreement to refer the accounts to arbitration was the principal term in the trust-deed, and the naming arbitrators and an umpire was but an accessory; and that the principal agreement was subsisting and ought to be performed, notwithstanding the death of the umpire.

The defendant, John Dalby, by his separate answer, stated that he did not believe that Thomas Dalby took advantage of his alleged situation to exact or obtain from the plaintiff large or unfair, or any, advantages in his own favour; for that it was at the particular recommendation and suggestion of him, John Dalby, made from motives of private regard and affection for his brother, Thomas Dalby, and not at the suggestion of Thomas Dalby, that it was made a term of the loan that the plaintiff should agree finally to settle the accounts then depending between him and Thomas Dalby; and that Thomas Dalby himself was not at all anxious to insist upon such terms, but was willing to have left the settlement of the accounts to the honour of the plaintiff, in whom he had greater confidence than John Dalby himself had.

The joint answer of John Dalby and his co-trustee corroborated the defence made by Thomas Dalby.

The evidence for the plaintiff was to the effect that at the time of the execution he was in such distressed circumstances as to induce him to accede to almost any terms for the purpose of obtaining a loan; that he had already applied for money on mortgage of his estate, but that the security he had to offer was objected to; that he had no other resource but to obtain the loan of 7000l. upon the conditions insisted upon by John Dalby; that he expressed great reluctance to submit to such conditions; and that some of his friends advised him, rather than submit to them, **[181]** to allow the sale of his effects to take place; that he could not make up his mind to take that course, and ultimately acceded to the required terms.

The evidence for the defendant, Thomas Dalby, did not differ materially from that of the plaintiff, so far as related to the plaintiff being compelled by distressed circumstances to accept the terms imposed upon him by John Dalby. The witnesses, however, generally acquitted the defendant Thomas Dalby of making the settlement of his own accounts a condition for affording the plaintiff his assistance; and one of them, who was also examined for the plaintiff, stated his belief that Thomas Dalby honestly exerted himself for the interest of the plaintiff, and would have done, and did, in fact, do all in his power to raise the money, and get the business of the plaintiff settled, without regard to his own claims, relying entirely on the honour and integrity of the plaintiff; but that his brother, John Dalby, interposed to prevent any arrangement

being effected, unless Thomas Dalby's claims were included and settled at the same time.

It appeared in evidence that the plaintiff had several times verbally admitted that he was indebted to Dalby, though he said it was but to a small amount, and only for professional business.

Sir Charles Wetherell and Mr. L. Wigram, for the plaintiff. Under the distressing circumstances in which the plaintiff was placed, in consequence of the approaching execution—a sale being advertised of his effects—himself threatened with exposure and expulsion, with attendant inconvenience and soreness of mind—he applied to the defendant, Thomas Dalby, for assistance. In the first instance Dalby endeavoured to make terms with the judgment-creditor, and so far his conduct was fair. But, upon the failure of those endeavours, and Dalby being in consequence more urgently pressed by his client to raise **[182]** money, he availed himself of the opportunity to say—Notwithstanding the difficulty in which you are placed, I think I have a remedy, and can procure you the 7000l. on mortgage; but I must slip in a claim of my own, and you must give me a mortgage for 12,000l.; I must make my claim a prefix or affix to the mortgage transaction. The time was short—the patience of the judgment-creditor was gone, and the consummation was shortly to take place. The plaintiff was thus induced to give a security for 12,000l. instead of 7000l. The sum of 5000l. was by these means added to the 7000l. really and bonâ fide borrowed. The mortgage security is, simpliciter, for 12,000l.; but there is a deed of even date in the nature of a declaration of trust, in which John Dalby and W. T. Dawson are trustees for this solicitor. That deed contains a false recital, that it was contemplated that Thomas Dalby should have been a party to the mortgage deed, and should, upon the execution thereof, have been paid the amount of his demand; but that the balance due to him had not been ascertained, and therefore that 5000l., part of the 12,000l., was retained by the trustees for the purpose of paying the balance, when found due. The whole of this statement is false. There is no pretence for saying that a liquidated debt, due to Thomas Dalby, was intended to be part and parcel of the mortgage debt of 12,000l. It was not the meaning of the mortgage deed that 5000l. was due to Thomas Dalby, but to be retained by the trustees till the balance was ascertained. That was not the genuine transaction. It is false to say that the sum of 5000l. was meant to be an admitted debt, due to Thomas Dalby. The retention of that sum was no other than a condition, without which Dalby would not procure the money. The trustees had no right to join in such a transaction, or to permit the plaintiff to sign the receipt which he did. The whole frame of this security, if it can be called a security, is evidence of an improper transaction. A power of sale **[183]** was given to the mortgagee; and though the Statute of Limitations had swallowed up all the plaintiff's demands, every demand, with interest, from the year 1797, was to be ripped up, and the only remedy the plaintiff had was the arbitration. Upon Fynes Clinton's death, however, the whole fabric of these unjust and oppressive instruments fell to the ground. The plaintiff was then advised that he had been wrongly dealt with, and the agreement for arbitration being functus officio, he tendered to the trustees the full sum, and the only sum, which is due upon these securities.

The first question is whether it is consonant to any rule of public policy that a solicitor employed by a gentleman to raise a sum of money, in order to avert almost instant ruin, is to intermix with it a transaction of his own, and to make it a condition of his exertions that his demands are to be identified with, and made part and parcel of, the loan of money which he, as solicitor, procures. It is said (though that is doubtful) that the money could not be obtained elsewhere. That aggravates the case against the solicitor. If the money was not to be procured from any other person but himself, the very fact that he was the only party who could lend it makes the matter worse. The exigency enhances the oppression. It might make but little difference whether the money was easily or not easily, possibly or not possibly, to be procured from a third person, but the relative situation of these parties as solicitor and client removes all doubt upon the subject. The rules of equity in regard to such a case as this are not capricious and arbitrary, but bottomed upon public morality. But, in addition to those undisputed rules by which all courts of justice are influenced in matters of this nature, it is a general rule of equity that a solicitor acting for his client in any transaction cannot in that transaction receive any benefit or gift from his client. In *Walmesley* v. *Booth* (2 Atk. 31), **[184]** where a person gave a bond to

his attorney in consideration of services rendered to him while in great difficulty, Lord Hardwicke expressed his opinion to be that the Court ought to pay no regard to such a bond, as it might encourage attornies, after they have got into the secrets of their clients, to extort from them unreasonable rewards to themselves. The general rule upon this subject is adverted to in many cases: *Bellew* v. *Russell* (1 Ball & Beat. 107), *Wood* v. *Downes* (18 Ves. 127), *Wells* v. *Middleton* (1 Cox, 112), *Wright* v. *Proud* (13 Ves. 138), *Montesquieu* v. *Sandys* (18 Ves. 302). The question here is whether the character of the benefit accruing to the solicitor can make any difference as to the general rule. It is clear that Dalby could not have accepted a gift of money from the plaintiff. Can he then accept a security for a sum of money, with a stipulation that the Statute of Limitations shall not bar his claim? It seems clear that he cannot. If the case be such that upon principle the Court ought to exercise its right of supervision over those transactions, the nature and extent of the benefit received by the solicitor can make no difference: *Lewes* v. *Morgan* (5 Price, 86). The benefit here is the same as if the client had given the solicitor a charge upon his estates.

The other question is whether the Court will decree a specific execution of the deed of trust, the special mode of taking the accounts directed by that deed having become impracticable. It is admitted that the security was to be confined to the balance to be found due upon an amicable adjustment or by arbitration. Upon the death of the umpire, however, the arbitration could no longer be carried into effect. Then how can the Court decree the relief prayed by the cross bill, the effect of which is to call upon a Court of Equity to compel the plaintiff to name a new umpire, or else to assume to itself the power, contrary to **[185]** the stipulation of the parties, of delegating to the Master the office of taking the accounts? It is an established rule of the Court, that no bill can be filed to compel parties to go to a reference or to name arbitrators. [Alderson, B. In some cases the Court would direct the account to be taken unless the parties consented to appoint an arbitrator.] It is submitted that the Court would refuse to interfere under any circumstances: *Agar* v. *Maclew* (2 S. & S. 418), *Street* v. *Rigby* (6 Ves. 815), *Milnes* v. *Gery* (14 Ves. 400). The mode of settling the debt being a stipulated mode, there is an end of the jurisdiction of a Court of Equity to compel the parties to adopt any other mode. Besides, if the Master takes the account, is he to act upon the principle that no length of time is to bar the demand? Is he to determine whether, upon the construction of these instruments, certain debts are or are not to carry interest? Within what limits is his discretion to be confined? It is not necessary, however, to carry the argument to this length, because, in fact, the subject matter of arbitration was at an end upon the death of the arbitrator, in whose room the new arbitrator was appointed. [Alderson, B. Although the deed might be void on grounds of public policy, you will not contend that it might not be set up by subsequent consent; then the question arises, whether the appointment of the new arbitrator was not a subsequent affirmation of the deed.] That cannot be proved unless it can be shewn that the plaintiff knew of the invalidity of the first deed. [Alderson, B. He was told by one witness that no Court in England would confirm it.] It is clear that he made the new appointment, not for the purpose of confirming the deed, but under the impression that he was bound by the terms of the deed to do so. Confirmation, in order to be available, must have been made by a person fully acquainted **[186]** with his rights, and aware that the original transaction was impeachable: *Crowe* v. *Ballard* (2 Cox, 253; 3 Bro. C. C. 117), *Roche* v. *O'Brien* (1 Ball & Beat. 339), *Dunbar* v. *Trevennick* (2 Ball & Beat. 304).

Mr. Boteler and Mr. Bethell, for the defendant, Thomas Dalby. The transaction which is called so oppressive is the result of an accumulated debt, arising from a number of small advances made by the defendant to the plaintiff at the instance and earnest entreaties of the plaintiff. These advances were made between the years 1797 and 1799. Letters are in evidence, shewing the urgency with which the plaintiff pressed for these loans, some of which were to the very smallest amount, and were wanted to meet the current expences of the day. The language of the letters is such that to have denied the plaintiff's requests would have been next to impossible. In 1801 an account of these advances was delivered by the defendant to the plaintiff. In 1802 another more particular account was delivered to him at his own request. From 1802 to 1810, nothing remarkable occurred; but the defendant having borrowed many of these monies to accommodate the plaintiff, was obliged to press him for interest in order to hand it over to the lenders. During that period the

defendant was repaid only the most trifling sums. In 1812 a correspondence took place, in which some alleged inaccuracies were explained, to the apparent satisfaction of the plaintiff. In 1810 another correspondence took place upon the same subject, which led to another explanation. From that period the defendant ceased to act generally as the plaintiff's solicitor, the plaintiff employing either Mr. Brock or Mr. Hall. In the present transaction Brock acted as the solicitor both for the plaintiff and the mortgagees, and he charged the procuration money. It is true that the defendant assisted in preparing the deeds, and delivered his **[187]** bill of costs for preparing them to Cheslyn. In form, perhaps, the account ought to have been made to John Dalby, and handed over to Cheslyn; but when the situation of the parties is considered, that circumstance is immaterial. The rule as to solicitor and client, which has been so much relied upon, cannot apply to this case. Upon what is that rule founded? On the consideration that the client has no advice. But here he is surrounded by advisers, and the person in whom he places his confidence, and who is not the defendant, is the party who advises him to engage in this transaction as the only means of procuring the money. He is not in the hands of the defendant as his solicitor. He is indeed in the hands of John Dalby, who made the conditions, while his brother would have slept upon his rights; but the whole matter was transacted under the advice of Cheslyn's own solicitor. Even had the plaintiff been forced into making this security, it was only to do a plain act of justice; but the evidence, so far from shewing improper interference in the defendant, shews that he was guided by others, and was himself disposed to trust to the honour of the plaintiff. After all, this is not a security for 5000l., but only for what honourable men would state to be due on taking the account. It is not because a solicitor takes a security from his client that it will not stand good for what is really due: *Lewes* v. *Morgan* (5 Price, 86), *Newman* v. *Payne* (4 Bro. C. C. 350; 2 Ves. J. 199).

The other point for which the plaintiff contends is that the Court will not carry into execution this deed of trust, upon the general grounds that it will not execute an agreement to refer to arbitration. The cases, however, which have been cited on that subject do not apply here. [Alderson, B. The difficulty here is that this is a deed which requires the settlement of accounts upon certain specific terms, one of which consists in a waiver of those ad-**[188]**-vantages which the law would give in the ordinary way. If you go out of the ordinary course, must you not take the deed in all its parts, one of which is that you refer the account to A., B., C., and D.? If the Master takes the account he must take it in the usual manner, subject to the Statute of Limitations. The clause in the deed as to waiver of the statute applies only in the case of the account being taken by arbitrators.] The effect of the statute is removed by the recital in the deed that the debt exists. [Alderson, B. There is some difficulty in that, since Lord Tenterden's Act (9 Geo. 4, c. 14). It may be doubted whether the written instrument required by that act should not state the amount of the debt due, as well as that a debt is due. In *Kennett* v. *Milbank* (8 Bing. 38; 1 M. & Scott, 102) there was a recital in a deed, as there is here, that a debt existed; and yet the Court held that the debt was barred by the Statute of Limitations. An account may consist of parts, some of which are barred by the statute, and some not. Can a man be bound by an acknowledgment which applies to one part of the account, and not to the other? The question comes to this, whether a debt being admitted to be due, you are not at liberty to apply parol evidence to prove the amount.] The case to which your Lordship refers might apply to a single debt, but not to an account. If this were an account between two mercantile houses, to hold that such a recital as this would not oust the statute would be productive of great hardship. The same observation applies to a steward's account. It would be an extraordinary thing to say that the whole account, consisting of many disputed items, was to be barred.

But it is scarcely necessary for the defendants' case that the Court should determine the effect of this recital, because the Court, before it grants the plaintiff the relief which he seeks, may impose upon him the very terms of **[189]** the deed. The plaintiff relies upon the abstract proposition that the Court will not compel the performance of an agreement to refer to arbitration. But the circumstances of this case give rise to a different proposition. You have here an agreement to refer, partially executed; and in the course of the performance of that agreement, the further carrying it on modo et formâ becomes impossible by the death of the arbitrators. The party then

comes here, not to carry the agreement into effect, but to avail himself of the accident which has occurred to break it. The proposition is, not to have the agreement executed, but that the party refusing to carry it on shall be relieved from it; and this is attempted to be justified upon principles only applicable when the agreement is to be enforced. It is true that the accident of death has stopped the proceedings under the arbitration, but it is the duty of a court of equity to relieve against such accidents. Can this party, who has it in his power to supply the defect arising from the accident, be allowed to have the benefit of that wrong? A court of equity will say, You may get back the estate as you can, but you who refuse to execute the contract shall have no assistance here. The true inquiry is, if a man give security to abide the event of an arbitration, which he agrees shall proceed, and he revokes the arbitration, shall he get back his security? He is in the position of a man who revokes his submission to arbitration. A man cannot come into a court of equity and say that established principles are applicable to them who break their agreement. In *Harcourt* v. *Ramsbottom* (1 J. & W. 505), where the party who gave security revoked his authority, and then came for an injunction, Lord Eldon refused it. He would not interfere at all. In similar circumstances a court of law acts upon the same principles: *Woolley* v. *Kelly* (1 B. & C. 68; 2 D. & R. 158). [Alderson, B. That case does not go the **[190]** length for which you contend. Where a verdict is taken subject to the award of an arbitrator as to the amount of the debt, the Court, if necessary, will compel the party to appoint a fresh arbitrator, but not where the verdict is taken subject to arbitration generally.] At all events the universal principle applies that no man can take advantage of his own wrong. A court of equity will not listen to a man who comes for its assistance, and yet, upon mere technical grounds, refuses to do equity: *Morse* v. *Merest* (6 Madd. 26). The consideration for this deed consisted in part of the settlement of the defendant's account. The plaintiff received the money upon the faith of that consideration; how then can he afterwards object to the settlement? Independently of principles of common honesty, a valuable consideration was given. The deed recites that the amount of the balance is not yet struck. That is a distinct acknowledgment of the relation of debtor and creditor. The substantial agreement is that the account shall be paid and there shall be a security for it. The plaintiff's refusal to name an arbitrator cannot deprive this Court of the power of ascertaining what is due to the defendant, and directing the account to be taken in its own way.

Upon the whole, the equity upon which the defendant insists is this: that the Court will not permit the plaintiff to take a reconveyance of the mortgaged premises until he shall have consented to the appointment of a new arbitrator, or until the accounts shall have been settled by the Master: the defendant being allowed in either case the benefit of all the stipulations in the deed. But, supposing the Court should make no immediate declaration as to the latter point, then it is submitted that the defendant ought to have the benefit of insisting upon the deed before the Master; it being open for him to contend, either that the plaintiff has contracted himself out of the Statute of Limita-**[191]**-tions, or that the recital of the deed satisfies Lord Tenterden's Act. *Dickenson* v. *Hatfield* (5 C. & P. 46; 1 Mood. & Rob. 141).

In the view which has been taken of the case on behalf of the defendant, it seems unnecessary to argue the question of confirmation.

Mr. Metcalfe, for the defendants, the trustees, observed that the bill prayed relief which materially affected his clients. They were called upon to reconvey the whole estate to the plaintiff, upon payment to them of a certain sum which the plaintiff alleged he had tendered to them, and which they had refused to accept. This involved the question whether the tender made to them was such as rendered it imperative upon them to accept it, and upon their refusal stopped the payment of interest upon the whole 7000l.(*b*) He thought they ought not to be called on to decide that question. [The Court concurring in this last observation, Metcalfe proceeded no further with his argument.]

Upon the question of arbitration, the counsel for Thomas Dalby here referred to *Webster* v. *Bishop* (Pre. Ch. 223), *Whitmel* v. *Farrel* (1 Ves. sen. 256), and Francis's Maxims.

(*b*) Co. Litt. 208 a.; *Reid* v. *Goldring*, 2 M. & S. 86; *Alexander* v. *Brown*, 1 C. & P. 280. See ante, p. 176.

Sir Charles Wetherell, in reply. No case in law or equity has been produced to sanction the proposition laid down in this bill. The question is whether if A. and B. contract by deed to refer the matters in dispute between them to arbitration, and one dies, it is or not discretionary with a court of equity to compel the parties to name new referees. The practice of the Court gives a negative to that proposition in all its shapes and forms. One rea-**[192]**-son is that the Court will not make itself subsidiary or ancillary to a private agreement of that description. Another ground, which is the direct one, is that, although a court of equity will execute that agreement which the parties themselves have made, it will not make a fresh agreement for the parties, by applying to it principles of similitude or analogy. If the Court deviated from this rule, its jurisdiction would be afloat, as it were; and even if this rule were not sustained by analogy to that of courts of law, it would not be an insuperable objection: because it is not always that in matters of practice courts of equity can follow the law; the form of proceedings in the respective courts being different. But here it so happens that the legal rule does support the analogy. If the verdict ascertains the extreme limit to which the damages may go, the parties say they will not trouble the Court with investigating all the items, and the matter is referred to arbitration. If then one of the parties refuse to name an arbitrator, the Court says, You have admitted upon the records of the Court that so much is due, and you shall proceed with the arbitration. But how does that affect the present case? Is there any authority for saying that this deed is a verdict for 5000l.? Is it a judicial proceeding? Can it be called matter of record? Even where a verdict has been taken for damages subject to the award of an arbitrator, a court of law will not in doubtful cases enforce the arbitration: *Hall* v. *Phillips* (M. & Scott, 167; 9 Bing. 89). It is clear, therefore, that the rule of courts of equity is not peculiar to their jurisdiction; and is there any thing in this case so stringent or exigent upon them that they shall begin a new rule? In *Milnes* v. *Gery* Sir William Grant said that an agreement, where there is no party to fix the price, is inoperative quasi nullo pretio statuto. Here, therefore, there is no operative **[193]** agreement; and if the Court drives the parties into the Master's office, it will make a new agreement for them, precisely as if it compelled the party to choose A. as an arbitrator instead of B.: and is it to be contended that the Court could compel that choice, when it is clear from the evidence that the arbitrators originally named were chosen from motives of private confidence?

With respect to the declaration of trust, it is argued that the debt being admitted by the deed, the amount of it must be referred, with all the stipulations of the deed, to a new referee. But is this such an absolute admission of the debt as can be laid before another referee? No; there is nothing but a recital that the bills are of a certain age, and that upon an adjudication upon them in the manner stated in the deed, the Statute of Limitations shall not be set up. But there is nothing in the deed to signify that it shall not be set up in any other court. Can you say that this is an admission which is to be received before every tribunal, when the deed recites that the balance to be found due upon the accounts "is to be ascertained and paid in manner hereinafter mentioned?" It is a fallacy, upon every rule of construction, to make this a simple admission of a debt. The plaintiff said—If my arbitrators are named the judges, I will consent that they shall take the account, and the statute shall be waived; but that was the extent of his admission. Can it be contended that under such a special agreement as this the Court may say, Though in other respects the deed falls to the ground, yet we will abstract the admission and give it a universal character; and therefore you must consent not to set up the statute? The case of *Kennett* v. *Millbank*, as far as it goes, is favourable to the plaintiff; at all events the judges did not there decide that the deed should operate for one purpose and not for another. This deed was most oppressively obtained, and even if it were practicable to refer the accounts to the Master, they must be dealt with **[194]** in the ordinary manner, and without reference to the deed. In cases like the present, all the authorities go to the entire destruction of the instrument. What has been said as to the extent of the solicitor's lien is not applicable to this unfair transaction.

June 28th.—ALDERSON, B. In these two bills, which are cross bills, the plaintiff Cheslyn seeks to set aside the lien claimed by the defendant Thomas Dalby on the estate mortgaged to the other two defendants, and to have a reconveyance on payment to them of a specific sum deposited (after having been previously tendered to them) in the hands of third persons for their use. On the other hand, the trustees claim to

hold the estate until the sum of 7000l., with interest to the present time, shall be paid to them; and further, until the defendant Thomas Dalby's lien in respect of the debt claimed by him is also satisfied. And in the cross bill, Thomas Dalby claims relief, and that the Court shall enfore the arrangement contained in the declaration of trust, dated 22nd April, 1830, either by compelling Cheslyn to nominate an arbitrator, or by referring the account between the parties to the Master on the same terms as the arbitrators originally named were empowered to ascertain the balance.

The question has been very fully and ably discussed, and is to be resolved into two inquiries, of which the first is, whether the transaction between the plaintiff Cheslyn and the defendant Thomas Dalby was a fair transaction—or whether it was one in which the latter, availing himself of his character of attorney, has obtained, in a case in which he was acting as attorney for Cheslyn, a greater remuneration and advantage for his services in that behalf than his regular and ordinary fees, in which case, on the grounds of public policy, it is contended the transaction ought to be set aside altogether.

There is no doubt that the courts of equity have always **[195]** exercised a very jealous superintendence over transactions between attorney and client. In *Wells* v. *Middleton* (1 Cox, 112), Lord Thurlow goes very fully into the question, and lays it down broadly that it is perfectly well known that an attorney cannot take a gift or gratuity whilst the client is in his hands, nor instead of his bill. And in *Walmesley* v. *Booth* (2 Atk. 27) Lord Hardwicke lays the same principle down and confirmed it in *Saunderson* v. *Glass* (2 Atk. 296). Again, Lord Eldon, in *Hatch* v. *Hatch* (9 Ves. 294), and Lord Erskine, in *Wright* v. *Proud* (13 Ves. 138), agree with this as being the law even where no fraud is imputable to the attorney. But I do not find it laid down that where only a security has been given for a debt really due, or for a reasonable reward for services already rendered, the Court will set such security aside. Indeed, in the case of *Walmesley* v. *Booth*, Lord Hardwicke suffered the bond to stand as a security for what was really due, and referred the amount of that proper compensation to the Master.

Upon looking at the facts of this case, I think I am bound to say that I see nothing whatever in them which can in the least fix upon Mr. Thomas Dalby the imputation of any improper conduct: and that is the case even if we take the transaction as really a stipulation made by him, and not by his brother on his behalf. There is some little ambiguity in the evidence as to this; but inasmuch as it was a stipulation only for his benefit, and to which, when his brother made it, he clearly assented—if, indeed, he did not originally suggest it—I think the reasonable mode of viewing the case is to treat it as a stipulation made by him. It seems to me, however, to be well made out that he had bonâ fide claims to a con-**[196]**-siderable amount upon Mr. Cheslyn, which had long been pending and unsettled; and which had been the subject of much arrangement between the parties. It appears to me highly probable, that a great part of these claims was well founded; and that there was a moral obligation at all events as to a great part, and a legal obligation as to some part of the debt binding upon Mr. Cheslyn at the time when the transaction took place.

I am by no means satisfied that, if we look to the substance of the transaction, and not merely to the form of it, Mr. Dalby can properly be considered as having acted in this business as the attorney for Mr. Cheslyn. It is clear that Mr. Cheslyn was attended and assisted by other persons, his undoubted attornies, and Thomas Dalby appears to me to have acted with them, rather as an agent for Cheslyn the mortgagor in procuring the money, and as the attorney for the trustees, who were the mortgagees lending it. It is true that he has made charges as an attorney in respect of the preparation of the deeds, &c., and that in his bill he names Mr. Cheslyn as his client. But it is no uncommon practice for the expence of such deeds to be charged on the mortgagor by the attorney for the mortgagees—and the mere form of making out the bill to Cheslyn, instead of to the trustees, when it was to be paid in any event by Cheslyn, does not appear to me to be at all conclusive. Looking therefore at all the circumstances of this case, in the absence of fraud, and at all events in the doubt whether Dalby was really the attorney for Cheslyn at this time—the plaintiff having had the presence of other attornies acting for him and on his behalf when this deed was executed, and there being a bonâ fide debt due, for which alone this was to be a security—I am not prepared to say that this case falls within those

general principles so well laid down in the authorities to which I have referred, and to which I give my most cordial assent. Perhaps, indeed, in the view I take of **[197]** this case, after the events which have since occurred, it is not absolutely necessary for me to decide that point.

Supposing that the transaction is unimpeachable on the first ground taken by the plaintiff, the question next arises—what is now to be done between the parties? Here, the arbitration originally agreed on has by the death of the arbitrator and umpire been wholly frustrated. And the question arises whether the Court can now enforce the specific performance of the agreement in the declaration of trust, by compelling Cheslyn to name a fresh referee, or, in case of his refusal, by referring the account to the Master: and if so, upon what terms must this be done? Here the plaintiff Cheslyn comes into Equity to ask relief, and before he can obtain that relief, he must of course perform what the Court shall deem to be equitable, that is to say, the substance of his agreement. Now, what is that? There is a recital that the plaintiff Cheslyn was, upon an account commencing in 1797 and continued down to the time of the agreement, indebted to Thomas Dalby, but that the balance was not ascertained. It is first provided that to the extent of 5000l., there should be a lien on the estates mortgaged for that balance when ascertained. And then the deed goes on to provide for a special mode of ascertaining that balance. If the parties cannot agree on it, it is to be ascertained by arbitration. Two persons are named to be the referees, with power to name an umpire: and there is then a special clause that, in taking the accounts, such arbitrators and umpire are not to allow the claim to be defeated by the Statute of Limitations.

Now, I think this agreement is composed of two distinct parts: 1st, it is admitted that there is some balance due to Thomas Dalby; and it is agreed that the estate is to be subject to a lien for that balance. But, 2ndly, there is also an agreement as to a specific mode of ascertaining that balance in case of dispute. Now, the latter alone has **[198]** failed, by events over which the parties had no controul. But it seems to me that, notwithstanding this, the former part remains entire, and if Mr. Cheslyn has admitted that there is a balance due, and has by a deed executed under such circumstances as that it ought to be enforced, agreed that his estate shall be subject to a lien for that balance, why am I to decree a reconveyance of the estate without compelling him to fulfil that part of his agreement? It appears to me that I ought not to do so —and that in this case I ought to declare that such lien exists.

But according to this view of the case, the special mode of ascertaining the balance has failed; and the Master therefore, in taking the account, ought to allow to Mr. Cheslyn the benefit of the Statute of Limitations, and all other defences which could legally have been made by him at the date when the declaration of trust was executed. For the proper mode, as it seems to me, of construing Mr. Cheslyn's stipulation, is to take the whole clauses as to the arbitration together. If the balance had been settled in the way proposed, and by the individuals named, it might be in his judgment reasonable to give a greater latitude to the discretion of his selected judges. But it would not be in accordance with this to give the same power to the Master as to other persons not in the same situation. That bargain alone which the Court clearly sees that he has made, ought to be enforced. But it is not clear to me that this was more than an absolute agreement that the estate should be bound for the true balance, with a conditional waiver of the defence of the Statute of Limitations, in case the balance was determined by selected judges.

Upon the whole, then, in the first case of *Cheslyn* v. *Dalby*, I propose to decree that the account should be referred to the Master—that he should take the account and ascertain the balance on the 22nd April, 1830, allowing all defences that could have been made by Mr. Cheslyn **[199]** at that date; and that, having ascertained such balance, he should allow interest thereon from that date to the present time, and that on payment of 7000l. and interest to the trustees, and also this ascertained balance with interest to Mr. Thomas Dalby, the trustees should be directed to reconvey the estates to Mr. Cheslyn.

I shall reserve the question of costs as to Mr. Thomas Dalby till the report has been made.

It seems to me that the trustees ought to have their costs.

The cross bill, I think, should be dismissed, and with costs.

Decree accordingly.

Nov. 24th.—On this day the cause was spoken to on the minutes.

ALDERSON, B. I have considered the point respecting the Statute of Limitations. It appears to me that the defendant, Thomas Dalby, ought not to be precluded from contending before the Court that he is not barred by the statute; though I do not think he will ultimately succeed in that argument. I think that the deed which speaks of the balance being due cannot be coupled with parol evidence of the amount of the balance; yet there are two authorities in which the question has arisen. In *Dixon* v. *Deveridge* (2 C. & P. 109) Lord Tenterden thought that a parol admission of a balance being due, coupled with parol evidence of the amount of the balance, would take the case out of the statute. Now, as the same learned judge says in *Dickenson* v. *Hatfield* (5 C. & P. 46), that the object of the statute was to procure that in writing for which words were previously sufficient, it may be contended that a written admission may now be coupled with parol evidence as to the amount, in the same way as a parol admission was coupled with parol **[200]** evidence before the statute. I shall therefore leave it for the Court to say, on a future occasion, whether the deed in question, coupled with the evidence, has the effect of placing this case within the range of such cases as *Dixon* v. *Deveridge*.

Therefore let the Master find the amount of what was due to the defendant, Thomas Dalby, within six years before the execution of the deed, and also find what was due before that time: the plaintiff on the one hand not to be precluded from the benefit of proof of payment or of satisfaction to be inferred by the Master from length of time; and the defendant on the other hand not to be precluded from setting up the deed as an answer to the Statute of Limitations.

PRIOR *v.* HORNIBLOW. June 28th, 29th, 1836.—In 1780 the interest of a sum of money was bequeathed to A. for her life, and after her decease the principal to her daughter B. Between 1784 and 1795 proceedings in Chancery, in which A. and B. were parties, were instituted against the executor, and a decree for an account was obtained, which was not acted upon. From that time till 1828 no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the executor, and from circumstances it appeared probable, that the legacy was paid by the executor many years ago to A. and B. jointly, or to one of them with the consent of the other: Held, nevertheless, that payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an executor: Held, also, that A. not dying till 1830, B.'s claim was not barred by the Statute of Limitations.—A residue bequeathed by will is clearly within the provisions of the stat. 3 & 4 Will. 4, c. 27, s. 40.

[Commented on, *Adams* v. *Barry*, 1845, 2 Coll. 290. Referred to, *In re Smith*; *Prada* v. *Vandroy*, [1916] 1 Ch. 528. See 4 Y. & C. Ex. 570.]

Sarah Freeman Tawney, by her will dated the 19th July, 1780, gave and bequeathed to her brother, James Horniblow, certain leasehold estates, upon trust to pay the rents and profits thereof to her daughter, Elizabeth Barnes, for her separate use for life, and after the death of the said Elizabeth Barnes, upon certain trusts for the benefit of the testatrix's grand-children, Samuel Barnes and the plaintiff, who were the children of Elizabeth Barnes; and after giving certain legacies, the testatrix gave and bequeathed to the said James Horniblow, his executors and administrators, the sum of 300l. upon trust, to place the same out at interest, and pay the interest unto her said daughter, for her separate use; and after the **[201]** death of her said daughter to pay and apply the interest of the said sum of 300l. as a further help and assistance towards the support and bringing up of her said grand-children, Samuel Barnes and the plaintiff, until their respective ages of twenty-one years; and the testatrix thereby gave to her said grand-children the said sum of 300l., to be paid them as they should respectively attain such ages, in equal shares and proportions; but in case her said daughter should survive her husband, then the testatrix gave and bequeathed to her the sum of 100l. part of the said sum of 300l., to be paid to her as soon as conveniently might be after her said husband's decease; and after giving certain specific bequests, the testatrix gave all the residue of her personal estate to her

said grand-children, to be equally divided between them, when they should attain the age of twenty-one years; and she appointed James Horniblow her executor.

The testatrix died in August, 1780, leaving the several persons named in her will surviving her. James Horniblow proved her will, and died in 1791, leaving W. T. Horniblow his executor; and W. T. Horniblow died in 1828, leaving the defendants his executors. Samuel Barnes attained his age of twenty-one, and died in the year 1802 intestate, and without having been married, and letters of administration of his personal effects were granted to the plaintiff. Elizabeth Barnes died in January, 1830, having survived her husband, Thomas Barnes.

Upon the death of Thomas Barnes, James Horniblow, the executor, paid to the use of Elizabeth Barnes the sum of 100l., part of the before-mentioned sum of 300l., pursuant to the directions of the will: but the present bill, which was filed in June, 1835, charged that neither James Horniblow nor his representatives ever paid more than the above sum of 100l., or ever duly accounted for the residue of the estate of the testatrix; and it prayed the usual **[202]** accounts, and payment of what might be found due to the plaintiff on taking those accounts.

The bill contained a charge, which was not supported by any evidence, that the interest on 200l., being the remainder of the legacy of 300l., after payment of the above sum of 100l., was paid to Elizabeth Barnes by James Horniblow and his representatives to the time of her death. The bill also charged that in the year 1784, some disputes having arisen between Elizabeth Barnes and James Horniblow concerning the estate of the testatrix, those disputes were referred to arbitration, and that it was awarded and declared that James Horniblow had in his hands the sum of 292l. 12s., part of the said sum of 300l.; and that he should proceed to get in the outstanding personal estate of the testatrix, and invest the same upon the trusts of the bill. The bill also charged admissions both by James Horniblow and W. T. Horniblow, that they were respectively accountable for the said sum of 292l. 12s.

The defendants by their answer stated that they had been informed by their solicitors that the latter had certain papers in their custody, which were very voluminous, and which had not been read by the defendants, whereby it appeared that in consequence of disputes between the parties, a bill had been filed in 1784 by the plaintiff's family, including herself, who was then an infant, against James Horniblow in relation to the will of the testatrix; that that suit terminated in the arbitration and award stated in the bill; that it did not appear, however, that that award was ever acted upon, for that the bill was afterwards amended, and in 1792 was revived; and that in November, 1795, a decree was made for an account of the personal estate of the testatrix come to the hands of James Horniblow, with a reservation of further directions. The defendants then stated that it did not appear that the decree was ever drawn up, but that all the matters of the **[203]** suit were referred to the final award of Benjamin Johnson, Esq., barrister, who awarded 206l. 18s., as the total sum due from the estate of James Horniblow to the plaintiff. The defendants then expressed their belief that the plaintiff and her brother had long before that period attained their full age, and "that on or about the year 1803, with the consent of all parties interested, the said sum of 206l. 18s. was paid to the said Elizabeth Barnes, Samuel Barnes, and the said plaintiff, or to some or one of them, with the privity of the rest of them; and that from that time none of those parties had any claims or rights against James Horniblow or his estates or representatives." The defendants then alleged that from the year 1803 till the month of October, 1828, when the plaintiff sent a letter to the defendant on the subject, no dealings had ever taken place between the plaintiff and her family, on the one part, and Horniblow or his representatives on the other, relative to the matters in question. They submitted that after the lapse of so many years, all claim of the plaintiff under the will of the testatrix must be presumed to be satisfied; they insisted that the laches of the plaintiff was a bar to any relief in a Court of Equity, and they claimed the benefit of the Statute of Limitations.

The letter of October, 1828, referred to in the answer, was written and sent by the plaintiff apparently without the knowledge of her mother, Elizabeth Barnes, who was then living. It was followed by a letter from the plaintiff's attorney, stating the plaintiff's claim, from the language of which it was to be inferred that Elizabeth Barnes was dead. With respect to the award which the defendants alleged to have been made by Johnson, there was reason upon the whole evidence to conjecture that their

statement was correct, but they failed in their proof of it, from inability to produce the deed of reference or arbitration bond.

[204] Mr. Simpkinson and Mr. Teed, for the plaintiff. The defence is that the plaintiff's claim is barred by the Statute of Limitations (3 & 4 Will. 4, c. 29). That cannot be the case, at all events, as regards the sum of 200l.; because, in order to bar a legacy of that description, the statute must have run twenty years after the right to receive payment has accrued. Here the right of payment did not accrue till the death of Elizabeth Barnes, the tenant for life, in January, 1830. As to the residue, it may be questioned whether it is within the meaning of the statute. The statute does not in terms comprehend the residue; the reason for which seems to be that the 40th section of the statute only applies to liquidated sums. A residue requires accounts to be taken and other proceedings to be had before it can be ascertained; and supposing it to have been ascertained and agreed upon between the parties, it is probable that the words of that section would apply; but here there is no evidence of an account being taken, or any settlement having taken place. The utmost extent to which the defendant could go in proving a balance would be the proof of Johnson's award; but in that they fail altogether.

Supposing the plaintiff's claim not to be barred by the statute; the question is whether it is affected by the law as it stood previously? Cases occurred before the statute, in which it was discussed whether certain legacies could fairly be presumed to have been settled after the lapse of twenty years. A point of that nature came before Lord Brougham, in *Campbell* v. *Graham* (1 Russ. & M. 453), in which his Lordship's judgment, reversing that of Sir John Leach, was affirmed in the House of Lords. His lordship held that where there are no circumstances to rebut that presumption, it would be in favour of the legacy being satisfied; and, in the case before him, he thought the presumption was not rebutted. The present is directly the reverse of **[205]** that case. Can there be any circumstances stronger than there are here, with reference to such a presumption? The same parties who were entitled to the residue were entitled to the legacy of 200l. That has never been paid to them, or invested for their benefit. If so, it follows almost of course that the residue never was accounted for.

Mr. Temple and Mr. J. Russell, for the defendants, were directed by the Court to confine themselves to the question as to the 200l. The adjudication of this matter in 1795 disposes of the present suit. The Court then, at the suit of the same plaintiff, and between parties representing the same interests, made the same decree as is now sought for. Since that time the plaintiff has taken no steps to enforce her rights. Parties who lie by for thirty or forty years have no right to expect strict evidence to rebut their claims. [Alderson, B. If you could shew that the legacy was payable thirty years ago, there would be much in your argument. But you do not shew that the legacy was payable till 1830.] There was an arrangement in 1803 or 1804, which completely established the right of all parties. The plaintiff was of age, and might have enforced the award as much as the tenant for life might have done, and had a greater interest in so doing. Yet it is an undisputed fact that no claim was ever made by her till 1828. She had an immediate interest in a sum which, in her circumstances, was considerable; she had also the benefit of an impending suit, and yet not one step was taken by her for the space of thirty years. At the end of that period the plaintiff makes a claim by letter; at the same time suggesting what she must have known to be false—namely, that her mother was dead. Upon the whole, there is sufficient evidence from which to presume that the whole claim as to the legacy was discharged in 1803 or 1804. The plaintiff was a party to the former suit. In **[206]** the decree in that suit there would have been a direction for payment to the mother during her life, with liberty to the plaintiff to apply. She had a present immediate right to call upon the executor to have the money invested. That is clear also from the award. [Alderson, B. You have not got the award. Besides, suppose it to have been awarded that the money ought to have been invested and paid to certain parties—what right have you to say that the party paid was the present plaintiff?] If she duly enforced her rights in that proceeding, the sum would have been secured to her. Though her enjoyment was future, her right to relief was immediate. In *Jones* v. *Turberville* (2 Ves. 11) there were strong circumstances to rebut the presumption of payment of a legacy, yet payment was presumed.

Mr. Simpkinson, in reply.

ALDERSON, B. It seems to me that the case presents no difficulty as to the question of residue. It is clear that residuary property is within the act, and I think also within the known rules relating to present right of payment; because the party had an opportunity, as far back as the year 1800, or soon afterwards, of ascertaining what was the clear residue, and requiring payment of the amount. The act says that all suits for legacies must be instituted within 20 years next after a present right to receive the same shall have accrued to the party capable of giving a release for the same. Here the present right to receive the residue accrued thirty years ago; at all events, it is not contended that any suit was necessary to ascertain it. The plaintiff's claim therefore is barred as to the residue. The legacy of 200l. stands on a different foundation, and I will look into the cases upon that subject. My present impression is that with respect to that the party is entitled to an account.

[207] ALDERSON, B. I have considered the question as to the legacy of 200l., and I have come to the conclusion that upon that point I ought to make a decree for the plaintiff. It is clear that as there was no present right in the plaintiff to receive that money before the year 1830, when the mother of Mrs. Prior died, there can be no ground for considering the plaintiff's claim in that respect as within the 40th section of the act. It is said, however, on behalf of the defendants, that I ought to presume payment of the legacy in question; and the ground on which that opinion is sought to be supported principally consists of a proceeding so long back as 1795, when a previous suit not having succeeded, and recourse having been then had to a reference which was not acted upon, the parties were advised to institute a fresh suit for securing the benefit of the will to Mrs. Prior and her two children. There was a decree in that suit, and the parties to that decree might have acted under it for the purpose of causing the money in the hands of the then executor to be paid into Court, so as to be put out to interest, the interest being paid to the mother for her life; and her two children after the expiration of her life interest receiving the 200l. From that time, however, to the present, there is an absence of all legitimate evidence on the subject. What presumption then can be drawn from the apparent acquiescence of the parties since the year 1795? From the mere lapse of time the only presumption that can be drawn is this—that what ought to have been done at the commencement of the period has been done at the end. But no other conclusion can be drawn than that. The defendants insist that payment of this legacy may be presumed; but you cannot draw that presumption from mere length of time, because such payment is out of the ordinary course of transactions. When the parties came of age in 1801 or 1802, it was open to them to make an arrangement with the executor which might be contrary to the presumed duty of the latter as executor. **[208]** They might have said—pay us now what we are entitled to in futuro—we are competent to give you a release. That, however, is not to be presumed, but proved. It must be presumed, not that the executor has not followed the ordinary course of his duty, but the contrary. Here, if the legacy in question was paid by the executor, it was not paid in the regular course of his duty—because it could not be so paid till 1830. If what is suggested has been really done or might be supposed from the documents to have been done, and the executor has done it without taking proper proof of it, he has nobody but himself to blame. The decree as to the 200l. must be for the plaintiff.

Decree accordingly.

FISHER *v.* ARLETT. June 18th, 1836.—Where occupiers file a bill against a party to establish a modus, pending a suit instituted against them by the same party for the tithes, it is not necessary for them, in support of their bill, to have the defendant's admission of their occupation.

A bill had been filed against the plaintiffs in this suit for an account and satisfaction of tithes for lands which were in their occupation in April, 1826. To that bill the defendants pleaded various moduses, and eight years afterwards filed the present bill to establish those moduses. The defendant, the plaintiff in the former bill, not having by his answer either admitted or denied the occupation of Harrison, one of the present plaintiffs, an exception was taken to his answer on that ground.

Mr. Walker, for the exception, contended that there must be an admission of occupation by Harrison subsequent to April, 1826; otherwise, Harrison would have no title to sue. A stranger cannot sue jointly with parties entitled: *Makepeace* v.

Haythorne (4 Russ. 244). If the other parties die, there is no admission authorizing Harrison to carry on the suit.

[209] Mr. Duckworth, contrà, said that as this was a cross bill, there was nothing in the objection; and he cited Mitf. Pl. 81, 82.

Mr. Walker, in reply, contended that Lord Redesdale only referred to the case where the original and cross suit come on together for hearing: here it was uncertain whether the plaintiff in the original suit would ever bring it to a hearing.

Per Curiam. It must be considered as a cross suit.

Exception overruled.

HUMBERSTONE *v.* CHASE. June 11th, 1836.—S. made a specific bequest of the dividends of certain stock to W. and his wife for their lives; the principal, after the decease of the survivor of them, to go to such of their children as should attain 21; and, in default of such children, to sink into the residue. Upon the death of the testatrix, the various bequests of the will were appropriated to the respective legatees, and W. regularly received his dividends, the principal stock still standing in the name of the testatrix. Afterwards, the wife of W. died, leaving one child by W. In consequence of this event, the executrix of S., colluding with W. and other interested parties, applied to the Bank of England to have part of the stock transferred to the residuary legatee, upon the representation that there was no child of W. The Bank consented to the transfer, but took a bond of indemnity, containing recitals from which it appeared that they had notice of the will, and of the appropriation of the legacies. The stock in question was transferred to the residuary legatee, and ultimately sold out: Held, that the Bank were not liable for the misapplication of the stock.—The Bank stands in relation to stock as a depositary of goods in relation to the goods. The Bank, therefore, can only be made responsible for a transfer of stock after distinct notice given to them of an existing claim upon the stock.—Although the Bank are bound to allow the transfer to or by the executor of stock specifically bequeathed, if the executor has not assented to the legacy, yet it does not follow that, if he has assented to the legacy, the Bank are bound to transfer it to the legatee.

Sarah Gauthorpe, by her will, dated in August, 1818, bequeathed 2200l. 5l. per cent. annuities, standing in her name, in the following manner; namely, the dividends of 600l., part of that stock, to William Chase and Elizabeth his wife, for their joint lives, and the life of the survivor of them; and after their deaths the principal to such of their children as should attain the age of twenty-one, or marry; if none should attain that age or marry, the principal to sink into the residue. And the testatrix declared, that in case William Chase should incumber his **[210]** share of the dividends, his life interest should become forfeited, and go to his children; and in default of such children, should sink into the residue. The testatrix then bequeathed 400l., other part of the above-mentioned stock, to George Henry Chase, to be paid to him at his age of twenty-one years; in default of his attaining that age, such stock to sink into the residue. She then bequeathed the dividends of 1200l., being the remainder of the above-mentioned stock, to Margaret Chase for her life, and after her death, in equal moieties to Sarah Hole and Margaret Humberstone, the two daughters of Margaret Chase, for their respective lives; after their deaths the principal to go to such of their children respectively as should attain twenty-one or marry; and in default of children attaining that age or marrying, to sink into the residue. The testatrix bequeathed the residue of her property to Sarah Hole and Margaret Humberstone in equal moieties, and appointed Margaret Chase her executrix.

The testatrix died in 1819, and Margaret Chase proved the will, but the stock, with the exception of such parts as were sold out, remained, during the life of Margaret Chase, in the name of the testatrix. Margaret Chase finding the property of the deceased, independently of the stock, to be insufficient for the payment of the debts and funeral expenses, sold out stock to the amount of about 200l., which occasioned a proportionate reduction of the several legacies. Some time between this period and the transaction about to be mentioned, Elizabeth, the wife of William Chase, died, leaving her husband and one child of their marriage, Margaret Ellen Chase, surviving her.

In October, 1828, application was made to the Bank to permit the transfer of a

moiety of the stock from which William Chase received his dividends. The parties to this application were Margaret Chase, William Chase, Sarah Hole, and John Hole, the husband of Sarah Hole. Upon this occasion it was represented to the Bank that **[211]** William and Elizabeth Chase were entitled to the dividends of this stock for their lives, and that upon their death, without leaving issue, one moiety of the principal would go to Sarah Hole as part of the residue; that Elizabeth Chase had died without leaving issue; that, therefore, William Chase became entitled to the dividends until forfeiture; and that, consequently, subject to his interest, Sarah Hole was entitled to a moiety of the principal.

In consequence of this representation, the Bank permitted the transfer, and one moiety of the stock in question was accordingly transferred from the name of the testatrix into that of Sarah Hole, who afterwards sold out that stock. The Bank, however, made it a condition of such transfer, that the parties applying should execute a bond of indemnity, for the purpose of saving the Bank harmless, in case it should ever appear that the stock had been improperly transferred. Those parties, and others as their sureties, accordingly executed a bond of that nature, which, in addition to the circumstances immediately calling for its execution, recited the will, the reduction of the legacies by the sale of stock for raising the 200l., and the subsequent receipt of dividends by William Chase.

Margaret Chase died in 1829, and Sarah Hole took out letters of administration of the personal estate of the testatrix, and obtained a transfer of the whole of the stock comprised in the will in her own name. The personal representative of Margaret Chase was not before the Court.

A decree having been made in this suit, without reference to the transaction with the Bank, and upon the supposition that the personal estate of the testatrix consisted of other property besides the above-mentioned stock, the parties aggrieved filed their supplemental bill, and presented their petition of rehearing, for the purpose of having the decree rectified so as to secure to them their rights **[212]** under the will; and the principal question upon the hearing of this bill and petition was whether, in the event of the stock which had been improperly sold out not being otherwise replaced, the Bank was liable to replace it.

Mr. Temple and Mr. Kenyon Parker, for the petition. No doubt the petitioners are entitled to a decree against Sarah Hole; but as the state of her circumstances renders that proceeding useless, the question is whether the Bank is liable. If the form of the bond were such that the petitioners could get liberty to sue in the Bank's name, they would not ask to sue the Bank, because then they would go against the sureties. But this is only an undertaking to indemnify the Bank for any money they may actually pay. It will be said that it was an unnecessary proceeding on the part of the Bank to take the indemnity; that it was only waste paper; that the executrix had a right to sell the stock; and that, on the authority of *Franklin* v. *Bank of England* (9 B. & C. 156; 4 M. & R. 11), the Bank could not prevent the sale. That case, however, does not decide that the executor has a general right to transfer stock into his own name, but only when he had not assented to the legacies. In that case there was no evidence of assent. Here, the bond is evidence both of the assent of the executrix and that the Bank had notice of it; for it recites the will, and that the legacies had been reduced, and that William Chase had received his dividends: which could only have been by assent of the executrix.

But, independently of the question of assent, the Bank have taken upon themselves the management of the stock. If the deed had been merely improper, however wrong the executrix was, the Bank might have stood clear. But here they rely upon a deed containing a false recital, and have altogether so mixed themselves up in the transaction, **[213]** as to be concluded from saying that they are not responsible for the misapplication of this fund. Having gone out of their way to join in this transaction, with a full knowledge of its impropriety and irregularity, they have no right to complain of any hardship in being compelled to make good the deficiency. Besides, in the first instance, they will only be put to the trouble of putting the bond in suit against the sureties; though, if the sureties are insolvent, the Bank must pay. The circumstance that the personal representative of Margaret Chase is not before the Court is immaterial. This is not a case in which the Court will compel us to take out administration; besides, when several trustees are involved in one common breach of trust, a cestui que trust, suffering from that breach, and not being party to it, may proceed against all or any

of the trustees; *Walker* v. *Symonds* (3 Swanst. 75; see 1 M. & K. 75). [The Lord Chief Baron. Is the Bank in this case a trustee? or is there any case which goes the length of deciding that a trustee, acting bonâ fide, shall be answerable for the acts of his co-trustee? No doubt, any one of several parties who are implicated in a joint breach of trust may be made answerable for the default of the others, though the others are not before the Court. Another rule is that where trust money is in the hands of a person who has notice of a claim upon it, if he parts with it he may be made liable for the breach of trust. But you cannot say that the Bank had notice that there was a party who had a claim upon this fund. If the Bank had been informed there was such a party, it might have been otherwise.] The Bank had not notice of the existence of the individual, but they had notice that the money was not payable while there was a child. Therefore they paid it out at their own peril, without ascertaining whether there was a child or not.

[214] Mr. Phillimore, for the Bank. The person who committed the breach of trust in this case was the executrix. She was the proper party to transfer the stock. The Bank was not bound to make any inquiries on the subject, and are not answerable for her acts. She or her representative ought to have been made a party to this suit; for the Bank had a right to resort to the executrix as well as to the sureties. Was there any appropriation of this stock? If there was, the plaintiff has no interest. If there was not, the Bank could not prevent the executrix from selling. The bond can make no difference. [The Lord Chief Baron. The plaintiff uses the bond as notice.] Admitting it to be so, the Bank is not bound to take cognizance of the trust. The case of *Franklin* v. *Bank of England* decides that unless there be an assent by the executor, the Bank cannot refuse the transfer; but it does not therefore follow that, if there be an assent, the Bank is bound to transfer to the legatee.

Mr. Girdlestone, for other parties.

Mr. Temple, in reply.

THE LORD CHIEF BARON. I am of opinion that upon neither of the grounds that have been urged is the Bank liable. I think, upon the grounds taken by Mr. Phillimore, no decree can be had against the Bank. The case where there are several trustees, and one is made answerable for the acts of the others, is not analogous to this. If the Bank are trustees, they are not joint trustees with other persons; although in some cases they have been called trustees, as having had notice of a trust. They are not, however, essentially trustees. If it were so, courts of law would be called upon to take notice of trustees. The word, as applied to them, is only used to express a sort of analogy; courts of equity calling a party a trustee under **[215]** circumstances arising out of his own conduct. In such a sense a party may be a trustee in many different ways; but that consideration does not arise here as applied to the Bank. Here the party who committed the wrong was the executrix, and I am inclined to say her representative ought to appear and be a party to the suit, on the ground that all the persons ought to be made parties who are primarily liable.

But, passing that by, let us meet the subject upon the main ground. Upon that, I am strongly of opinion that the Bank is not liable. The Bank does not profess to hold money in trust for any body. There is nothing in their act or charter constituting them trustees for that purpose. If the Bank voluntarily enters in its own books a trustee's account, it may, under certain circumstances, become liable for the obligation of those trusts. But the Bank is merely a public servant, and is generally under the obligation to transfer the fund to the person in whom it is vested. Therefore, unless the Bank choose to involve themselves in any transaction, there is nothing to implicate them. The only way in which they can be affected is, by giving them distinct notice of a liability to which the stock is made subject. That happens by a proceeding from this Court or the Court of Chancery, where you have a sort of lien placed upon the stock, so as to prevent the transfer of it. Now that might operate to the prejudice of the Bank, if they set themselves in opposition to such a proceeding, but still they would not be trustees on that account. Then here, the Bank having been informed that there was no trust, nevertheless thought proper to take a bond of indemnity; but how does that make them trustees? It is argued that in the present case the Bank took upon itself the trust, in not ascertaining that there were no children entitled to share the fund in question. But that argument carries one a very great length. If you say there may be a possibility of the existence of a **[216]** person entitled to the fund, and that the Bank is bound to ascertain the negative, it will follow that the

Bank is in no case justified in allowing the executor to transfer any thing. Unless it had notice of every thing being clear, which can only be by decree of the Court, it could not act. The consequence would be, that you could never transfer any thing till a suit was instituted in a court of equity to administer the estate, or it could be shewn that the executor had advertised for the several parties claiming to be entitled, to come in and prove their claims. Where is the difference between that case and this? Here the notice is, not that the stock is liable to a certain trust, but that the trust is at an end. Is the Bank then to be responsible if that notice turns out fallacious? If the Bank is liable at all, it is only, as in the case of any other depositary, from notice that the person in whose name it stands was not the real owner. Thus, in the case of a wharfinger, if he had notice that A. B. had obtained certain goods by fraud, and after such notice he shipped those goods, the owner might bring trover for them against the wharfinger; and it is a common question at Nisi Prius whether the wharfinger had not notice, and whether he was not therefore bound by the consequences. So in the case of a sale of shares in the London Dock, and notice given by the vendor or other party interested, not to transfer the shares, the Dock Company are answerable, if after that notice they make the transfer. This is the utmost length to which you could press the Bank. They had, in this case, no notice of a specific trust, but just the contrary—that there was no trust. I do not think the bond makes any difference. It amounts only to a notice that there was a trust, and that the trust is at an end. I think, therefore, on these grounds, that the bill must be dismissed as to the Bank.

Decree accordingly.

[217] CALVERT *v.* DAY. June 17th, 1836.—A plaintiff who gives a false description in the bill of his place of residence will be made to give security for costs, although, from the nature of his trade, he has no residence.

[Discussed, *Fraser* v. *Palmer*, 1838, 3 Y. & C. 279. Not applied, *Redondo* v. *Chaytor*, 1879, 4 Q. B. D. 457.]

This was a motion on the part of two of the defendants, that the plaintiffs, or one of them, might give security for costs; or that the bill might stand dismissed. The plaintiff, J. Calvert, had described himself in the bill as of Cross-street, Canal Basin, City-road, yeoman, whereas it appeared that he lived, when at home, at Gibraltar-street, Liverpool, but that being a hawker and pedlar he had no fixed place of abode. The defendants, who made this motion, and who resided at Kingston-upon-Hull, had obtained two orders for time to answer, namely, on the 7th of April and the 21st of May; but they did not receive information of the misdescription of the plaintiff till the latter end of May. On the 31st of that month inquiries were made at Cross-street, and it was satisfactorily ascertained that no person answering to the description of the plaintiff had been known to live there.

Mr. Dixon, in support of the motion, cited Fowler's Practice (2 Fowl. Pr. 311), *Sandys* v. *Long* (2 M. & K. 487), *Mason* v. *Polhill* (1 Cromp. & Mees. 620), *Meliorucchy* v. *Meliorucchy* (2 Ves. sen. 24), and *Oliva* v. *Johnson* (5 B. & A. 908). And he observed that the party being a hawker and pedlar was in itself a sufficient reason for ordering him to give security for costs.

Mr. Tamlyn, contrà, contended that the application came too late, and cited *Adams* v. *Brown* (9 Bing. 81) and *Anon.* (10 Ves. 287). It is not the practice to require security for costs for a false description, except under very strong circumstances. Here it was impossible to give a true de-**[218]**-scription, because it was impossible to state what was the residence of the party. Besides, the motion is irregular in form. An order cannot be made in the alternative; either that security may be given, or the bill dismissed.

THE LORD CHIEF BARON, after observing on the difference of practice in courts of equity and courts of law upon this point, said: It appears clearly that there is a misdescription of this plaintiff's residence, and the only reason given for it is that he had no residence. But if an attorney get a hawker and pedlar to be made plaintiff, he ought to give security for costs. The motion, however, cannot be strictly complied

with, for there is no reason to ask for the dismission of the bill. All I can do is to stay proceedings till security for costs be found.

Order accordingly.

CULVERHOUSE *v.* ALEXANDER. Nov. 10th, 1836.—The bill charged that the defendants had given no consideration for a certain bill of exchange, of which they were the holders, but that they were mere trustees of it for the plaintiffs; and so it would appear if the defendants would discover and set forth the circumstances under which, and the consideration for which, the bill was endorsed to them. The defendants answered the particular charges as to the circumstances, consideration, &c., but omitted to answer the general charge as to their being trustees: Held, that the answer was insufficient.

The bill alleged that, in April 1835, the plaintiffs, partners in trade, entered into a composition with their creditors at 2s. 6d. in the pound; and, thereupon, the creditors executed to them a deed of release. That N. A. Calisher, on the part of Calisher & Co., who were amongst the creditors, executed the deed; but that previously to such execution there was a private stipulation between him and the plaintiffs, that as a further consideration for the release, Calisher and Co. should have an additional sum of 25l. 10s., to be secured by the plaintiff's acceptance; that accordingly N. A. Calisher drew a bill of exchange for that amount on the plaintiffs, which they **[219]** accepted upon the express understanding that this security was only to be held as an acknowledgment, and not to be negotiated; that, contrary to this understanding, Calisher & Co. endorsed the bill to the defendants, who had brought their action against the plaintiffs for the amount.

The bill, which was for a discovery and an injunction to restrain the proceedings at law, charged that, under the circumstances, the acceptance of the plaintiffs was void, and a fraud upon the other creditors; that the defendants received the bill in question after it had become due and payable; that they paid no consideration for it, and that they were merely trustees for Calisher & Co. for the amount to be recovered upon it; and so it would appear if the defendants would discover and set forth the circumstances under which, and the consideration for which, the plaintiffs accepted the said bill, &c.

The defendants, by their answer, stated that in March 1835 they, at the request of N. A. Calisher, discounted a bill of exchange for 44l., purporting to be drawn by Calisher and Co. upon and accepted by the plaintiffs; that shortly before that bill became due, they delivered it up to Calisher in consideration of his paying to them 18l. 18s. in cash, and indorsing to them the bill in question. They denied all personal knowledge of the transaction alleged to have taken place between N. A. Calisher and the plaintiffs. They denied that the bill in question had been indorsed to them before it became due, for the purposes stated in the bill or any other purpose: on the contrary, they alleged that it was indorsed to them for the consideration and purpose before mentioned, and not otherwise. They admitted that, being bonâ fide holders of the bill, they had commenced, and intended to prosecute, their action upon it. They also denied that the bill was void under any circumstances: "because these defendants say that they being the bonâ fide holders of the said bill of **[220]** exchange, and having given full consideration for the same, without notice or reason to suspect or believe that the same was voidable or void, and the said bill being overdue and unpaid, are entitled to sue for and recover the amount thereof against the said plaintiffs."

The defendants having omitted to answer the charge as to their being trustees of the bill for the plaintiffs, an exception was taken to the answer in that respect.

Mr. Bagshawe, for the exception.

Mr. Bacon, contrà. The interrogatory as to the defendants being trustees, depends upon a mere inference of law. [The Lord Chief Baron. Do you state that you mean to recover on the bill and hold the proceeds for your own benefit? All you state may be true, and yet you may hold as trustees for other persons.] The bill charges them with being trustees, and that so it would appear from certain circumstances, which are expressively negatived. It is not necessary that they should deny totidem verbis that they are trustees. [The Lord Chief Baron. It would not be necessary, if you discovered facts which shewed the impossibility of their being trustees. The plaintiff files his bill of discovery and alleges you to be trustees, upon the ground of particular

circumstances, which he states. Those circumstances may not be true, but you may hold the bill as trustees under other circumstances. If you deny the particular circumstances, but do not deny the conclusion which the plaintiff draws from them, that is a negative pregnant. You ought to have answered not only as to the facts from which he draws his conclusion, but as to every thing from which such a conclusion might be drawn.] The inquiry of the plaintiff is confined to particular circumstances. He says, you are trustees under certain circumstances; tell me whether those circumstances are true? To this question there is an ex-**[221]**-press denial. In *Bally* v. *Kenrick* (13 Price, 291) it is laid down very emphatically by Richards, C. B., that the sufficiency of an answer is to be tried by its materiality alone. Here, all the material facts on which the plaintiff's equity is founded are denied. The defendants state expressly that they are bonâ fide holders of the bill, and never knew or suspected that the same was void or voidable.

Mr. Bagshawe, in reply, contended that the charge as to the defendants being trustees was distinct and general, and not to be restricted to the particular facts suggested as the foundation of the charge.

THE LORD CHIEF BARON. This is not a sufficient answer. It is contended that the charge as to the defendants being trustees for the plaintiffs rests merely on a certain statement of facts made by the plaintiffs. That is not so. There is a distinct charge that "the defendants are trustees for Calisher and Co. for the amount to be recovered on the said bill." The plaintiffs then go on and say, "And so it would appear" if certain facts were stated. The defendants deny these facts, but they do not say that the truth might not appear from other causes. They indeed say that, being bonâ fide holders of the bill, they brought their action upon it. It is very true they might be bonâ holders up to the time the action was brought; but they do not allege that being and remaining so up to this time, they brought their action. Their allegation is too uncertain to admit of an indictment for perjury and therefore too uncertain for an answer. Denying a particular statement of facts on which a conclusion is founded, without denying the conclusion generally, is a negative pregnant. I am sorry that the defendants fail in this instance, because I think they intended to answer fully and honestly. Let it be understood that in allowing this ex-**[222]**-ception, I found myself on the circumstance that there is a distinct and substantive allegation that the plaintiffs are trustees.

Exception allowed.

NYSSEN *v.* GRETTON. Nov. 18th, 22nd, 1836.—Testator devised a mixed fund of real and personal property to a trustee upon trust to pay the rents, issues, and profits to certain persons (amongst whom was his daughter M.), for their respective lives, and subject to those trusts he gave M. power to appoint by will the whole property. M. married, and by a will executed in pursuance of the power, devised the whole fund to a trustee, upon trust to permit her husband to receive and take the rents, issues, and profits for his life, subject as thereinafter mentioned; and in case she should leave any issue of the marriage, son or daughter, living at her decease, she charged the estate with 4000l. for the benefit of that son or daughter; and after the decease of her husband she devised the whole fund to such son or daughter absolutely; she then proceeded as follows:—"And in case there shall be no issue of my marriage living at my decease, then I give, devise, and bequeath to my said dear husband all and singular my said estates and effects, to hold to him, his heirs, executors, &c., subject nevertheless and chargeable with the payment of 100l. to each of his sisters, A., B., C., and D. Also, I give and bequeath to E. the sum of 200l., to be paid to her within twelve calendar months next after my decease:" Held that E.'s legacy was a charge upon the real estate over which M. exercised her power of appointment.—The circumstance that a mixed fund of real and personal estate is devised to the executor is not alone sufficient to make pecuniary legacies a charge upon the real estate.

[S. C. nomine *Nyssen* v. *Ernst*, 6 L. J. Ex. Eq. 22. See 4 Y. & C. Ex. 570.]

John Gammond, by his will, gave, devised, and bequeathed unto John Gibson, of Ross, in the county of Hereford, all his messuages, lands, tenements, and hereditaments, situate in the parish of Balcombe, or elsewhere in the county of Somerset; and

all his messuages, lands, tenements, hereditaments, and real estates, as well in the parish of Much Marde, in the county of Hereford, as elsewhere in the kingdom of Great Britain; and also all and singular his personal estate and effects, and all other his estate whatsoever and wheresoever, to hold to him the said John Gibson, his heirs, executors, and administrators, upon trust, to let and set his freehold estates, and to receive the rents, issues, and profits thereof; and also to make sale of all his personal estate, and with what monies he had in hand, to place the same upon Government or other security as he should think fit; and collect and call in all monies that might be due and owing to the testator at the time of his decease, and out of the same to pay to the testator's sister, Mary Brown, an annuity or clear yearly sum of 60l. for her life; and the testator thereby directed his said trustee to pay the rents and profits of his said estate as aforesaid unto his wife, Ann Gammond, and his natural daughter, Mary **[223]** Donne, otherwise Smith, in equal shares and proportions, for and during their natural lives; but if his said wife should thereafter intermarry, then he revoked the said bequest to her as aforesaid, and in lieu thereof gave and bequeathed to her one annuity of 50l. for her life; and from and immediately after the death or marriage of his said wife, the testator directed his said trustee to pay the whole of the rents and profits of his said estate and effects into the proper hands of his said daughter, Mary Donne, otherwise Smith. And in case his said sister, Mary Brown, and his said wife, should survive his said natural daughter, Mary Donne, otherwise Smith, without issue and unmarried, then the testator revoked the said annuity of 60l., so given to his said sister as aforesaid; and in lieu thereof directed his said trustee to pay the whole of the rents and profits of his said estate and effects unto his said sister and wife (as long as she continued his widow and unmarried), in equal shares and proportions. But, nevertheless, his will and meaning was, and he thereby empowered his said natural daughter, Mary Donne, otherwise Smith, to give, devise, and dispose of all and singular his freehold estates and effects and premises to such person and persons, and for such estate and estates, uses, ends, intents, and purposes as his said daughter should by her last will and testament give and devise the same, or any instrument or writing purporting to be her last will and testament to be by her made, whether sole or covert, and executed in the presence of three or more credible witnesses.

Mary Donne, otherwise Smith, survived the testator and Ann Gammond, and married the Rev. G. H. L. Gretton. By her will, after reciting so much of the will of John Gammond as is above stated, she devised as follows:—"Therefore I give, devise, and bequeath unto George Gretton, Dean of the Cathedral Church of Hereford, all and singular the said messuages, lands, tenements, heredit-**[224]**-aments, and all other my real estate whatsoever and wheresoever in the kingdom of Great Britain; and all and singular my personal estate and effects, and all other my estate whatsoever and wheresoever, upon trust, to permit and suffer my said dear husband, G. H. L. Gretton, to receive and take the rents, issues, and profits of my said estates as aforesaid, to and for his own use and benefit, for and during the term of his natural life, (subject nevertheless as is hereinafter mentioned), and upon this further trust, that in case there shall be any issue of my marriage with the said G. H. L. Gretton, being a son or daughter, living at the time of my decease, I will and direct that my said trustee, his heirs, executors, administrators, or assigns, do and shall, upon such son or daughter attaining his or her age of twenty-one years, or being a daughter, upon her attaining such age or day of marriage, which shall first happen, by and out of the rents, issues, and profits of my said estates as aforesaid, or by demise, sale, mortgage, or other disposition thereof, levy and raise the sum of four thousand pounds of lawful money of Great Britain, and pay the same unto such son or daughter, to and for his and their own absolute use and benefit. And I will and direct that the entire care and management of the education and advancement in the world of such son or daughter be left to my said dear husband; and from and immediately after the decease of my said husband, I give and devise and bequeath my said estates and effects as aforesaid unto such son or daughter, his or her heirs, executors, administrators, and assigns for ever; and in case there shall be no issue of my marriage with the said G. H. L. Gretton living at the time of my decease, then I give, devise, and bequeath unto my said dear husband all and singular my said estates and effects as aforesaid, To hold to him, his heirs, executors, administrators, and assigns for ever; subject nevertheless and chargeable with the payment of the sum of one hundred pounds to

each of his sisters (that is to say), Mary, Elizabeth, **[225]** Catherine, Susan, Georgiana, and Emma, which I do hereby give and bequeath to them accordingly. Also, I give and bequeath unto my godson, John Donne Collins, and Eliza Anne Gibson, eldest daughter of the said John Gibson, the sum of two hundred pounds each, to be paid to them within twelve calendar months next after my decease." The testatrix then provided for the reimbursement of the trustee's costs and expenses, and concluded her will by appointing George Gretton her sole executor.

Mary Gretton died in May, 1814, without issue, leaving her husband and the several other parties interested under her will (except John Donne Collins) surviving her. Eliza Anne Gibson married Henry Nyssen. Upon Mary Gretton's decease, George Gretton proved her will, and G. H. L. Gretton entered into the possession of the real estates thereby devised to him. In the year 1830 he sold and conveyed those estates to the defendants, Ernst and Clifford. Both George Gretton and G. H. L. Gretton died before the filing of the present bill.

The bill was filed by Henry Nyssen and his wife, against the surviving and only acting executor under the will of George Gretton, and against the purchasers of the real estates; praying that the legacy of 200l. bequeathed by the testatrix to Mrs. Nyssen might be paid out of the personal estate of the testatrix possessed by George Gretton; and in case the personal estate was insufficient for that purpose, that the deficiency might be supplied out of the rents and profits, or if necessary, by a sale of a competent part of the real estates over which the testatrix had a power of disposition.

To this bill the defendant Ernst, who was one of the purchasers of the real estates, demurred generally for want of equity.

Mr. Boteler and Mr. Hall, for the demurrer. The legacy given to the plaintiff, Mrs. Nyssen, is a substantive **[226]** independent gift, unconnected with any of the preceding clauses. There is, therefore, no necessary implication, and certainly there are no express words, shewing that the testatrix meant to charge this legacy on the real estate: *Davis* v. *Gardiner* (2 P. W. 187), *Kightley* v. *Kightley* (2 Ves. J. 332). In all the cases in which it has been held, that a legacy is charged upon the realty, the Court has proceeded upon particular expressions in the will, ultra the mere gift of the real and personal estate. Thus, in *Tomkins* v. *Tomkins* (Pre. Ch. 397), the testator bequeathed certain legacies, and "after my debts and legacies paid," devised his real estates to his son; and upon this it was held that the legacies were charged on the real estates. *Alcock* v. *Sparhawk* (2 Vern. 228) and *Hassel* v. *Hassel* (2 Dick. 527) are cases of the same description. In *Aubrey* v. *Middleton* (4 Vin. Abr. 460) the testator, after bequeathing legacies, devised "all the rest and residue" of his goods, chattels, and estate to his nephew; and that was held sufficient to charge the realty with the legacies. So, in *Bench* v. *Biles* (4 Madd. 187) and *Cole* v. *Turner* (4 Russ. 376), the ultimate devise being of the rest and residue of the real and personal estate, the legacies previously given were held to be charged on the realty. In the latter case the Master of the Rolls took the distinction that it was not a devise of the estates themselves, but of the residue of those estates after a prior purpose satisfied; that is to say, after payment of legacies. In *Kightley* v. *Kightley*, even the words "rest and residue, &c." had not the same effect as they have had in other cases; and the real estate was held to be exempt from the charge of legacies, notwithstanding the strong words at the beginning of the will. [The Lord Chief Baron. But in that case there was some-**[227]**-thing to which the words "rest and residue" might be referred; namely, the real and personal estate previously devised.] At all events, in order to make the legacies a charge on the real estate, it is not enough that both the real and personal estate should come to the same person: *Parker* v. *Fearnley* (2 Sim. & St. 192). Where there are no express words to fix that person with the payment of debts and legacies, he must either be devisee of the rest and residue of the real estate, or there must be some direction to him to see the debts and legacies paid. Here, there is nothing to shew that the plaintiff's legacy was more than a common pecuniary legacy. It was payable absolutely within a year of the decease of the testatrix. Of the bequests which are expressly charged on the real estate, those to the children might not be payable for twenty years after the death of the testatrix; and those to the sisters depended altogether upon a contingency, and might not be payable at all, so that the legacy in question, therefore, differs entirely from the others, in the mode and circumstances in which it is given. [The Lord Chief Baron. The words, "subject as hereinafter mentioned," are important.] Those words refer, in the first instance,

to the bequest to the children; and in the second, to the bequest to the sisters. The legacy to the plaintiff is to be considered apart from those words; as if it had been contained in a codicil. [The Lord Chief Baron. The whole property is, in the first place, devised to George Gretton; and the question is, whether all the subsequent gifts are not carved out of that.]

Mr. Girdlestone, for the bill. The first question is what the testatrix proposed to do—and the next, what she has actually done. She states upon her will what she proposed to do. She recites her father's will, under which **[228]** she has a power of appointment over a blended fund of real and personal estate, and she proposes to exercise that power in favour of the several legatees named. After setting out the power at full length, she says, "Therefore I give, devise," &c., all the property, real and personal, comprised in the power, to George Gretton, upon certain trusts. The first trust is to permit her husband to receive the rents and profits of the real estates for his life, "subject as hereinafter mentioned:" then follows a trust to raise 4000*l.* for a son or daughter, should there be any, out of the rents and profits, or by sale or mortgage of those estates; and, upon the death of her husband, she devises the estates to such son or daughter in fee. It is insisted that the words "subject as hereinafter mentioned," must be confined to this direction to raise the 4000*l.*, and do not apply to any thing afterwards. That cannot be so; because, as between the husband and the party entitled to the reversion, the 4000*l.* would be a charge upon the corpus of the estate, and not merely upon the husband's life interest. The testatrix then proceeds to dispose of her property, in the event of there being no children. In that event she makes a clear and absolute disposition of the whole blended property to her husband, and what comes afterwards must be considered as carved out of that interest. She gives the whole property to him, subject to the charges in favour of the sisters; subject "also" to the legacies to Collins and the plaintiff Mrs. Nyssen. The word "also" has the effect of excepting those legacies from the operation of the previous devise to the husband. [The Lord Chief Baron. That argument would fail, if the devise to the husband did not take effect.] In that case the legatees would take under the previous words, "subject as hereinafter mentioned." But even supposing the legacies to Collins and Mrs. Nyssen to be substantive bequests, entirely independent of the devise to the husband, they are given after a previous **[229]** disposition of a blended fund of realty and personalty, and that shews that they were intended to be charged on the realty. Notwithstanding the opinion of the Court in *Kightley* v. *Kightley*, there is no difference between debts and legacies in an implied charge upon real estate by will: *Williams* v. *Chitty* (3 Ves. 551). The case of *Parker* v. *Fearnley* has been cited to shew that the blending of the fund is immaterial; but there the testatrix expressly directed that the legacies should be paid "by her executor thereinafter named," which was no more than a direction to pay them in the usual manner. In *Kidney* v. *Cousmaker* (1 Ves. jun. 444), it is expressly laid down by Lord Thurlow, that where a testator combines real with personal property, all the burthens of the personal property are put upon the real property so combined with it. If you find the two kinds of property combined, you must conclude that the testator combined them for one purpose. The case of *Bench* v. *Biles* settles the question. There, the testator gave all his real and personal estate to his wife for life; and after her death bequeathed various legacies, and gave all the rest, residue, and remainder of his real and personal estate to his two nephews, share and share alike, their heirs, executors, administrators, and assigns. There was nothing stronger in favour of the charge in that case than there is here. There was a distinct and independent bequest of pecuniary legacies. It is true that the devise was of the rest and residue; but that was equivalent to a devise of the whole blended fund, taking out enough to satisfy the pecuniary bequest; and the judgment of the Court proceeded upon that view of the question. In that case the testator gave a part of the fund, and then gave the residue: here, she gives the whole, and then gives a part out of it. There is no substantial difference between the two cases.

[230] Mr. Boteler, in reply. In *Kidney* v. *Cousmaker*, a sale of the real estate was directed, and the words of the Court must be taken with reference to the case where real estate is to be converted into money. It is a mistake to call this a mixed fund. The testatrix had, under the will of her father, power to dispose of real and personal estate. She might have passed each separately, and had not a mere power to dispose of it as a mixed fund. The devise of real estate is a specific devise, though of the

whole. This is a devise of real estate quoad the real estate, and of the personal estate quoad the personal estate. There is no forming of a single fund for a particular purpose, but a gift of all she had to give. The cases which have been cited went upon the intention of the testator to give the devisee of the residue only that which was left after payment of legacies. That intention was apparent in the cases of *Bench* v. *Biles* and *Cole* v. *Turner;* and accordingly the real estate was held chargeable. In the former of these cases the Court certainly speaks of a blended fund, but that is an inaccurate expression. [The Lord Chief Baron. I wish to see the principle contended for on the other side put in relief, and not mixed up with other circumstances. Suppose a person devises all his real and personal estate to his executor, and then gives legacies to A., B., and C.; would the executor be trustee of the real estate for the legatees?] According to *Parker* v. *Fearnley*, he would not. There must be express words, beyond the mere gift of both properties to one individual, to make the real estate chargeable with legacies. Then the question is whether such express words exist in the present will. The whole property, real and personal, is given to a trustee, his heirs, &c., upon trust for the husband for life, "subject as hereinafter mentioned." Now, if those words had been meant to extend to every thing coming afterwards, they would have been fixed to the estate of the trustees, and not to that of the husband. But they clearly **[231]** have reference only to the life estate of the husband; and this appears more plainly, when it is seen that afterwards, in devising the property to the children upon the death of the husband, the testatrix drops the word "subject" altogether, and devises it to them absolutely. Then, again, in the event of having no son or daughter, she charges the husband's estate for the benefit of his sisters. That was natural enough; for there might be sufficient for that purpose in one case and not in the other; yet that might be a reason for her not charging this particular legacy upon it.

Nov. 22nd.—The Lord Chief Baron. Upon looking at the will and the several cases cited, it appears to me that there is sufficient in this will to justify me in declaring that the legacy in question was a charge on the real estate. It has always appeared to me very idle to look at cases upon the construction of wills, for the purpose of finding a precise precedent for that which is under discussion. All that can be done is to find what general principle of law is applicable, and then it must be determined, from the particular circumstances of each case, how far that principle is to be illustrated. I have looked at the several cases, and I find only two rules which govern them which are not rules of construction, but of law. One is (what is familiar to every one) that, primâ facie, all legacies are paid out of the personal estate; the other is that if it appears to be the intention of the testator, as collected from his will, that the legacies should be charged on real estate, then they should be charged on the real estate. Whether the testator so intended depends on particular expressions of doubtful character appearing in the will, and the Judge determines the point according to the language of the will; not according to any rule of law, but as he would construe the intention of a party from any other document laid before him.

It has been said, and truly, that where a testator gives his real and personal estate to one individual, subject to **[232]** legacies, that makes the real as well as the personal estate a fund for the payment of those legacies. Again, where a person bequeaths legacies, and afterwards devises the rest and residue of his real estate, after payment of his debts and legacies, that is a ground upon which it is reasonable to suppose that he intended to bequeath his real estate subject to the payment of legacies. A variety of examples might be put, in which the precise expressions of the testator might affect the construction of the will in this respect. If a man left legacies generally, and then left his real and personal property to an individual, it would not from thence be inferred that he meant to charge them on his real estate; but if he left legacies, and devised his real and personal property to his executor, and directed his executor to see the legacies paid, you would infer from that direction given to the person to whom he left all the real estate, that he meant to charge them on the real estate.

I can find no case precisely like the present. It was contended for the plaintiff that wherever the testator leaves the whole real and personal estate embodied in one bequest to one individual, that is a principle to determine that the legacies left afterwards are to come out of the real estate. I own I can find no such principle in any of the authorities. The case of *Bench* v. *Biles*, not only involved the circumstance of the whole of the real and personal estate being devised to one party, but it contained

a direction that that whole should be paid to him after payment of legacies. In the present case the ground of my decision is taken from the whole will. In the first place, this is not properly a will, but an instrument in execution of a power. It is executed by a married woman, and she recites a power given to her under the will of her father. All his estates, real and personal, had been vested in a trustee for the purpose of paying his wife an annuity, and other objects: and then it contains a power to her to appoint the whole to whom she pleases. The whole had been blended in one fund by the settlement of her ancestor, **[233]** and what she does is to execute the power. She in fact leaves the whole to her husband for life; and in case she leaves any child, son or daughter, she means them to have it absolutely after her husband's death. In case she has no son or daughter, she gives the whole to her husband—that is the effect of it—"subject as hereinafter mentioned." Subject to what? All that comes afterwards must be taken out of the fund so left to the husband. Then, in case she has a child, son or daughter, she directs 4000l. to be raised out of the estate for that son or daughter. If she has no son or daughter, she directs that her husband, having the whole estate absolutely, shall pay 100l. to each of his sisters, and then she gives the legacies in question to the two persons named, who say that the words "subject as hereinafter mentioned," extend to the whole property. I see no reason why they should not extend to the whole. It was ingeniously argued by Mr. Boteler, that those words ought not to be considered as applying to the whole, because, in the devise to the sisters, the testatrix uses the word "subject" again. But it appears to me that the case stands thus: She gives the whole estate to her husband in case she should leave no children living at her death, they being the first objects of her bounty; but in that contingency, she gives it to her husband subject to a charge in favour of his sisters. Now the legacies to the sisters are conditional, and depend on his having an estate in fee. If he had not the fee, they would get nothing. Therefore, when she came to dispose of the fee to her husband in the event of there being no children, she thought it necessary, for the purpose of the charge in favour of the sisters, to introduce the word "subject" again. But if, after charging the real estate, first with the 4000l., and afterwards, in another event, with the several sums of 100l., she intended that the plaintiff's legacy should not be chargeable upon it, why did she not use language to that effect? In point of construction, the second word "subject" comes before the legacy to the sis-**[234]**-ters, and after the bequest of the real and personal estate; and, therefore, I see no reason why I should not limit its operation to that legacy. The testatrix doubted whether the estate in fee of the husband would be subject to his sisters' legacies if she omitted to use words for that purpose; therefore, in the second instance, she uses the word subject as applicable to that bequest alone. But the legacy to Mrs. Nyssen is absolute and unconditional, and must be paid, whether the husband has a life estate, or an estate in fee. Upon these grounds, not thinking that this case is precisely like any other upon the same point, it appears to me that I must overrule the demurrer.

Demurrer overruled.

DAVIES *v.* THOMAS. June 28th, Dec. 12th, 1836.—An estate was devised to trustees, upon trust by sale or mortgage, to discharge a specific debt, and to apply the residue for the benefit of the testator's children. A. purchased the estate of the surviving trustee (who was A.'s father), but left the purchase money (except what was required to satisfy the debt) unpaid, giving his bond as a collateral security for the payment of it. Between the time of the contract and the actual conveyance of the premises, A. entered into marriage articles, whereby he covenanted to settle the premises upon his intended wife and her issue. After A.'s marriage and the execution of the conveyance, a settlement was made in pursuance of the articles. The settlement recited the conveyance, and the conveyance referred to the will: Held, that the settlement conveyed notice of the will, and that such notice was binding on the wife and children of A., although the articles were silent as to the will; consequently, that the testator's children were entitled, as against the children of A., to a lien on the estate, to the amount of the purchase money left unpaid.—A party claiming to be a purchaser for a valuable consideration without notice, under a marriage contract, must shew that he had no notice

at the time of the settlement; proof that he had no notice at the time of the articles is not sufficient.

[S. C. 7 L. J. Ex. Eq. 21. See 4 Y. & C. Ex. 570.]

John Davies, by his will reciting that he had purchased the hereditaments and premises after described, and that to enable him to complete such purchase, he had borrowed from his brother, the defendant, David Davies, the sum of 911l., gave and devised all his messuages, lands, and hereditaments, situate in the parish of Eglwysfach, in the county of Denbigh, to Abel Lloyd and Robert Kyffin, since deceased, to mortgage or sell, and pay the said sum of 911l. and interest thereon, and divide the produce of such sale, and also his personal estate, between his, the testator's, wife and children, provided that if his wife should marry before all his **[235]** children should attain twenty-one (which she did), she should derive no benefit under his will. The will contained a clause that the trustees' receipts should be a sufficient discharge to the purchaser for the purchase money to be paid for the premises, and that the purchaser should not be bound to see to the application thereof. The testator appointed his wife and David Davies executors of his will.

The testator died in January, 1819, leaving several children. David Davies proved the will. In 1814 Abel Lloyd and Robert Kyffin contracted to sell the estate to John Lloyd, the son of Abel Lloyd, for the sum of 2242l. 14s. 6d., and he was let into possession.

By articles dated the 11th August, 1815, which was after the above-mentioned contract for purchase by John Lloyd, but before the premises were actually conveyed to him, Abel Lloyd and John Lloyd, in contemplation of a marriage which was shortly afterwards had between John Lloyd and Elizabeth Jones, an infant, covenanted that they would, within a year after the celebration of the marriage, convey the premises to the use of John Lloyd for his life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of trustees for the term of 500 years, for raising 1000l. for portioning the younger children of the marriage, with remainder to the use of the first and other sons of the marriage in tail, with remainder to the use of the daughters of the marriage in tail.

By indentures of lease and release, dated the 1st and 2nd May, 1817, to which David Davies, the executor, and Robert Davies, the eldest son of the testator, were parties, the premises were conveyed by Abel Lloyd to John Lloyd in fee. The consideration for that conveyance was expressed to be the sum of 2242l. 14s. 6d.; but the only part of the purchase-money actually paid or settled in account was the sum of 1349l. 3s. 1d., which sum con-**[236]**-sisted of the debt of 991l. due to David Davies, and the accumulations of interest thereon. The remainder of the purchase-money, amounting to 895l. 11s. 5d., was never paid by John Lloyd; but, as a collateral security for that sum, he executed a bond to that amount to Abel Lloyd, who was then the surviving trustee. In that bond, which bore date the 2nd May, 1817, David Davies joined as a surety.

By indentures of lease and release and settlement, dated the 11th and 12th August, 1820, and executed after the marriage of John Lloyd, the premises in question were conveyed to trustees to uses, in pursuance of the articles. David Davies and Robert Davies were parties to that settlement.

In 1822 the younger children of the testator, John Davies, instituted a suit in this court, praying an account of the testator's personal estate, and of the rents, profits, and produce of his real estate, and that their respective shares in the residue might be paid or secured to them. In that suit Abel Lloyd, David Davies, and Robert Davies, were defendants; and in February, 1826, it was, amongst other things, ordered and decreed that the defendant, Abel Lloyd, should forthwith proceed to recover and get in the principal and interest due from John Lloyd, and the defendant, David Davies, upon the bond of the 2nd of May, 1817, and in case the defendant, Abel Lloyd, should not within three months from the date of that decree proceed to recover and get in the same, then it was ordered that the plaintiffs should be at liberty to use the name of the defendant, Abel Lloyd, and to institute such proceedings in his name as they should be advised for the recovery thereof.

In September, 1826, John Lloyd died intestate, leaving his widow (formerly Elizabeth Jones) and two children of their marriage surviving him. Upon this, the action directed by the decree to be brought against John Lloyd, **[237]** was brought

against his widow as his administratrix; but for default of assets of the intestate, nothing was recovered in the action. An action, as directed by the decree, was also brought against David Davies, but he took the benefit of the Insolvent Debtors' Act, and nothing was recoverable from his estate.

In May, 1828, Abel Lloyd died insolvent.

The present bill, which was one of revivor and supplement, was filed for the purpose of establishing a lien claimed by the children of John Davies, upon his estate, to the amount of 895l. 11s. 5d., the residue of the purchase-money due from John Lloyd. The plaintiffs were such of the children of John Davies as were infants at the time of decree in the original suit. The defendants, in addition to those in the original bill, or their representatives, were the other children of John Davies, the infant children of John Lloyd, and the trustees under John Lloyd's marriage settlement.

The bill charged that, when the marriage articles were entered into, John Lloyd had notice that his father, Abel Lloyd, had no title to the premises, other than as one of the trustees for sale under the will of the testator John Davies, and that he had no power to contract to settle the same; and that John Lloyd had also notice that the children of the testator were entitled to the surplus produce of the sale of the premises.

In support of this charge it appeared that in the deed of release of the 2nd May, 1817, Abel Lloyd was described as "surviving devisee in trust for sale under the will of the said John Davies;" and that this deed of release was recited in the subsequent indenture of settlement of the 12th August, 1820. It likewise appeared that Messrs. John and Edward Oldfield, with full notice of the trusts of the will of John Davies, acted as the solicitors of Abel Lloyd and John Lloyd in relation to this purchase, that they prepared the deeds of conveyance, and likewise pre-**[238]**-pared and were attesting witnesses to the bond; and that one of them, John Oldfield, was a trustee under the settlement. Mr. Edward Oldfield in his examination stated that although a receipt for the whole purchase money was endorsed on the deed of the 2nd May, 1817, he could not say that any portion of the same was, at the time of the execution of that deed, or at any other time, actually paid by John Lloyd to Abel Lloyd; and he believed that the sum of 895l. 11s. 5d., for which John Lloyd's bond was given, was part of the money purporting by such endorsement to have been paid by John Lloyd.

Mr. Simpkinson, and Mr. Koe for the bill. Abel Lloyd had no interest in the premises, except as a devisee in trust, under the will of the testator. He had no right to enter into such an agreement as he entered into with his son. The purchase money under that agreement has not been all paid; and the question is whether the lien which once existed on the estate for the deficiency can be said to have been discharged. In that respect the articles of settlement can have but little effect; for even if the parties were purchasers for a valuable consideration without notice, mere articles would not entitle them to insist upon such a plea; there must be an actual conveyance. It is no answer to such a claim as this to say that at the time of the contract there was no notice; the party must shew that he had no notice at the time of the conveyance.

John Lloyd must have had notice not only of the trusts of the will, but also that the purchase money was not paid; and all parties claiming under him must be held to have had constructive notice of the trusts of the will. The purchase deed of May, 1817, refers to the will. That deed is virtually incorporated in the settlement by means of a recital; and consequently it conveys notice of the will. The parties, therefore, who derive title under the settlement, must have had notice of the trusts for the testator's children; **[239]** and it was incumbent upon them to see that the purchase money for the trust estate had been bonâ fide paid to the proper person. Besides, they had notice through the medium of their solicitors, not merely of the trusts of the will, but that the money secured by bond as a collateral security for part of the purchase money had not been paid. It is clear, therefore, that they cannot insist on the want of notice, and that the lien remains. The vendor remains owner till all the purchase money is paid. The purchaser giving a bond for payment of the purchase money does not discharge the estate. Abel Lloyd might at any time have resorted to the estate. He stood in the mere situation of a trustee, selling it for other persons. His cestui que trusts may work out their equities through him, to have the purchase money raised out of the estate. The persons claiming

under John Lloyd have no better title than he had, and he had no title to an estate other than an estate charged with the purchase money.

Mr. Ombler, for the defendants in the same interest with the plaintiff.

Mr. Duckworth, for other defendants.

Mr. Temple and Mr. Tennant, for the trustees and infant children of John Lloyd. The infant children of John Lloyd are purchasers for a valuable consideration, without notice of the trusts of the will. The original decree must have decided this point. It must have been founded on the hypothesis that there was no lien; otherwise it would have declared the estate liable to make up the deficiency by sale or mortgage. The plaintiffs ask the same benefit by their original bill as they do now; and they cannot raise the question by supplemental bill. This is in fact the same case as was heard before the Chief Baron in 1826; and **[240]** without a rehearing, the Court cannot depart from the equity which was then administered.

But supposing there were no decree, the question would be whether, under the circumstances disclosed, the children of the marriage of John Lloyd can be deprived of the benefit of their mother's marriage contract, when she became the wife of their father. There is no authority for saying that the children are bound by the notice to John Lloyd. In order to bind them, it must be shewn that the mother or her guardian had notice. What could the notice amount to? That part of the purchase money was not paid, but a security taken. Why could not those parties take a security? The testator directed the estate to be converted into money. It was therefore the duty of the trustee to pay the purchase money to the executor, to be placed upon such security as he might approve. The executor had a right to invest the money on bond or mortgage if he pleased; taking upon himself the responsibility of that security. Here, the executor approved the security which was offered, and was, as well as Abel Lloyd, a party to the deed of conveyance. Robert Davies, the testator's eldest son, was also of age, and accepted the security.

It appears from the will that the purchaser was not to be bound to see to the application of the purchase money, but that the receipt of the trustee was to be a sufficient discharge to the purchaser. The marriage consideration made this a purchase. [Alderson, B. The purchaser was not bound to see to the application of the purchase money, but here there was no receipt of the money.] The receipt indorsed on the conveyance would be evidence of the payment of the money in favour of all persons except John Lloyd. Those who contract with John Lloyd are not to be affected by his misrepresentations. He represents that he is the owner of the property. He covenants that he will, within one year, grant the pre-**[241]**-mises to secure a jointure for his wife and a provision for his children. Being owner only of an equitable interest in the property, he gets an absolute conveyance, and when afterwards called upon to complete his marriage contract, he does so by a settlement reciting the deed of 1817, which purports to be the absolute conveyance. Amongst the parties actually joining in the deed of settlement are the trustee, executor, and the heir-at-law of the testator, who are also parties to the deed of 1817. [Alderson, B. When John Lloyd, in 1814, contracted to settle the property, he had not paid the purchase money. Afterwards he is called upon to settle such estate as he had when he contracted.] Our only notice is that he claims to be owner of the estate. When called upon, he shews what satisfies a conveyancer that he is so, namely, the receipt for the purchase money, and that all the proper parties have joined in the instruments of conveyance. There was no fraud in the wife, and she and her children ought not to suffer for the acts of Abel Lloyd, against whom they have no remedy. They do not call on the Court to aid them in enforcing their own rights, but to defend them against parties seeking to deprive them of their rights. Those parties could not stand an instant in a court of law; why, then, should a court of equity interfere in their favour? The trustees for the widow and children having obtained the legal estate in 1820, it is immaterial what notice they had before that time. Besides, notice of the trusts of the will is not notice that the purchase money has not been paid.

Mr. Simpkinson, in reply. It is said that the point in issue has been already adjudicated, and that no supplemental bill will lie. That is not so; because neither John Lloyd, nor the trustees, nor the parties claiming under John Lloyd, were ever before the Court. The bill could not, therefore, by possibility raise the question of lien. Then, has the question of lien been displaced? They admit, **[242]** that if

John Lloyd had been a purchaser on his own behalf, and they claimed under him as volunteers, they could not be in a better situation than he; but then they say that his children are purchasers for a valuable consideration, and that the marriage consideration is the highest; that, therefore, they are not to be affected unless it can be shewn that the mother, or some one who had the charge of her interests when the settlement was made, had notice. That argument would be good, either if the will was out of the question, or they had no notice of the will, and supposing that under the terms of the will a derivative purchaser was not bound to see to the original purchase money being paid. But the mere contract antecedent to the settlement will be nothing in favour of the children, unless it can be shewn that at the time of the actual execution of the settlement the parties had no notice. When a purchase for a valuable consideration is pleaded, it is not enough to say that there was no notice at the time of the payment of the money: it must be averred that there was none at the time of the execution of the conveyance. Now, whether the wife had notice or not at the time of the execution of the articles, it is clear that at the time of the settlement all the parties had notice. No one can read the conveyance and settlement without coming to that conclusion.

The clause in the will relieving the purchaser from the necessity of seeing to the application of the purchase money only applies to money actually paid. Both the original and the derivative purchaser are bound to see to the payment of the purchase money. Here, a large portion of the purchase money was left outstanding upon a collateral security; and it is clear that the purchaser was bound to see that it was paid to the parties entitled to it.

Dec. 12th.—ALDERSON, B. The only question in this case is whether the plaintiffs are entitled to claim a lien on the estate of the late John Davies to the amount of 895l. 11s. 5d.

[243] The estate belonged originally to John Davies, by whose will it was devised to Abel Lloyd and Robert Kyffin, in trust to raise by mortgage or sale the amount due to David Davies; and, if sold, to divide the residue, after David Davies's debt was paid, between the testator's children. Under this power the estate was bargained to be sold by Abel Lloyd and Robert Kyffin to Hugh Hughes, as agent for John Lloyd, for the sum of 2242l. 14s. 6d.; and afterwards, in 1817, by a deed of release, which recited the will of John Davies, the amount of the debt with interest then due to David Davies, and all the other material facts, the estate in question was conveyed by Abel Lloyd, therein described as the surviving devisee for sale under the will of John Davies, to John Lloyd and his trustees.

In point of fact, the whole purchase money was not paid, but only the debt due to David Davies, and a portion of the residue, the whole of which was devisable amongst the children of John Davies under his will. The remainder, being the sum of 895l. 11s. 5d., was secured by the joint bond of John Lloyd and David Davies. Now for this amount there was clearly at that time a lien on the estate sold.

John Lloyd, as a party to this transaction, had, of course, full knowledge of the will of John Davies, and of this breach of trust, in leaving a part of the purchase-money thus unpaid; and if the defendants are volunteers claiming under him, they will be in the same situation in which he would have been. As to him, it is not doubted that the plaintiffs would be entitled to the lien on the estate now claimed by them.

But the case of the defendants is twofold. First, they say that this question has already been decided by this Court. I think, however, that this was not so; neither John Lloyd nor his descendants were then parties to the suit, and this point could not properly have come before the Court: this, therefore, is not a good defence. But **[244]** then, secondly, it was urged that the children of John Lloyd are purchasers for valuable consideration and without notice, and therefore are entitled to the judgment of the Court. This marriage, it may be admitted, was a valuable consideration; and if the marriage took place, and the settlement was made without notice of the will of John Davies, and of the money not having been paid, the case would be different. I delayed my judgment on this point till I could examine the deeds.

The articles, previous to the marriage, are dated in 1815, and by them there is an engagement to convey these estates to certain uses thereinafter stated. No notice is there taken of John Davies's will. At that time there had been no conveyance,

nor any money paid for the estate in question, nor the bond given for the residue: this took place subsequently in 1817.

The settlement itself was executed in 1820 and after the marriage. It is true that this, being in pursuance of previous articles, could not be voluntary. But here, in the settlement itself, there was, I think, sufficient notice; for the will of John Davies is distinctly referred to in it, and that ought to have led the parties to make the requisite inquiries; and if that had been done, they would have found that there was a lien on the estate for the residue of the purchase money. This, therefore, is equivalent to notice; and this second defence also fails. The decree must therefore contain a declaration as claimed by the plaintiff of the existence of the lien.

This was the only point in dispute argued before me.

Decree accordingly.

[245] CLARKE *v.* CLARKE. June 29th, July 7th, 1836.—The reasonableness of setting out every tenth turnip, instead of every tenth heap of turnips, for the parson, must depend upon whether, by that mode of tithing, the parson has an opportunity of seeing that the tithe is fairly set out.

This was a bill by a rector against the occupier of a farm, praying an account and satisfaction of tithes of various tithable matters, amongst which were turnips. The plaintiff had been in the habit of compounding for his tithes. In 1833 the defendant, being dissatisfied with the amount of the composition, applied for a reduction, but his request was refused. Disputes afterwards took place between the parties, and the defendant was called upon to set out his tithes. Instead, however, of setting out the turnips in heaps, he threw out every tenth turnip. The rector's tithingman refused to take the tithe in this form.

Mr. Simpkinson and Mr. Monro, for the plaintiff, contended that this mode of setting out the tithe of turnips was not allowable; observing that the law upon that point was settled by the case of *Beaumont* v. *Shilcot* (3 Gwill. 944; 2 E. & Y. 226).

Mr. Boteler and Mr. Walker, for the defendant. In *Beaumont* v. *Shepherd* the bill was dismissed: the decision, therefore, in that case is in favour of the defendant. Another case, however, that of *Blamey* v. *Whitaker* (3 Dougl. 183; 10 East, 12, cited), seems conclusive as to the defendant's right to set out the tithe turnips in heaps. The observations of Lord Mansfield and Mr. Justice Buller in that case are very strong. No fraud is imputed to the defendant. The plaintiff's own tithe-gatherer does not venture to say that the tithe was not fairly set out: all he says is that one or two turnips were damaged. The only question is whether the defendant bonâ fide drew the turnips for the feeding of his cattle. If he did, he has a right to set out the tithe in **[246]** this manner. [Alderson, B. I agree to the principle laid down in the case in Douglas, that the farmer is not bound to expend more labour upon the parson's turnips than on his own. On the other hand, the tithe-owner has a right to have an opportunity of seeing that the tithe is fairly set out. Now, if this mode of tithing be adopted, is the parson capable of seeing whether the tenth turnip is of a medium size? A custom in the parish, in regard to this, would of course bind the parties; but otherwise this mode seems to me to be open to fraud.] At all events, this manner of tithing is recognised in the cases cited.

Mr. Simpkinson, in reply.

ALDERSON, B. It appears to me that the question whether, in the absence of any customary mode of tithing, and under all the circumstances of this case, this was a reasonable mode of setting out the tithe, must depend upon the fact as to the parson having had an opportunity of seeing it set out fairly. Every such case must depend upon its own circumstances. If the quantity of turnips drawn be large, this may not be a reasonable way of setting out the tithe; if the quantity drawn be small, it may be the most reasonable way. It may be reasonable to set out the turnips in rows. Any mode by which one party sets out the tithe so as to enable the other party to see that it is fairly done is the right mode. I shall look into the evidence to see how that principle applies here.

July 7th.—On this day his Lordship said he had examined the evidence, and he was of opinion that the decree upon this point must be for the plaintiff.

Decree accordingly.

[247] WEBB *v.* LUGAR. July 6th, Dec. 12, 1836.—A testator, being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon condition that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes, and premises, should, at all times after his decease, free and discharge his said farm from all manner of tithes which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease, for a valuable consideration, to A. B., with notice of the trusts of the will: Held, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will; consequently, that he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines.

[S. C. 6 L. J. Ex. Eq. 49.]

Some time previously to the year 1736, the Archdeacon of Colchester granted to one Lee Warley a lease for three years of the parsonage and rectorial tithes of Ardleigh, in the county of Essex; which lease was, in the year 1736, purchased of Warley by William Lugar. The purchaser being at that time owner in fee of a farm at Ardleigh, called Badley Hall farm, the purchase was made in the name of his brother, James Lugar, to whom the lease was duly assigned, in trust for William Lugar. Soon afterwards James Lugar executed a declaration of trust, to the effect that the lease was purchased with the proper monies of William Lugar, and that he, James Lugar, held it only as trustee for his brother.

The original lease given to Lee Warley contained no covenant for renewal, but the assignment to William Lugar was of all the estate and interest of Lee Warley in the parsonage and tithes, with benefit of renewal of the lease, &c.

William Lugar died in 1752, seised of the Badley Hall farm, and possessed of the before-mentioned lease. Shortly before his death he devised the Badley Hall farm in moieties to his two nephews in tail male, and he gave and devised all his estates, rights, and interest in and to the parsonage of Ardleigh aforesaid, with the houses, barns, stables, lands, tithes, perquisites, privileges, and appurtenances to the same belonging, unto his brother, James Lugar, his executors, administrators, and assigns, but upon this condition, nevertheless, that his said brother, James Lugar, his executors, administrators, and assigns, **[248]** owners or occupiers of the said parsonage, tithes, and premises, should at all times, after his decease, free and discharge all and every his said farm and lands called Badley Hall of and from all manner of tithes and portions of tithe which should arise and be payable out of the same to the said owner or occupier of the parsonage and tithes of Ardleigh aforesaid.

James Lugar survived the testator, and died in 1755, leaving his interest in the lease to his four sons, who from time to time obtained renewals of the leases, the particulars of which are stated in the judgment. It appeared from the recitals in the renewed leases that they were executed in consideration of the surrender of the old leases.

In 1782 the parties entitled to the lease under the will of James Lugar assigned it for a valuable consideration to Abraham Newman, who thereupon held it, as to three-fourths, for his own benefit, and as to the remaining one-fourth in trust for one Marshall Lugar.

The present bill was filed by the plaintiff, claiming title under the will of Abraham Newman, and by purchase from Marshall Lugar, against the defendant, as the owner and occupier of the Badley Hall farm, to recover the tithes of that property. The nature of the defence was that under the will of William Lugar the Badley Hall farm was exempt from the payment of tithes, and that the plaintiff must be considered as having had notice of such exemption. The circumstances of notice are stated in the arguments and judgment.

The cause now came on to be heard on admissions.

Mr. G. Richards (with whom was Mr. J. Russell), for the plaintiff. The words of

the will were binding only during the continuance of the lease which then existed, and do not apply to the individual who is now the owner and purchaser of the tithes of Ardleigh. This is not like a covenant running with the land, and binding the party in occupation. **[249]** At the time the testator made his will he contemplated merely the existing lease. He knew that the only interest he had was in the three lives. Indeed, he could not bind future lessees, for he had no right to compel the archdeacon to renew. After the lives had run out, the occupiers of the Badley Hall farm could not compel the lessees of the tithes to discharge them. This case is distinguishable from that where a tenant for life, under a renewable lease, renews, and says he will not hold it for the benefit of the parties entitled to renew. Here the parties in possession of the Badley Hall farm were strangers. It is said that the assignment was made by Lee Warley to William Lugar, with benefit of renewal; but there is no covenant to renew in the lease of 1736. If the words of condition contained in this will are to apply to the renewed leases, the consequence will be to exempt Badley Hall farm from the payment of tithes for all period of time. The defendant contends that those words operate by estoppel against the claim of the present occupiers of the parsonage. They cannot however have that effect, because they amount only to a condition imposed upon the party: they create no trust benefiting the party in possession of the Badley Hall farm at the expense of the owner of the tithes. Another question is whether the defendant can avail himself of this defence without proving that the plaintiff had notice of the condition in the will. The plaintiff is in the ordinary situation of a party who appears in a court of equity, having paid a valuable consideration without notice; he cannot therefore be amoved from his own rights. Although James Lugar executed the declaration of trust, it does not appear that Abraham Newman, who purchased the lease in 1782, had notice of the declaration of trust, or the condition. The same observation applies to the plaintiff when he purchased the remaining one-fourth in 1827.

This is a bill filed by a party in his legal right. The **[250]** lessee of a rector appears in equity as in law; the bill for tithes being a mere action of account. There can be no defence therefore in equity which cannot be set up at law. The present defence is that the plaintiff has taken these tithes upon a condition which he is bound to fulfil; but that would be no defence at law, and is, therefore, no defence in equity. The defendant, it is true, might have filed a cross bill, alleging himself to be interested in the tithes of the Badley Hall farm, but in that case he must have contributed to the fines which the parties in the occupation of the parsonage are bound to pay.

Mr. Simpkinson and Mr. Lovat, for the defendant. The argument relative to the necessity of filing a cross bill cannot be maintained for a moment, for no cestui que trust can be compelled by his trustee to take that course. The real question is whether the plaintiff, who is now the lessee of the rectory, and who claims through the parties deriving title under the will of William Lugar, has not taken the lease subject to the trusts of that will. Let us first take the case as if it were a question between the defendant and a devisee of James Lugar. Whether the words of the will amount to a condition or a trust is immaterial. In either case the court will carry the testator's intention into effect. It is true that the will does not expressly allude to a renewal; and it does not appear that in the assignment to Abraham Newman the word renewal is mentioned. But that will not affect the question, for the renewal of the former lease is the renewal of the trusts of that lease. It is indisputable that, during the continuance of the former lease, James Lugar, and those claiming under him, were bound to exonerate the farm from the payment of these tithes. When that lease was renewed, the trusts upon which it was held were renewed. There are many authorities to shew that a person having an interest in a lease and renewing it, takes the renewal for the benefit of **[251]** all parties interested in the former lease. It would be a breach of trust for him to treat for the renewal behind the backs of the parties interested. A tenant right of renewal, though not a legal, and in some sense, not an equitable right, is, under such circumstances, a subject to be dealt with in a court of equity. The Court has frequently interfered to prevent a person having a particular interest in a lease from taking a renewal for his own benefit alone, declaring him a trustee for all the parties interested in the old lease: *Palmer* v. *Young* (1 Vern. 276), *Keech* v. *Sandford* (Sel. Ca. Ch. 61), *Blewett* v. *Millett* (7 Bro. P. C. 367, Toml. ed.), *Featherstonhaugh* v. *Fenwick* (17 Ves. 298). Even where a fresh lease has been granted after the expiration of the former lease, that

fresh lease has been affected with the trust: *Griffin* v. *Griffin* (1 Sch. & L. 352), *Fitzgerald* v. *Fauconberge* (Fitzgib. 207), *Moody* v. *Matthews* (7 Ves. 174), *Maxwell* v. *Ashe* (id. 184, cited).

It is submitted that these authorities would be conclusive upon the question as between the defendant and a devisee of James Lugar. Then, is the case different as between the defendant and the plaintiff, who claims under Abraham Newman? That turns upon the question of notice. The plaintiff has the legal estate, and that must still be affected by all equities originally attached to it, unless he can protect himself by shewing that he is a purchaser of that legal estate without notice. Now it is clear that Newman must have had notice of the trust. The leases from the year 1777 to the year 1817 are in evidence. They are of course all renewals, and are granted in consideration of the surrender of the former leases. The renewed lease obtained by Newman recites the will of James Lugar; a circumstance which alone is strong to shew that Newman had notice of James Lugar's **[252]** title. Another strong circumstance is that a suit instituted for these very tithes by Abraham Newman and Marshall Lugar, in 1787, was abandoned, after the same defence was made by answer as is now made. The observation that it would have been incumbent on the defendant, if he had filed a cross bill, to contribute to the expenses of the renewal, is fully answered by the cases of *Moody* v. *Matthews* and *Maxwell* v. *Ashe;* and is evident, from the wording of the will, that the testator must have intended that James Lugar, and those claiming under him, should free the Badley Hall farm from tithes at their own expense.

Mr. Richards, in reply. The cases of renewal by a bare trustee, or by a party who is compellable to renew, differ widely from the present case. Where a person is a bare trustee under a will or settlement, it is his duty to renew for the benefit of the cestui que trusts. The cases of *Fitzgerald* v. *Fauconberge*, and *Montford* v. *Cadogan* (17 Ves. 485) were of that class. In *Moody* v. *Matthews* the party who renewed, and who was declared a trustee, might have been compelled, by a court of equity, to renew. The party claiming the benefit of the renewal was the purchaser of an annuity. The purchase deed contained an express covenant that the annuity should be charged upon the leasehold tithes. The husband of the grantor having after her death taken a renewal of the lease with his own money, the question was whether the annuity was a charge upon the renewed term, and Sir William Grant held that it was; being of opinion that the husband stood in no better situation in regard to the annuity than the wife, and might have been compelled by a court of equity to renew the lease for the benefit of the annuitant. A renewed lease is held for the benefit of third persons, **[253]** when either by law or by contract the party who holds it might have been compelled to renew it for their benefit. But here there was nothing in the will shewing that it was compulsory on James Lugar to renew the lease. All that he and his executors had to do was to keep the property free from such tithes as should be payable during the existing lease. The words "payable to the said owner or occupier," refer to the then owner or occupier of the parsonage and tithes. There was no covenant by James Lugar to renew, and consequently there is no breach of trust in those who claim under him if they do not renew: *Capel* v. *Wood* (4 Russ. 500). There is therefore no obligation upon them to keep this property free from tithes. To hold otherwise would be to sanction a perpetuity.

Upon the question of notice it is clear that the Court cannot presume notice against a legal claim. The defendant says that the plaintiff must be presumed to have had notice of William Lugar's will, but it is difficult to say on what ground; for, upon the purchase by Abraham Newman, it was not necessary to see the trusts of William Lugar's will. James Lugar's will contains no reference to that of William.

Dec. 12.—ALDERSON, B. This case has been brought before the Court on admissions—the question being, whether the plaintiff is entitled to the tithes of defendant's farm called Badley Hall. The defendant sets up as a defence that the plaintiff is not entitled to maintain the present bill, inasmuch as he must be considered in equity as the trustee for the defendant of the tithes of this farm.

It appears that William Lugar, in 1752, was seised in fee of the farm in question, and entitled, as cestui que trust (James Lugar being his trustee), to the interest in a lease for three lives of the tithes of the parish of Ardleigh, in **[254]** which the farm was situate, under the Archdeacon of Colchester. He made his will in 1752, devising the farm in moieties to different persons, and bequeathing all his rights and interests

in the parsonage and tithes to James Lugar, his trustee, on condition that James Lugar, his executors, administrators, and assigns, owners or occupiers thereof, should at all times after his decease free the farm from all tithes.

The defendant, it appears, has by several mesne conveyances, which it is not necessary to state, become entitled, through the devisees under William Lugar's will, to the Badley Hall farm.

James Lugar, to whom the lease of tithes subject to the above condition was bequeathed, died in 1755, leaving this property to his four sons, James, William, Francis, and Philip. In July, 1755, a new lease was obtained by the four sons, and one life having dropped, Philip Lugar's life was added to those of Freeman and Bradstreet, who were two of the original nominees. In July, 1761, a new lease was granted to Francis Lugar (one of the four sons), for the lives of Bradstreet, Philip Lugar, and James Lugar. In October, 1777, a new lease was granted to William Lugar, Philip Lugar, Marshall Lugar, and William Harman, for three lives: namely, Philip Lugar, John Eyre, and Frederick Eyre. It would appear, therefore, that all the lives upon which the estate depended when the testator died had expired at some period between 1761 and 1777.

Afterwards, Abraham Newman having purchased three-fourths of this lease in May, 1782, the whole was assigned to him (in trust, however, as to one-fourth, for Marshall Lugar); and having done this, he let the whole to Marshall Lugar, as tenant thereof. Soon after this a suit was commenced by Marshall Lugar and Abraham Newman against Ann Lugar, the occupier of Badley Hall farm, for the recovery of the tithes thereof; but after answer put in, stating **[255]** the above facts, the suit was abandoned. In the year 1799 Abraham Newman died, bequeathing all his interest (three-fourths) in these tithes to the plaintiff, who, in 1817, having purchased of Marshall Lugar the remaining one-fourth part, became entitled to the whole; and being so entitled, obtained a renewal of the lease from Dr. Jefferson, Archdeacon of Colchester, in December, 1817. That lease is now in force.

Now, the first question is, what is the true construction to be put on William Lugar's will? Is it to be considered as a bequest on condition that the estate should be free from tithes during the continuance of the lease for the lives then in being, or is it to be taken in a larger sense? The condition is that his executors, administrators, and assigns shall at all times free the estate. These words are general and not qualified as to time; and when we consider the nature of this property, and the customary mode of renewing on the falling in of each life, I cannot entertain any doubt that the intention of the testator was that so long as these tithes should belong to James Lugar and those claiming under him, so long Badley Hall should be free and discharged of tithes; and that if he or they assigned the lease, they should do so subject to the same conditions. This, then, gave the proprietors of Badley Hall an exemption from tithes during the continuance of the lease, and a special interest in the renewal of it.

Now, according to a class of cases, beginning with *Rawe* v. *Chichester* (1 Bro. C. C. 198, n.), it is laid down that, when a lease of this sort is renewed, it is to be considered as a continuation of the old lease, and all who had a special interest in the old lease take the same special interest in that which is renewed. It is clear, therefore, that if the plaintiff was a volunteer claiming under James Lugar, he could not maintain the present suit; and, according to the cases of *Max*-**[256]**-*well* v. *Ashe* and *Moody* v. *Matthews*, the defendant is not even bound to contribute towards the renewal fines. Indeed, I think that, independently of those authorities, the principle alone ought to have led me to that conclusion: for if a beneficial interest is given and accepted on the condition of an exemption at all times from tithes being conferred on this estate, why should I add a restriction on that condition not mentioned by the testator, of a contribution to future fines? If this condition, taken simpliciter, made the bequest not advantageous, James Lugar might have repudiated it altogether.

But then it is said that the present plaintiff is a purchaser for valuable consideration and without notice. No doubt he is a purchaser for valuable consideration, for Newman, under whom he claims part, was a purchaser for valuable consideration, and he is himself the purchaser for value of the remainder. But here, no tithes were ever collected from this estate, either between 1752 and 1782, or between 1782 and the present time. It seems to me that that fact alone ought to have put the parties on making inquiries, independently of the recitals in the deeds, which are also strong

evidence on this subject. I think, therefore, that the parties here must be considered as purchasers with notice.

It is not necessary to determine what would have been the result in case I had come to a different conclusion as to the fact of notice. It is quite sufficient that these parties stand in the same situation as parties claiming as volunteers under James Lugar would have done. I think, therefore, that the same result must follow as was the case when the suit was instituted by Abraham Newman and Marshall Lugar, and that this bill must be dismissed with costs.

Decree accordingly.

[257] NEATE *v.* LATIMER. July 1st, 1836.—Where, as a security for money advanced from time to time to A., the creditor of A. had taken various bills of sale and assignments of A.'s personal property, but had left A. in the visible user and enjoyment of that property; upon a bill filed by a subsequent judgment-creditor of A., impeaching the prior securities for fraud: Held, upon motion before hearing that the plaintiff was entitled to the production of the several bills of sale and assignments.

[Affirmed, 1837, 4 Cl. & F. 570; 11 Bli. (N. S.) 112. Distinguished, *Browne* v. *Lockhart*, 1840, 10 Sim. 421; *Taylor* v. *Rundell*, 1841, Cr. & Ph. 104; 11 Sim. 391. Applied, *Dundas* v. *Blake*, 1847, 10 Ir. Eq. R. 260.]

The plaintiff claimed to be a judgment-creditor of the Duke of Marlborough, who was a defendant to this suit, by virtue of a bond executed to him by the duke, in the year 1815, for the sum of 7000l., upon which the plaintiff obtained a final judgment, in the year 1818, for 14,000l., debt, and 158l. 1s. damages. That judgment was suffered to abate, but was revived in the year 1821, and kept on foot; and in the month of November, 1824, the plaintiff sued out execution upon it. Under that execution, the Sheriff of Oxford seized various goods and chattels at Blenheim, of which the defendant Latimer claimed to be the lawful owner under divers bills of sale, assignments, and other instruments, which he alleged to have been executed to him for a valuable consideration by the duke and other persons authorized by him. Latimer, in consequence of this seizure, brought his action against the sheriff, and obtained a verdict. The plaintiff, however, in 1833, again sued out execution on his judgment, and upon the sheriff making a return of nulla bona, the plaintiff, in February, 1834, brought his action against the sheriff for a false return.

In May, 1835, which was pending the action against the sheriff, the plaintiff filed his bill in this Court, praying that it might be declared that all the bills of sale and assignments of the goods and chattels in and upon the mansion-house and premises at Blenheim, made and executed by the Duke of Marlborough to the defendant, were void as against the plaintiff, and that the same might be delivered up to be cancelled, and an account might be taken of what was due to the plaintiff upon the judgment, and for his debt, damages, and costs; that an account might also be taken of the pecuniary dealings and transactions between the defendant and the Duke of Marlborough since 1823, **[258]** and in case a balance were found due to the defendant, that an inquiry might be directed whether he had any lien or security for it upon all or any of the goods and chattels at Blenheim, the plaintiff offering to pay what, if anything, might be found due on such security; that the goods and chattels in question might be sold, and that out of the proceeds the plaintiff might be paid the amount of his debt, costs, &c., and what, if any thing, he might pay to the defendant; and also that the Duke of Marlborough's equitable interest in the property might be applied, as far as it would extend, to the purposes of this suit.

The bill charged that in the year 1824, and in several succeeding years, several bills of sale and assignments of part of the goods and chattels, personal estate and effects, in and about the mansion and premises at Blenheim, were executed to the defendant Latimer, by or under the directions of the defendant, the Duke of Marlborough; that the same were respectively dated, &c., and were made and executed to the defendant Latimer without any consideration having been paid or given by him for the same; that no part of the said goods &c. had ever at any time been removed from the said mansion-house, but that the Duke of Marlborough had, ever since the said bills of sale and assignments were made, continued to use and did then use the

same as his own absolute property; that all the said bills of sale and assignments then were, and always had been, void and of none effect in equity against the plaintiff; that the defendants had in their custody or power, and ought to set forth a list or schedule of the aforesaid deeds, bills of sale, &c., and leave the same in the hands of their clerk in Court for the usual purposes.

The defendant Latimer, by his original answer, admitted that he had in his custody, possession, or power, the several bills of sale and assignments mentioned in the bill. He also admitted that the defendant, the Duke of Marlborough, had, ever since the said bills of sale and assign-**[259]**-ments were made, continued to use, and did then use, the goods and chattels which were in and upon the mansion-house at Blenheim; but he denied that they were used by the duke as his absolute property, because they had ever since been and were then in the possession of one Richard Wilson, who was his, the defendant Latimer's, servant and agent. He further stated that the bills of sale and assignments were duly executed by all proper parties for a full and valuable consideration, and insisted that the same were his title-deeds; and that, as such, he was not bound to produce them, but that upon payment of the sum of 8000l., which he alleged to be the amount of his debt, he was ready and willing to deposit them in Court.

Exceptions having been taken to this answer for insufficiency, and those exceptions having been allowed, the defendant put in a further answer, to which he annexed two schedules, the first of which contained a statement of the several bills of sale and assignments.

The plaintiff now moved for the production of the bills of sale, assignments, and other legal instruments admitted by the answers of the defendant Latimer to be in his possession.

Mr. Temple and Mr. Ellison, for the motion. The rule that a purchaser for a valuable consideration without notice cannot be compelled to discover his title-deeds does not extend to the mortgage or purchase deed itself: *Ex parte Caldecott* (Mont. 55). The defendant insists that he is a bonâ fide mortgagee, and has a lien on this personal property for the amount of his advances. If that be so, the Duke of Marlborough would have a right to inspect the deeds himself, in order to know the amount due from him, and consequently a judgment-creditor of his stands in the same situation. A mortgagee never can object to produce the **[260]** mortgage deed. If the plaintiff amended his bill, he might compel the defendant to set out the deeds in hæc verba, which would only be creating useless expense. If the deeds are produced, it will appear in the action against the sheriff what goods are not covered by these securities. Looking, however, at the defendant, not as mortgagee, but as claiming the goods under the bills of sale, we seek to impeach his securities for fraud, and on that ground have a right to their production. In *Beckford* v. *Wildman* (16 Ves. 438) Lord Eldon says, "that where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced." In that case the motion was not acceded to as being unusual in point of form, but the rule of practice, as laid down by Lord Eldon, is undisputed: *Balsh* v. *Symes* (Turn. & Russ. 87). In *Kennedy* v. *Green* (6 Sim. 6) it was held that a party who alleged himself to be a purchaser for a valuable consideration without notice of fraud was bound to answer all the allegations of the bill tending to shew that he had such notice, and not having so done, he was ordered to produce the purchase deed. Here, the defendant, in answer to a variety of questions relative to the consideration given for the assignments, simply alleges that he gave a valuable consideration for them. That is not a sufficient answer to a bill charging want of consideration, and on that ground the order for production should be made.

Mr. Simpkinson and Mr. C. Romilly, contrà. The case of *Ex parte Caldecott* does not decide that a deed of conveyance to a party is not his title-deed. The principle of that case is that in consequence of the privity of contract between the mortgagor and mortgagee, the mortgagor has such an interest in the mortgage deed as to be entitled to call upon the mortgagee to produce it. The mortgagor's interest appears upon the face of the deed, and the mort-**[261]**-gagee is his trustee. The plaintiff, however, is not in the situation of a mortgagee; and feeling that difficulty, he treats the bill in two different characters—first, as a bill to redeem, and next as a bill to set aside a conveyance for fraud. He asks that the bills of sale may be declared void, and yet that the Master may inquire whether the defendant has any lien. [The Lord Chief Baron. The plaintiff asks for that in case the deeds are found valid.] He

cannot redeem at all so long as this imputation of the deeds remains on the record. The main object of the bill is clearly to impeach these securities, and taking it in that light, this case differs materially from those which have been cited. In those cases the bill was filed by a party to the instrument: the party himself impeaching his own instrument. But it would be a very different thing to say that a party is entitled to call for the inspection of the instrument for the benefit of third persons. In *Beckford* v. *Wildman*, all that Lord Eldon said he could do was to order the deed to be produced at the hearing. [The Lord Chief Baron. The object there was not to impeach the deed, but to take an account.] Then, what was said in *Balsh* v. *Symes* was merely a loose dictum, which, though cited as authority in the subsequent case of *Tyler* v. *Drayton* (2 S. & S. 309), was not acted upon. In the latter case, which was a bill to set aside a conveyance for fraud, Sir John Leach refused to order the production of the instrument. [The Lord Chief Baron. The purchase deed there could have no relation to the plaintiff's title.] In *Kennedy* v. *Green* the existence of the alleged indorsements on the deeds not being denied by the defendant, the Court treated the case as one of suspicion, and as warranting a departure from the general rule.

Admitting that, as a mortgagor or judgment-creditor of the Duke of Marlborough, the plaintiff might, under some **[262]** circumstances, have a right to the production of these instruments—can he insist upon such a right while claiming, not under, but against the duke? He claims by an adverse title, alleging that he has obtained a judgment which gives him a lien on the property. The cases upon the subject depend upon contract or derivative contract: *Sparke* v. *Montriou* (1 Y. & C. 103), *Postlethwaite* v. *Bligh* (2 Swanst. 256).

THE LORD CHIEF BARON. The general rule upon this subject is liable to so many exceptions that it is difficult to know to what cases it may be applied. The general rule is that a party is not bound to produce his own title-deeds for the inspection of his opponent; yet, if the party seeking their production has an equal interest in them with the holder, that gives him an equal right to their production. Again, a party is not bound to produce title-deeds which are only collateral to the title of the party seeking their production. A mortgagee generally is not bound to produce his title-deeds without payment of the money due to him; but suppose the mortgagor says that the mortgage deed has been falsified, and that a larger sum has been inserted in it than he ever received or intended to receive: if he impeach it for fraud, in this manner, he is entitled to have that question tried before he pays even the sum which he admits to be due. But it follows that unless he has the inspection of the deed he may fail in his object, because he may wish to take advantage of some particular part of the instrument. It is clear that if he wants to know what sum is due, he is not bound to trust to the oath of the mortgagee. So that, in many cases, it depends upon the particular object which the plaintiff seeks to accomplish, whether he has a right to inspect the deed or not.

Now it would be preposterous to say that a first mortgagee might be called upon by the second to produce his **[263]** mortgage, in order that upon a bill for foreclosure the second mortgagee might have the advantage of impeaching the title of the first. But suppose some fraud to have existed between the first mortgagee and the mortgagor, and that in consequence of their representations the second mortgagee was prevailed upon to advance a larger sum than he otherwise would have done; if he afterwards filed his bill for a discovery of the fraud, and made the first mortgagee a party to the bill, unless the latter made a perfect discovery of those facts, how could a court of equity administer justice without calling upon him to produce the deed? The second mortgagee might say to the first incumbrancer, "When I advanced my money, 5000*l.* was represented to be due to you, and now it turns out to be 10,000*l.*: there must be some collusion between you and the mortgagor, and I desire discovery." It is possible, therefore, to suppose a case where a court of equity would call upon a party to disclose that deed from which evidence of the fraud might be obtained. In the present case I do not see in what way a court of equity could relieve the plaintiff, unless the deed were brought into Court; and as it must be produced at some time or other, why not before the hearing?

It was said by Mr. Romilly that no imputation of fraud rests against the defendant Latimer. Is that so? He denies fraud generally; but the question is whether the facts on which the allegation of fraud is founded are denied. The important question is whether Latimer is bonâ fide preventing the Duke of Marlborough from having the

personal enjoyment of the goods and chattels at Blenheim, the possession of which by the duke is a badge of fraud as between him and Latimer. The possession of goods not going with the title has always been admitted as a badge of fraud. That has been evaded in this case by putting a person in possession. Why is that person in possession of the goods at Blenheim, except for the purpose of saying **[264]** that the duke is not in possession? But the duke has the substantial benefit of the goods: he has the entire usufruct of the whole. How is that consistent with the allegation that Latimer is in possession of the whole? The case is not free from suspicion. The plaintiff says—"The fact of the Duke of Marlborough residing at Blenheim in possession of goods upon which I have a right of execution as the fruit of my judgment, while at the same time another party alleges that he has the possession of them, is itself a circumstance which demands inquiry; therefore I am not bound to take the oath of Latimer as to the claim which he sets up. I require an investigation of the amount of that claim, and the circumstances in which I find the goods placed justify the inquiry." If they had been in the possession of Latimer subject to the claim of the Duke of Marlborough to redeem, it would have been the ordinary case of the first mortgagee insisting upon his prior right to be redeemed. But under the circumstances of this case—one man having the goods and another the title by assignment—the plaintiff may say, "I am not bound without further inquiry to pay the 8000l., and investigate the matter afterwards. Why should I be liable to the necessity of filing another bill to have the money refunded?"

Upon the whole it appears that the plaintiff has a judgment which would operate upon these goods except for Latimer's claim. A suspicion naturally arises as to the nature of that claim from the situation of the goods. If that situation is a sufficient badge of fraud, it is a sufficient cause for investigation. I do not mean to say that the case is conclusive against the defendants, but I think there is sufficient to induce the plaintiff to say that he ought not to be bound by Latimer's assertions without production of the deeds. If the case is an honest one, I see no reason why he should not produce them. I do not say it is not an honest case, but only that there is no reason why he should not produce the deeds if the case is **[265]** free from suspicion or taint of fraud. He is bound, however, to produce them on the ground that the plaintiff, having an interest in these goods, and having a right to redeem Latimer's mortgage upon payment of the full amount due to him, has an interest in paring down Latimer's title, and in reducing it to its proper dimensions before he purchases it, and that it is not a case in which Latimer can say that he is a mortgagee with respect to whom the plaintiff stands in the situation of a mere stranger, or that the plaintiff must satisfy the amount of his claim before he can ask for the production of these deeds. That, I think, is not his case. The deeds therefore must be produced.

Order accordingly.

WILLIAMS *v.* THE BANK OF ENGLAND. Nov. 5th, 1836.—Distringas obtained in this Court, followed by proceedings in the Court of Chancery, discharged with costs.

[S. C. 6 L. J. Ex. Eq. 20.]

On the 11th August, 1836, the plaintiff obtained from this Court a writ of distringas to restrain the transfer of 116l. Long Annuities, standing in the name of John Calverly and his wife. On the 14th October following, Calverly made an application to the bank for a transfer of the stock; upon which the bank gave notice to the plaintiff that, unless a bill was filed and an injunction obtained to prevent the transfer of the stock, a transfer would be permitted. The plaintiff then, after ascertaining that the Lord Chief Baron was not in town, filed his bill in Chancery on the 17th October, and on the following day obtained an injunction from the Master of the Rolls.

Mr. Chandless now moved, on the part of Mr. Calverly, that the writ of distringas might be discharged, and that **[266]** the plaintiff might be ordered to pay the costs of issuing and discharging the same. He contended that obtaining a distringas in this Court, and following it up by proceedings in the Court of Chancery, was altogether irregular, and was in effect obtaining two injunctions. He cited *Fellows* v. *Bank of England* (1 Younge, 385) and *Argent* v. *Bank of England* (1 Y. & C. 557).

Mr. Simpkinson and Mr. Rogers, contrà. It is clear from the affidavits that it was the intention of the plaintiff to file his bill in this Court, and that he was only

prevented from so doing by the absence of the Lord Chief Baron. That distinguishes this case from *Fellows* v. *Bank of England*. There it appeared, from the plaintiff's own affidavit, that he obtained a distringas here with the intention of filing a bill in Chancery; and such a proceeding was looked upon by Lord Lyndhurst as an abuse of the process of this Court, and accordingly the writ was discharged. Here, upon receiving notice from the bank and learning that the Lord Chief Baron was not in town, the plaintiff could do no otherwise than file his bill in Chancery. Besides, this motion is altogether unnecessary, because the distringas is not in the nature of an injunction, but operates only as a notice to the bank, which they may obey or not, as they think expedient. At all events, upon obtaining the injunction the distringas became a nullity. The plaintiff is a mere trustee, and ought not to be made to pay these costs.

Mr. Chandless, in reply.

THE LORD CHIEF BARON. I cannot agree that the distringas is a nullity. The question is whether a party shall be at liberty to obtain the process of this Court (the **[267]** effect of which would be, in particular cases, to give advantages to the plaintiff which he otherwise would not possess), for the purpose of filing a bill in another Court. If this Court were ancillary to the Court of Chancery for the purpose of holding property in security, it would be a different question; but where a distringas issues from this Court, it proceeds on the understanding that the party is going to carry on the proceedings here; and it was never intended that a party should have a distringas in the Court of Exchequer, in order to arrest property in the Bank of England, until he files a bill in the Court of Chancery. I cannot say but that there might be an extraordinary case where this practice might be departed from, as, for instance, the impossibility of obtaining an injunction from a Judge of this Court. In the absence of a Judge abroad, as in fact did happen in the early part of the vacation, such a proceeding would have been justifiable. I perceive by the affidavit that, though application was made at my house in town, it is not stated whether, in answer to the application, the party was not informed that I might be in town at any time within three hours, or that the party might have been with me within the same time; nor is it stated that the Master of the Rolls was regularly in town, or that his being in town was not accidental. If this practice were countenanced, it would follow that, unless the Judges of this Court were every day in town, a party would be at liberty to issue a distringas in the early part of August, and afterwards to file a bill in the Court of Chancery, and to abandon the proceedings in this Court. The complaint is that a grievance is done by arresting the right to transfer this stock for seven days until the plaintiff can file his bill in Chancery. The process of this Court, in the first instance, effectually served the plaintiff; it gave him an opportunity of filing a bill, and he has acted against good faith to the Court of Exchequer after obtaining these advantages. I **[268]** do not think, on the face of the affidavit, there was a sufficient excuse for applying to the Court of Chancery, and therefore I must grant the motion, with costs.

Distringas discharged, with costs.

BLIGH *v.* BRENT. Nov. 14th, 16th, 1836; Jan. 18th, 1837.—The shares in the Chelsea Waterworks Company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds.—Real property, held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern.

[S. C. 6 L. J. Ex. Eq. 58. Approved, *Watson* v. *Spratley*, 1854, 10 Ex. 222.]

(Before the Lord Chief Baron, Parke, B., Alderson, B., and Gurney, B.)

Timothy Brent, being possessed of several shares in the Chelsea Waterworks Company, by his will, and two codicils thereto annexed, gave all his estate and effects absolutely to his wife, Margaret Brent, and appointed Margaret Brent and his nephew, W. B. Brent, his executrix and executor. Neither the will nor the codicils were executed so as to pass real estates of inheritance.

The testator died, leaving his wife and nephew surviving him, whereupon the plaintiff, as heir-at-law of the testator, brought his bill against the widow and the

Governor and Company of the Chelsea Waterworks, charging that the shares in that company are in their nature real estates of inheritance in fee-simple, and that, as such, the shares held by Timothy Brent did not pass by his will, but descended to the plaintiff as his heir-at-law; and praying an account of those shares, a declaration that the plaintiff was entitled thereto, and that his name might be inserted in the books of the corporation as the proprietor thereof.

Upon the death of the widow the suit was revived against the testator's nephew, as the personal representative both of the testator and the widow.

The cause came on for hearing before Alderson, B., at the sittings after Trinity Term, 1836, when his Lordship was pleased to direct that the cause should be heard be-**[269]**-fore the full Court, which was now done accordingly; the question being whether the shares so held by the testator descended as real estate to the plaintiff, as the testator's heir-at-law, or passed as personalty under the testator's will to his personal representative.

This question depended upon the construction of the Acts of Parliament and charters by which the company was established, and is now supported. The statute 8 Geo. 1, c. 26, after reciting (amongst other things) that great advantages would accrue to the inhabitants of Westminster, "if new waterworks were erected in convenient places for providing and supplying the said inhabitants with good and wholesome water from the river Thames, by one or more cut or cuts, to be made at any convenient place or places, between the grounds belonging to the Royal Hospital at Chelsea and the houses or grounds commonly called the Neat Houses, in the county of Middlesex, into canals and ponds proper for receiving the same, and from thence to convey and raise such water into convenient reservatories, to be erected or made at any place or places, between the place called Oliver's Mount and Hyde Park, for the purposes of this act,"—enacts that certain persons therein named "shall be commissioners, undertakers, and trustees for designing, carrying on, and effecting the purposes aforesaid, and for directing, ordering, appointing, and making such waterworks, and for maintaining, preserving, and supporting the same; and the property thereof shall be and is hereby vested in the said commissioners, undertakers, and trustees, and their successors."

The fourth section gives power to his Majesty, by letters patent, to incorporate the commissioners, undertakers, and trustees appointed by this Act, by the name and title of the Governor and Company of the Chelsea Waterworks, and enacts that "they and their successors, by the name aforesaid, shall be able and capable in law to **[270]** have, purchase, receive, enjoy, possess, and retain to them and their successors, messuages, lands, tenements, rents, and hereditaments of what kind, nature, or quality soever, not exceeding 1000l. per annum in the whole; and also to sell, grant, demise, alien, or dispose of the same or any part thereof," &c.; "and to do and execute all and singular other matters and things by the name aforesaid, that to them may or shall appertain to do, with such powers and clauses as shall be requisite and necessary for erecting, preserving, and supporting the said waterworks, and all necessary ways, passages, and water-courses thereto belonging from time to time; and to be under such rules, qualifications, and appointments as his Majesty, his heirs or successors, shall think necessary or reasonable to be inserted in any such letters patent; and that it shall and may be lawful to and for his Majesty, his heirs and successors, by such charter of incorporation, to empower such corporation and their successors to make reasonable laws, constitutions, orders, and ordinances from time to time for the good government of such corporation."

The fifth section enacts that "it shall be lawful for the said commissioners, undertakers, and trustees, and their successors, to open, dig, cut, make, erect, raise, and from time to time to repair, preserve, and maintain, alter, scour, and cleanse all such sewers, trenches, water-courses, canals, waterworks, pits, dams, banks, walls, arches, sluices, flood-gates, engines, pipes, cisterns, ponds, and other works, devices, and buildings which shall be made for conducting, drawing, or conveying to the places aforesaid, or for using there all such waters for the purposes aforesaid, through or under any roads, highways, or streets, or in, through, under, or over any ground which shall be purchased by them for the purposes aforesaid, and to discharge or issue thereout such waters, and to make, have, and enjoy new ponds, or other receptacles for water, as occasion shall require, in convenient places, **[271]** in or near to the said city of Westminster, or the liberty thereof, for the purposes aforesaid."

The ninth section enacts, "That the said commissioners and trustees, and their successors, shall and may, from time to time, have free liberty, power, and authority, without molestation or disturbance, by their servants and workmen, to lay pipes from the said streets, passages, or common grounds or places in or about Westminster, and for that end to dig up the pavements," &c.

By the thirteenth section this act is to be deemed and taken to be a public act.

The charter of the company, after reciting the Act of Parliament, proceeds to give general powers to the commissioners, in words nearly similar to those contained in the fourth section of the act. It then establishes a governor, deputy-governor, and thirteen directors. It gives power to the governor and company, and their successors, to hold a general court so often as the governor, deputy-governor, and directors for the time being, or as ten other persons, who shall have in their own right ten whole shares a-piece in the joint stock of the company, shall in writing demand of the governor, deputy-governor, or any five or more of the directors; such court to treat and consult, or make and establish reasonable laws, orders, and rules concerning the affairs of the company, or for the good government thereof. By a subsequent section the charter gives power to the governor and company, and their successors, to elect yearly, on the 25th of March, a governor, deputy-governor, and seven directors, out and from the members of the company, and six more directors, from and among the last preceding directors of the said company, by plurality of votes of all such, who have, or shall have, in his or their own right, five whole shares in the joint stock of the said company, and are then capable to vote, as thereafter mentioned.

[272] By the eleventh and twelfth sections of the charter it is declared and provided that each and every twenty pounds, which will be part of the joint stock, and no less, shall be and accounted one share therein, and that each member having in his or her own right five whole shares in the said joint stock, shall have in every general court of the said company one vote for the same; and each member having in his or her own right ten whole shares in the said joint stock, shall in every such court have two votes for the same; and each member having in his or her own right twenty shares in the joint stock aforesaid, shall have three votes in every such court for the same; and that no person shall have a vote in any such general court who shall be possessed or interested in his own name, or in the name of any other person or persons in trust for him, either solely or jointly, of any part or share of or in the joint stock of any other company, or undertaking, for raising or conveying of water to the cities of London and Westminster, or to either of them, or to the liberties of, or parts adjacent to the same, or to either of them.

The twenty-first section of the charter grants to the company "that they, the said governor and company, and their successors, shall and may have full, free, and lawful licence, power, and authority to take, have, purchase, receive, enjoy, and possess, to them and their successors for ever, any manors, lordships, messuages, mills, waters, streams, conduits, rents, services, reservoirs, lands, tenements, and other hereditaments whatsoever, so as the same do not exceed the yearly value of 1000l. above all charges and repairs, and also estates for life or lives, and for years, and goods and chattels of what value, nature, or kind soever, for the better carrying on and effecting the purposes in these our letters patent contained, not exceeding the value of the joint stock of the corporation hereinafter mentioned and limited, and to be taken and computed as part thereof; and also to give, grant, de-**[273]**-mise, alien, assign, and dispose of such manors, lordships, messuages, mills, waters, streams, conduits, rents, services, reservoirs, lands, tenements, hereditaments, estates for life or lives, and for years, goods and chattels; and also to do and execute all such other lawful acts and things whatsoever by the name aforesaid, touching and concerning the powers, liberties, privileges, and purposes before mentioned."

The twenty-third section of the charter gives power to the company, "by subscription or contribution of their members and others, to make and raise a joint stock, not exceeding the sum of 40,000l. of lawful money of Great Britain, to be applied for the carrying on and effecting the purposes of this charter; and the same joint stock to order, manage, and conduct from time to time, for the purposes aforesaid, and to receive the benefit and advantage of the same, to the use of them the said governor and company, and their successors, according to such shares and proportions as they or any of them have or shall have therein; and all and every person and persons so subscribing and contributing any sum or sums of money to such joint stock, shall by

virtue thereof become members of the said corporation, and shall be entitled to a share or shares in such joint stock equal to the sum or sums of money so by him or them actually contributed and paid in, and no greater, and shall be and are hereby enabled to sell, assign, and transfer the same or any part thereof to any person or persons, by transfer in the books of the said company, in such manner as shall be ordered, directed, appointed, and established in and by a general court of the said company, or by his or their last will and testament; and the person or persons to whom such assignments, or transfer or disposition by last will and testament shall be made, shall by virtue thereof become members of this corporation: Provided, nevertheless, that no person or persons who hath or shall have any shares or part of the said joint stock, shall assign or transfer the same before or until such time as the said water **[274]** shall be brought into the grand reservatory or reservatories intended to be made at or near the said place called Oliver's Mount. Provided also, that no assignment or transfer be at any time made of any sum or sums, in the said joint stock, less than one whole share."

The twenty-eighth section of the charter provides that for preventing the Governor and Company of the Chelsea Waterworks from interfering with the business of the Bank of England, and dealing in any trade or merchandize, "the said corporation hereby established shall not at any time hereafter discount or deal in bills of exchange, or inland bills or notes, nor shall receive monies, or keep the accounts or cash of any person or persons (other than their own proper monies, accounts, and cash, being the real produce of their joint stock or fund, or such monies as shall be paid to them for the purposes herein mentioned), nor shall deal in banking, or any ways use the banking trade or business, nor shall under their common seal, nor by their cashiers, officers, or servants, or any other person on their behalf, give or issue out any bills or notes payable upon demand for the loan of money, with or without interest, nor shall advance or lend any money at interest upon any account whatsoever (except the monies arising out of or by the real produce of their own joint stock or fund, or to be received by them, as hereinbefore mentioned), nor shall by way of trade or merchandize directly or indirectly, buy, or sell, or deal in any bullion, gold, or silver, or any goods, wares, or merchandizes."

By a subsequent charter of King George the Second, power was given to the company to increase their joint stock, and it was declared that the contributors to the additional stock should be entitled to shares proportioned to their contributions, and should be enabled to assign the same "in such manner as any share or shares in the present joint stock of the said company can or may be assigned or transferred."

By the stat. 49 Geo. 3, c. 157, additional powers were **[275]** given to the company for the purchase of lands near the River Thames, and in regard to freeholds, a form of conveyance is prescribed, by which the vendors grant and release to the Governor and Company of Chelsea Waterworks all their right, title, and interest in and to the conveyed premises, to hold to the said governor and company, and their successors for ever.

Mr. Simpkinson, Mr. Creswell, and Mr. Toller, for the plaintiff. According to all the decisions, property of this nature has been held to be real estate. The declaration contained in many of the acts of Parliament, that shares of this nature shall be deemed to be personal estate, is a strong argument to shew what in the contemplation of the legislature would have been the nature of these shares without that declaration. The present case is of a mixed complexion. Here the property is vested in the shareholders as a corporation, in trust for themselves individually, according to their respective interests. A general power is given to the company to bring water from the Thames in perpetuum by any means they may think fit. They had liberty to purchase freehold lands to an amount not exceeding 1000l. per annum, to purchase leaseholds, to lay pipes alieno solo, and through the medium of those pipes to supply in perpetuum the residents of Westminster with water. How, then, in any view, is this a chattel interest in the corporation? It is a right given to them in perpetuum, and which, to say the least of it, savours of the realty. The right of laying down pipes alieno solo is, according to a vast number of cases, a right concerning land. That is determined by a numerous class of authorities, in which the rateability of occupiers of lands has been discussed. In the case of *Rex* v. *Corporation of Bath* (14 East, 609) the nature of this sort of property was much **[276]** gone into, and Lord Ellenborough said: "I confess I have great difficulty in distinguishing between the case of water collected in a trunk or reservoir so many yards wide, or in pipes so

many inches wide, each being attached to the soil." Bayley, J., also said: "The reservoir with the water would all descend to the heir." *Rex* v. *Rochdale Waterworks Company* (1 M. & S. 634), *Rex* v. *Brighton Gas Light Company* (5 B. & C. 466; 8 D. & R. 308), and *Rex* v. *Chelsea Waterworks Company* (2 Nev. & Man. 765; 5 B. & Ad. 156) are also strong authorities to shew that these pipes and reservoirs constitute an interest in land. It is only on that ground that the rates could be supported. *Negus* v. *Colter* (Ambl. 647) is an analogous case. What, then, is the extent of interest which the company has? An estate vested in them and their successors for ever; which constitutes in them an estate in fee-simple. If so, how is it possible to contend successfully that, the company being trustees for the shareholders, the interest of the cestui que trusts is not co-extensive with the legal interest of the trustees? The cases on the New River shares go far to decide the present question. The New River was established by stat. 3 Jac. 1, c. 18. By virtue of that act the city of London had a mere right to cut alieno solo: the property in the land was reserved to the owner. It was under that act that the powers of the city were regulated and the shares held. The other act relating to the New River is the 4 Jac. 1, c. 12. It seems only to give the city a liberty to erect a trunk or vault. Now, it is well known that Sir Hugh Middleton obtained a conveyance from the city of London of the right given to them by that act. The conveyance was to him, his heirs and assigns. He commenced making the cut, and died, and the right became vested in a variety of persons. The proprietors have since **[277]** been incorporated. The decrees pronounced upon the New River shares, since the company have acted as a corporation, will bear upon this case. A leading case upon the subject is *Townsend* v. *Ash* (3 Atk. 336), which not only supports the proposition that New River shares are real estate, but is also an authority for the mode of proceeding in this case. [The Lord Chief Baron. There the decree would have been the same if it had been personal property.] The case of *Drybutter* v. *Bartholomew* (2 P. W. 127) is an express decision that a share in the New River Company is real estate. In *Lord Stafford* v. *Buckley* (2 Ves. sen. 182) Lord Hardwicke says that "the case of *The New River Company* was one of so much land aquâ coopert', but there was no act of Parliament altering the nature of them, and they are forced to levy fines in all the counties through which the river runs." [Parke, B. Was there a charter at that time?] Long before that time, namely, in 17 Jac. 1. *Lord Sandys* v. *Sibthorpe* (2 Dick. 545) and *Swaine* v. *Falconer* (Show. P. C. 207) are authorities to the same effect. Analogous to these is the case of *Buckeridge* v. *Ingram* (2 Ves. 652), relative to the shares in the navigation of the river Avon. [Parke, B. Was that the case of a corporation?] It was not so. The judgment of the Court, however, did not proceed on that circumstances, or upon the stipulations and usage between the parties, but upon general principles of law. "I have no difficulty," said the Master of the Rolls, "in saying that wherever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with, or, as it is emphatically expressed by Lord Coke, exerciseable within it, it is that sort of property the law denominates real, and cannot pass by a will without three witnesses." Another case to the same effect, with reference to navigation shares, is that of **[278]** *Howse* v. *Chapman* (4 Ves. 542), and the principle of all these cases was adopted by Sir John Leach in *Ex parte the Vauxhall Bridge Company* (1 Glyn & Jac. 101). That was a question as to whether certain shares in the Vauxhall Bridge Company (then being a company incorporated), held by an individual shareholder, who afterwards became bankrupt, were within his order and disposition, and Sir John Leach held that they were real estate, and therefore did not come within that clause of the Bankrupt Act. This decision, it is true, might be incorrect, because the act of Parliament constituting the company contained an express provision that the shares should be personal estate. That clause, however, was overlooked by counsel on both sides, and the case was decided as if there was no such clause. In the subsequent case of *The Lancaster Canal Company* (Mont. & Bligh, 94) the Court came to the contrary conclusion, on the ground of the express words of the act.

Upon these authorities, it is submitted that the shares in this company are real estate. But admitting, for the sake of argument, that a fractional part of the property held by the company is personalty, are not these parts, regard being had to the nature of the undertaking, mere adjuncts to the realty? The undertaking is perpetually to supply with water. The rents to be received are to be paid in perpetuum to the undertakers. How can it signify whether some of the component parts of the under-

taking consist of personal estate? It cannot be carried into effect except through the instrumentality of real estate. [Parke, B. Does your observation as to the personalty apply to leaseholds?] There is no leasehold property. The shares, therefore, are in an undertaking constituted mainly of real estate. These shares are, by the terms of the charter and the act of Parliament, indivisible. No person is to be at liberty to convey less than one share; and if so, you can-[279]-not separate the realty from the personalty. [Parke, B. It does not follow that the law may not separate them. The clause which you allude to applies only to voluntary transfers. They are like the transfers under the Ship Registry Acts.] The aggregate of the property, even if it consist both of real and personal parts, is real. It consists chiefly of the power of laying down pipes, and of lands which have been actually purchased in fee. That property is, by the express words of the act and of the charter, held in perpetuum. If that be so, how can an individual purchasing a share in the company take any other interest than what they possess? [The Lord Chief Baron. Though the shareholders may have the profits, the corporation may have the interest in the land and not the shareholders. Parke, B. Suppose lands to have been purchased for the purpose of an undertaking, and to have been conveyed to certain parties who execute a deed of trust, upon trust to divide the surplus profits among the original subscribers; would their having the surplus profits give the original subscribers any estate in the land? It appears to me that the company are as much distinct from the proprietors of shares as one man is from another.] The plaintiff is not driven to that dilemma. The very possession of a share makes a man a member of the company. [Alderson, B. The charter says that he shall be entitled to a share in the joint stock. Upon looking back, you see what it consists of, namely, the land which they buy, and also the goods, chattels, and money. Parke, B. The corporation is separate from the members. If the stock were assigned to a third person as trustee, he would have the same interest as the corporation. All the subscribers have to do is to receive the net profits.] The trust given to the corporation by section 23 is to raise a joint stock, and "to receive the benefits and advantage of the same to the use of them the said governor and company and their successors, according to such shares and [280] proportions as they or any of them have or shall have therein." The question is, who, under this clause, is to be "the successor," in the absence of any transfer or will under the act of Parliament. The property being principally real, why should the personal representative be the successor? There would be no difficulty in holding that the party who takes the real estate takes the personal as fixtures attached to the realty. In every joint stock company the shareholder has an estate of the same nature as the company. In all the cases which have been cited that principle was taken for granted, and in the cases of real property the widow was held dowable. [The Lord Chief Baron. If a joint stock company purchase property, each individual shareholder has an interest in it, but the moment the company becomes a corporation, the corporation has the property in trust for the individuals. That proceeds on the principle that a man cannot be trustee for himself. Parke, B. The difficulty arises from confounding the corporation with the persons who take the profits: those persons have no right to any thing but the profits.] It is submitted that there is nothing to limit their right to the surplus profits. In the case of *The Lancaster Canal Company* (1 D. & C. 420; Mont. & Bligh, 113) Lord Lyndhurst says: "The persons who are shareholders are absolute holders of the entire interest in the property, whatever that is." He added that in that case the legislature had declared it to be personal estate. The clause in the Bankrupt Act, as to "order and disposition," goes upon the supposition that the shares held by individuals partake of the nature of that property which belongs to the company. Applying that principle to the present case, the shares in this company must be considered real estate, and the testator's will, not being attested by three witnesses, will not be sufficient to deprive the plaintiff of his rights. This view is corroborated by the words of the charter. The company are thereby enabled to direct the proper form [281] of conveyance, but they cannot alter the nature of the estate, or the mode of devising it. It is not said that the shareholders may transfer their shares to be held as the company shall direct, but that they may transfer their shares in such manner as may be ordered by the company, or by his or their last will and testament. That must be a will and testament executed according to law. It might be necessary, for the sake of cheapness, to give the company a power of altering the form of con-

veyance, but that reason does not apply to wills, and there was no ground for depriving this property of the ordinary protection given to real property in regard to wills. Upon the whole, there is no reason, in the present case, to give the cestui que trust a less estate than his trustee has. Primâ facie their interests are co-extensive in a court of equity; and if any distinction can be drawn on the ground that a corporation is the trustee in this case, that argument will equally apply to New River shares. With respect to them, the land is conveyed to the corporation: yet it was never said that a shareholder in that corporation had not a fee simple.

The grounds of defence stated in the pleadings are threefold: first, that the shares have since the establishment of the company been treated as personal estate; 2dly, that Sir Thomas Sewell, in a case of *Weekley* v. *Weekley*,(*a*) held that these shares were personal [282] estate; and, 3rdly, that in 1815, the plaintiff, as the representative of his father, who was a shareholder, obtained a transfer to himself of some of the shares as of personal estate. [Alderson, B. The first and third objections will not avail the defendant.] Then, upon the case of *Weekley* v. *Weekley* it may be observed that it is no where reported, nor to be found in any manuscript note. The facts of it, as far as they may be gathered from the registrar's book, are complicated and perplexed, and the [283] case seems to have been one of election, the plaintiff having accepted benefits under the will. Besides, the company were not parties to the suit, so that it is difficult to say how the Court could make such a decree in their absence.

The Attorney-General, Mr. Boteler, and Mr. Prescott White for the defendants, the Governor and Company of the Chelsea Waterworks. For 125 years these shares have been considered as personal property, and have in that character been disposed of inter vivos, and bequeathed by will. The only case of a dispute upon the point was that before Sir Thomas Sewell in 1781. If these shares were now to be considered as real estate, so as not to pass by a will unattested by three witnesses, the

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(*a*) Rolls, 5th February, 1781.

Between Jane Weekley, Spinster, Plaintiff; and Jane Arabella Weekley, Widow, Defendant.

George Weekley, by his will, dated the 22nd April, 1774, and attested only by two witnesses, devised certain real estate to the plaintiff, who was his only child, in fee, and bequeathed to her certain articles of furniture. He then "gave her also twenty shares in the Chelsea Waterworks." After giving various bequests to his relations and friends, and, among them, "to my cousin Walton ten shares of my Chelsea Waterworks;" and after devising certain real estate to the defendant, who was his wife, for life, with remainder to the plaintiff in fee, he gave to the defendant "fifty shares in the Chelsea Waterworks, for life only, and to my daughter and her heirs for ever:" and he appointed the defendant his executrix.

The testator died, entitled to eighty shares in the Chelsea Waterworks. Upon his death, the plaintiff filed the present bill, insisting that his real estate did not pass by the will, but descended on her, subject to the widow's claim of dower, and charging that the shares in the Chelsea Waterworks were to be considered as real estate and to be treated accordingly. The bill prayed (among other things) for an account of the produce of the Chelsea Waterworks shares, accrued since the testator's death, which had been received by the defendant, and that the securities for such shares might be delivered up to the plaintiff, or secured in court.

The defendant, by her answer, submitted that the Chelsea Waterworks shares were personal estate; and issue being joined, the parties went into evidence on the subject, which consisted of the act of the 8th Geo. 1; a copy of the charter of the 9th Geo. 1; copies of the transfers of eighty shares from the testator, as executor of Thomas Weekley, to John Harbutt, and from John Harbutt again to the testator; and depositions of Mr. Stainsby, a director of the Chelsea Waterworks Company, and of Mr. Bligh, their secretary, as to the nature and mode of transfer of the shares.

"The cause was heard before Sir Thomas Sewell, M. R., and the decree (among other things) declared, "that the eighty shares in the Chelsea Waterworks, in the said testator's will mentioned, are to be considered as part of his personal estate, specifically devised by his will; and that the plaintiff is entitled to twenty shares thereof; and Frances Walton, in the said will called cousin Walton, to ten shares thereof; and that the defendant is entitled to the income of fifty shares thereof for her life only, and the plaintiff to the said fifty shares after the death of the defendant."

greatest confusion and distress would arise. The correctness of the decisions on *The New River Company* and *The Bath and Avon Navigation* are not questioned. Something, however, does depend on the intention of the parties and their acts. Where real property has been purchased for partnership purposes, it is for all the purposes of the partnership personal, and passes accordingly. In the case of *The New River Company* that rule did not apply, because, by the express words of the 3 Jac. 1 and of the charter, the shares were made descendible to the heirs of the parties interested. The grant was originally made to Sir Hugh Middleton, his heirs and assigns. So, in the case of *The Bath and Avon Navigation*, it is expressly ordained that "the share of a party dying shall descend and go to the heirs and assigns of the party so dying." Upon this circumstance, and upon the usage and general understanding between the proprietors, the Master, in the case of *Buckeridge* v. *Ingram* (2 Ves. jun. 659), reported that those shares were in the nature of realty. Here the case has been directly **[284]** the contrary. It has been the invariable usage to assign the shares as personalty. In the first instance the company purchased a lease of certain lands for 99 years, and upon that land their works were erected. They held no freehold land whatever previous to the year 1729. Before that time these shares were personal. Every thing that they had was personal. In 1729, however, they purchased three acres of freehold, and from that time till 1735 they had only those three acres of freehold. Does the plaintiff mean to say that if this company have a perch of land and personal property to the amount of 500,000l., the latter is a mere schedule to the realty? In 1735 they purchased three acres, one rood more; and in 1793, six acres. These acres are no doubt realty, and are vested in the corporation. The question, however, in all these cases is, not what estate the corporation has, but what the individuals have. [The Lord Chief Baron. *The Bath and Avon case* may be left out of the question, for the Duke of Beaufort was not a corporation.] In the present case five-sixths of the property of the corporation is personal. As far as the shareholders are concerned, it is attended with all the incidents of personalty. The company was constituted with a commercial intent; that is, for supplying Westminster with water, as it might with milk or any other commodity. Certain persons were to meet together to settle plans for their own advantage, and to contract with customers; they were to raise a stock of 40,000l.; that stock was to consist of money subscribed by the shareholders, for the purposes of this commercial adventure. The shareholders had power to transfer their shares—a power which they might have exercised before a single acre was purchased. The word "heirs" is not to be found, in relation to the shareholders, either in the statute 8 Geo. 1 or in the subsequent charters; and that distinguishes this case from that of *The Bath and Avon Navigation*. [The Lord Chief Baron. In some of the older acts the word **[285]** "heirs" is used with reference to personal estate.] It is sufficient, however, for the purposes of this argument to say that according to the cases on the subject real estate purchased for commercial purposes is personal, even if the legal estate is in the shareholders; and consequently that these shares would pass under a will, and inter vivos, as personalty. The question is, whether they pass under this will? It is said that they cannot, because the will is not executed so as to pass real estate. But when the situation of the words "last will and testament" in the twenty-third section is considered, coming as they do immediately after the words, "sell, assign, and transfer," &c., it seems clear that any will or testament, of which the Ecclesiastical Court would grant probate, would satisfy the words of this charter.

Under all these circumstances, how can it successfully be contended that these shares are realty? Reference has been made to the cases in which it has been held that the occupiers of pipes are liable to rates. Under Lord Coke's definition the right of laying pipes may be a tenement, but it is only a tenement in the corporation. A share in the corporation is one thing; a tenement which is in the corporation is totally different. There is no authority for the proposition that in a mixed fund that which savours of the realty gives a character to the whole. When the corporation was originally constituted, all that they could pretend to have as savouring of the realty was the power of laying pipes. It is not stated what their interest would have been, if all the landed property had been leasehold. It is clear, therefore, when all the circumstances of the case are considered, that the property of this corporation is to be treated like that of any ordinary mercantile partnership.

The law upon this point is perfectly settled. Whatever landed property the

partnership acquires, whether freehold or leasehold, devolves in equity to the executors of **[286]** the partners: *Phillips* v. *Phillips* (1 M. & K. 649). This does not alter the nature of the property to all intents and purposes, because the partners have or had lately the power of voting at elections. That was the case with the partners in Day & Martin's house. But the law presumes that when partners lay out their money in landed property, they only intend to invest their money for partnership purposes, and when the partnership ceases the property returns to them in money. This principle is not adopted for the benefit of creditors, because, if a person trading singly buys real property, it descends to his heir, while the chattels go to his executor. The ground of the principle is the convenience of the partners themselves, and the partners may, if they please, waive the benefit of that principle by contract. If they take a conveyance of real estate in a form which shews they do not intend it to devolve to their executors, they can do so: *Balmain* v. *Shore* (9 Ves. 500). If A. & B., partners, enter the freehold property in their books as partnership property, that will be evidence to shew that by contract it is partnership property. If they enter it half as A.'s property and half as B.'s, then it is otherwise. The books speak of partners in trade, and some years ago there was a difficulty as to collieries being considered within that description; but now, if several parties take a colliery, the law considers it, whether freehold or leasehold, as partnership property: *Fereday* v. *Wightwick* (1 Russ. & Mylne, 45; Taml. 250). The observations of Sir John Leach in that case are not applicable to mines alone. Any other property in the nature of realty, as a farming lease, would come within the same rule: *Jeffereys* v. *Small* (1 Vern. 217), *Elliot* v. *Brown* (3 Swanst. 489), *Jackson* v. *Jackson* (9 Ves. 591), *Lake* v. *Wilkinson* (3 P. W. 150). The Court cannot stop short of the proposition that upon **[287]** the dissolution of a partnership carrying on a trade, and purchasing a farm as the means, the farm must be sold and the money divided between the partners. But, suppose fifty persons to be embarked in a trade, and purchasing land, and suppose the land to remain in the whole body; might they not agree that as to each particular share the executors should come in, and not the heir? Again, suppose a company incorporated to carry on a mere trading concern, and that by an act of Parliament they are authorized to purchase land to a certain extent, can it be contended that the shares do not go to the executors? Besides here the parties, from the beginning to the end of their act and charter, have bound themselves by words applicable only to personal estate. That is sufficient to make these shares personalty without any express words for that purpose. In *Jackson* v. *Jackson* (9 Ves. 591) Lord Eldon held that, from the manner of treating real property, it might by implication be considered partnership property. Here it is clear, from the acts and deeds of the parties, that this property is held for partnership purposes. That being so, the broad general rule of equity, already alluded to, must apply. That rule depends, not on any express contract between the partners, or upon any considerations as to the amount of partnership debts, but on general grounds of convenience. In *Phillips* v. *Phillips* it was contended that this was a rule for the benefit of creditors only, and that as soon as their demands were satisfied the partnership property became liable, according to its nature, to the incidents of real and personal estate respectively: but Sir John Leach, in the course of his judgment said that he considered it settled that all property, whatever might be its nature, purchased with the partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, to every intent, the quality **[288]** of personal estate; and that the principle was not to be confined to the payment of the partnership demands. [The Lord Chief Baron. You consider the holder of a Chelsea Waterworks share liable to the bankrupt laws.] This is an incorporated company, and expressly exempted from the operation of those laws; otherwise, under the more liberal construction of the bankrupt laws which now prevails, a shareholder would be so liable. The company buys the water, and manufactures it through the operation of philtres. A contract to supply water in pipes is a contract to supply goods within the meaning of the bankrupt laws: *West Middlesex Waterworks Company* v. *Suwerkropp* (4 C. & P. 87). The shareholder is a mere trader, and the real and personal property are the machines for carrying on the trade. The corporation holds them for the management of the concern, and the individual shareholders have only a right to a share of the net profits: *Ex parte Horne* (7 B. & C. 632). [Parke, B. Your argument is that the shareholder has no right to the specific profits, or to the possession of any part of the realty, but only to a share of the capital, according to

the amount of his capital subscribed.] That is the argument now submitted to the Court.

With respect to the cases which have been cited for the plaintiff, that of *The New River Company* is totally inapplicable here; the form of its act and charter, and also of the original conveyance to Sir Hugh Middleton, being expressly applicable to the transfer of real property only. [The Lord Chief Baron. It appears that the land in that case was not vested in the Corporation of London at all, but in the individuals. The corporation was incidental to the purposes of management only, and was not seized of the land. That explains the observation of Lord Hardwicke, which at first appears extraordinary, as to the pos-**[289]**-sibility of the proprietors bringing ejectments (3 Atk. 338). Parke, B. The Corporation of London took no estate, but only a power, the effect of which would be to vest the real property in the individual members.] Then, as to the *The Vauxhall Bridge Company* (1 G. & J. 101), admitting the decision of Sir John Leach to be correct, it only goes to the extent that the shares in that company are not within the clause of "order and disposition." It does not necessarily follow that they are real estate, inasmuch as leaseholds are not within that clause. Upon the whole, the present case must be governed by that of *Weekley* v. *Weekley*, which is a full, precise, and explanatory decision upon the subject.

Mr. G. Richards and Mr. Stevens, for the defendant William Brent. Considering the frame of these documents, and the mode of dealing by the company, it is not incumbent on the defendant to shew that the shares have been expressly converted into personalty; it lies on the plaintiff to shew the contrary. It is impossible to say that the proprietors could bring ejectments for their shares. The argument that the shares ought to partake of the general nature of the property is totally untenable, and, if adopted, would lead to great absurdities.

This is a trading adventure, in which the shares are personalty though existing in perpetuum. In *Lord Stafford* v. *Buckley* (2 Ves. sen. 170) Lord Hardwicke held that the mere circumstance of an annuity being charged as personalty in perpetuum would not make it in the nature of realty. This case is stronger in favour of the personal representative than are cases of that class. In that case there was nothing on the face of the instrument to shew why it should go as personalty; but here the party takes an assignment to him, his executors, administrators, and assigns, which shews, not merely a contract between him and the other **[290]** shareholders, but a personal interest in himself. But even if the shares should be considered real, it is not clear whether, under the 23rd section, the shareholder has not a right to dispose of them by a will not executed according to the Statute of Frauds. The conveyance inter vivos was not intended to be made according to the rules of law, and there is no reason to think that a will was intended to be placed on a different footing.

The plaintiff claims as heir at law of Timothy Brent, but he gives no evidence of an equitable seisin in fee. Supposing the shares to be real property, the conveyance to Timothy Brent would only pass a life estate, there being no words of inheritance.

Mr. Simpkinson, in reply. It is impossible to distinguish the nature of the property which the proprietors of this company originally acquired under the act of Geo. 1, from that of the property belonging to the New River Company. The question then is whether the nature of the property of the Chelsea Waterworks Company has ever been varied? It is clear that, unless barred by act of Parliament, or by charter under an act of Parliament, it must have remained the same. Now, what power was given by the charter to vary the nature of this property? The King is empowered to incorporate the proprietors by a certain name, and to authorize them to purchase lands in fee to a value not exceeding 1000*l.* per annum; he is also authorized to enable the corporation to make reasonable bye-laws. But that does not give the King power to alter the nature of the property, or to dispense with the Statute of Frauds. From what, then, can the inference be drawn that the nature of this property was altered? Not from the act of Parliament, which is to be regarded altogether as a private act, and which therefore cannot alter the mode of devising real estate. The case cannot be decided by mere construction, drawn, **[291]** as in the case of an ordinary partnership, from the acts of the parties and the entries in books. It is not, in fact, a trading company, for the very act on which that argument is grounded prohibits the company from trading.

Where a partnership is established for avowedly trading purposes, it is said that any lands purchased for the purpose of the trading shall be deemed mere incidents

of the partnership, and dealt with as personalty. That, however, only applies to a common trading partnership, and not to a case where the parties are severally entitled and not answerable the one for the other. Besides, supposing this to be a partnership adventure, it is not shewn that the future holders of the property are to be bound by that undertaking. Even in the case of a common partnership, after the affairs are wound up, the property, though considered for that purpose as personal property, would not necessarily retain that character in perpetuum as between the representatives of the partners. It is, therefore, not too much to say that the whole property must follow the nature of its main ingredient, which is the realty. The realty and personalty together constitute the joint stock. In regard to that stock the interest of the cestui que trusts is co-extensive with that of the trustees, although the trustees or directors manage the whole fund. [Parke, B. Then whether the property were real or personal would depend romt ime to time on the option of the directors.] Such a result, though improbable, would not be contrary to law. In *Douglas* v. *Whitteronge* (*a*)[1] a person granted a lease for land for years, and in that lease power was given to the lessee to purchase the fee at a given price, provided he elected so to do within a given time. The lessor died during the term, having made his will, by which he devised the property as real estate. The will was properly attested. Afterwards the lessee elected **[292]** to purchase; and the question arising between the devisee and personal representative of the vendor, whether this was to be considered real or personal property in the testator, the Court held that the lessee having made his election, that had relation back to the terms of the contract, and consequently that the property was personal and not real. The principle of that case, however, is not likely to require application to the present. Upon the whole, the character and objects of this company are not distinguishable from those of the New River Company. The case in Shower (*a*)[2] is expressly in point.

Jan. 18th, 1837.—ALDERSON, B., now delivered the judgment of the Court. This was a bill praying in substance that the defendant, Margaret Brent, widow and executrix of Timothy Brent deceased, may account for certain shares of the Chelsea Waterworks, and that it may be declared by the Court that the plaintiff as his heir at law became entitled to those shares, and that the other defendants, the Governor and Company of the Chelsea Waterworks, may be directed to insert in their transfer books the plaintiff's name as proprietor thereof. There is no dispute as to the facts, and the only question for the Court was whether these shares were part of the real or personal estate of the testator. If the former, the plaintiff as heir at law is entitled to the decree he prays, because the will is attested by only two witnesses; and if the latter, his bill must be dismissed.

When this question originally came before me, I thought it one of so much difficulty, and involving such extensive consequences, that I was desirous the parties should have the benefit of having the opinion of my learned brethren also; and accordingly, in conformity to the practice here (which is a peculiar advantage in the frame of the Court **[293]** of Equity in the Exchequer), I adjourned the case to be heard before the full Court. The case was, in the course of last Michaelmas Term, very fully and ably argued before Lord Abinger, my brothers Parke and Gurney, and myself, and I am now to deliver the opinion of the whole Court on the point.

The Company of the Chelsea Waterworks was originally constituted under the provisions of the statute 8 Geo. 1, 1723. By that act, certain persons named therein were constituted commissioners, undertakers, and trustees for carrying into effect the works then projected, and for afterwards maintaining them. For that purpose his Majesty was, by a subsequent clause, empowered to incorporate them, by the name of the Governor and Company of the Chelsea Waterworks. And they were to have the power of purchasing lands not exceeding 1000l. per annum, and to sell and dispose thereof at their pleasure, and to do all necessary works, and to be subject to such rules, qualifications, and appointments as his Majesty should think reasonable to be inserted in the charter. And might also be empowered to make bye-laws from time to time for the good government of the corporation.

In pursuance of this power, a charter of incorporation was granted almost immediately afterwards by George the First. That charter followed the directions of the

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(*a*)[1] 16 Ves. 253, cited; S. C. nom. *Lawes* v. *Bennett*, 1 Cox, 167.
(*a*)[2] *Swaine* v. *Falconer*, Show. P. C. 207.

statute, and gave the corporation power to purchase lands, &c., so as they did not exceed in value 1000*l.* per annum, and also estates for life or lives, and for years, and goods and chattels of what nature or value soever, for the better carrying on and effecting the purposes of the company, not exceeding the value of the joint stock of the corporation thereinafter mentioned and limited, and to be taken and computed as part thereof.

The twenty-third section empowered the corporation by subscription to raise a joint stock, not exceeding 40,000*l.*, and to manage the same from time to time, and **[294]** to receive the benefit and advantage of the same to the use of them the said governor and company and their successors, according to such shares and proportions as they or any of them have or shall have therein. And then it provided that every person subscribing and contributing any sum or sums of money should, by virtue thereof, become members of the said corporation, and should be entitled to a share or shares in such joint stock (previously fixed at 20*l.* each), equal to the sum or sums of money so by him actually contributed and paid in, and no greater; and should be enabled to sell, assign, and transfer the same or any part thereof (not being less than one whole share, as by a subsequent clause was provided), by transfers in the company's books, in such manner as should be by a general court directed, or by his last will and testament; and the person to whom such assignment or transfer, or disposition by last will and testament, should be made, should by virtue thereof become a member of the said corporation.

What, then, is the intention of the crown and legislature to be collected from all these particulars, as to the nature of the interest which each shareholder is to have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is entrusted. They have power of vesting it at their pleasure in real estate or in personal estate, limited only as to amount, and of altering from time to time the species of property which they may choose to hold; and, in order to give them greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one **[295]** decided test of this is that they belong inalienably to the corporation, whereas all the joint stock is capable expressly of being sold, exchanged, varied, or disposed of at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally entrusted, and that of the body to whose management it is entrusted: the powers that body has over it, and the purposes for which these powers are given. The property is money—the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time; and the purpose of all this is the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors.

It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments), whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body? And yet that is, in truth, this case; for the individual members of a corporation are quite as distinct from the metaphysical body called "the corporation," as any others of his Majesty's subjects are.

This case varies most materially from those which were cited in the argument. In *The New River case* the individual corporators have the property. The corporation have only the management of it. Lord Hardwicke, **[296]** in the case in Atkyns, expressly puts it on that ground. "They have the legal right," he says; "they may bring an ejectment for so much land covered with water; and the only difference between the shareholders of the king's half and the others is that the corporation of management have, as to these shares, perhaps, the legal estate in them, the equitable

estate being in the individual proprietors. In that case, too, the property given to the corporation was real property, which they are to manage for the good of all. They have no powers of converting it into any other sort of property, but must keep it and make a profit from it as it is, viz.: as real property.

The same observations apply to *Buckeridge* v. *Ingram* (the Avon Navigation) with this addition, that there the undertakers do not appear to have been a corporation at all, and in both the shares are transferred to the shareholders and their heirs. But here the case is wholly different—the property entrusted is money; the corporation may do what they like with it, and may obtain their profit in any way they please from the employment of their capital stock. If they thought that they could with greater profit supply water by conveying it in carts or the like, they would have a perfect right so to do. It would be strange that the nature of these shares should continually fluctuate, and be sometimes real estate and sometimes personal, according as the corporation in the course of their management should choose to hold real or personal property. Suppose a man made his will attested by two persons, and at a time when the corporation held only personal estate. It is good. He becomes lunatic or is incapable from age, and then real property is bought by the corporation. Is his will to be set aside? And yet he cannot make another.

Then, in what way has this property always been treated. If we look to the wording of the charter, the **[297]** language is much more suitable to personal than to real estate. Indeed, on the latter supposition, it is very inaccurate. Again, the form of transfer appointed by the legislature (for that which is done under the provisions of the charter is, in fact, done by the legislature, and is, indeed, subsequently recognised by it), is applicable to personal estate only. These shares are not transferred to A. B. and his heirs, but A. B., his executors, administrators, and assigns, and so they have always been. This form, indeed, may be considered as almost a contemporary exposition of the law on this point.

Lastly, in *Weekley* v. *Weekley*, this point came expressly under the consideration of Sir Thomas Sewell, Master of the Rolls, and he decided that these shares were personal property.

Upon the whole, therefore, we think that the principles of law, the usage of the company, and the distinct authority of one decided case, are sufficient to warrant us in coming to the conclusion that these shares are personal property.

The result is that the bill must be dismissed with costs.

Decree accordingly.

STEPHENS *v.* FROST. July 9th, 1837.—A party who files his bill to obtain the benefit of an interest accruing by intestacy, must not only make the personal representative of the intestate a party to the suit, but must charge that in fact there was a surplus of the intestate's estate after payment of all debts and incumbrances.—Where, after demurrer allowed for want of parties, the plaintiff is permitted to amend by adding parties, he is likewise permitted to amend by charging all such matters as constitute the equity of the case against the new defendant.—A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of 21 years, and in the mean time to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and, upon his attaining the age of 21 years, upon trust to assign the said premises, together with the lease and the accumulations of rents, unto the said son, his executors, &c., for the remainder of the term: Held, that the son took a vested interest in the lease, and that, upon his death under 21, it passed to his personal representative.—Demurrer, under circumstances, allowed to amended bill, after answer to original bill.

[S. C. 6 L. J. Ex. Eq. 41.]

The bill stated that by an indenture of lease, dated in May, 1815, a certain piece of ground, situate near Lucas Street, in the parish of Saint George in the East, and four messuages situate in that street, were demised to John Barker, his executors, &c., for a term of 76 years; and that by an indenture dated the 1st of November, 1828,

[298] and made between the said John Barker, of the one part, and the defendant Pownall of the other part, the premises comprised in the said indenture of lease were assigned by the said John Barker to the said Pownall, his executors, &c., for the residue of the said term, in trust for Thomas William Barker (since deceased), the son of the said John Barker, until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof, in trust to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same to and towards the maintenance, education, clothing, and support of the said Thomas William Barker during his minority; and upon the said Thomas William Barker attaining the age of twenty-one years, upon trust to assign the said premises, together with the said indenture of lease, and the accumulations of the rents and profits thereof (if any) unto the said Thomas William Barker, his executors, administrators, or assigns, absolutely, for all the remainder of the aforesaid term which should be then unexpired.

The bill then proceeded to state that notwithstanding the aforesaid assignment, the said John Barker continued in the possession or receipt of the rents and profits of the said premises therein comprised, and he continued to be the ostensible proprietor and owner thereof until he made such assignment thereof as hereinafter mentioned to his son-in-law, the defendant Frost; that the said Thomas William Barker had departed this life intestate and unmarried; that in September, 1833, the plaintiff brought his action and obtained a verdict against John Barker for a libel, and that John Barker was afterwards charged in execution at the suit of the plaintiff for costs and damages amounting to the sum of 300l. 10s., and was committed to the Fleet; that when the verdict was obtained, John Barker was in insolvent circumstances, and that with a view of [299] defeating the plaintiff's execution, and the just claims of his other creditors, and of obtaining his discharge under the Insolvent Act, he voluntarily proposed to execute to Frost an assignment of the premises contained in the lease, and that accordingly, by an indenture of assignment which was prepared by Pownall, dated the 8th of January, 1834, and made between Pownall, of the first part, John Barker, of the second part, and Frost of the third part, Pownall, in consideration of 200l. expressed to be paid by Frost to John Barker, and by the direction of John Barker, assigned to Frost, his executors, &c., the premises comprised in the indenture of lease, to hold &c., for the residue of the term.

The bill then stated that soon after the execution of the last-mentioned assignment, John Barker petitioned to be discharged under the Insolvent Act; that the plaintiff opposed his discharge, on the ground of fraud practised in executing that deed; that accordingly the Court remanded the prisoner to custody, and appointed the plaintiff his assignee. The bill then, after charging that the assignment to Frost was made by the insolvent voluntarily and without pressure, and that the same was in fraud of the plaintiff's rights, prayed a declaration to that effect, and that the defendant Pownall might be declared to be a trustee for the plaintiff of the premises comprised in the indenture of November, 1828, and also that the defendants Frost and Pownall might re-assign the premises, and deliver up possession of them to the plaintiff, &c.

It did not appear by the bill when Thomas William Barker died, or whether he died before or after the assignment to Frost.

To this bill the defendant Pownall demurred, first, for want of equity, and secondly, because the legal personal representative of Thomas William Barker was not made a party to the suit.

[300] Mr. Chandless, for the demurrer. Admitting that the assignment to Frost was void against the plaintiff, on the supposition that the insolvent had an interest in the premises at that time, the bill does not shew that he had any such interest. Under the indenture of November, 1828, the son took an absolute interest, and that deed is not impeached. Then how is it shewn by the bill that upon the son's death the property came back to the insolvent? It is alleged, indeed, that the son died intestate, and that thereupon all his interest became vested in the insolvent, and passed to the assignee. That allegation might be sufficient by way of defence, but it is not a sufficient mode of stating a plaintiff's interest: *Walburne* v. *Ingleby* (1 M. & K. 61). However, the deed of assignment to Frost is not void; for the party having the legal interest joined in the assignment. Upon the second ground of demurrer it is clear

that the son's administrator ought to have been a party to the suit. The Court will not administer his assets to the prejudice of his widow or creditors.

Mr. Simpkinson and Mr. Keene, for the bill. Barker, the father, was the next of kin to his son, and was therefore entitled to the beneficial interest (if any) which his son had in the lease. [The Lord Chief Baron. Suppose the son left creditors.] The person entitled to the administration is the next of kin. [The Lord Chief Baron. I cannot take notice of that.] At all events, that is only a defect for want of parties. The defendant cannot insist that the plaintiff has no equity under the deed of November, 1828, to which the defendant himself was a party, and under which he became trustee for the son. Neither can he set up the subsequent deed of assignment to Frost, which was clearly fraudulent, and void against the plaintiff. His joining in that transaction while he was a trustee for the son was an act of fraud. [The Lord Chief Baron. No doubt, **[301]** upon the statement in the bill, the deed is void. A deed, even under the statute of Elizabeth, would not be the less void because the trustee joined in conveying the legal estate.] That being so, the defendant is remitted to his former estate under the deed of November, 1828, and is a trustee for the plaintiff.

Mr. Chandless having replied,

Some discussion took place as to the extent to which the bill might be amended, in case the demurrer were allowed. It was insisted, on the one hand, that the practice in this Court ought to follow that of the Court of Chancery, where, after the allowance of the demurrer, the plaintiff is not at liberty to amend except by adding parties; that in this case liberty to amend by merely adding parties would not cure the defects of the bill, as it must still be shewn that there was a beneficial surplus after payment of the intestate's debts, and consequently that no liberty to amend ought to be granted. On the other side it was contended that when a plaintiff is allowed to introduce new parties, he is allowed to introduce proper charges in relation to those parties.

THE LORD CHIEF BARON. My difficulty is this. The equity which the plaintiff seeks against Pownall is that he may be declared a trustee for the plaintiff. But he cannot be a trustee unless certain facts, which do not appear upon the bill, are established, namely, that Barker, the son, died without leaving any debts, or without having encumbered his title or disposed of his equitable interest. For all that comes to the father would be the surplus, after satisfaction of all charges upon the property made by the son. It ought, therefore, to appear upon the bill that the son did not part with or mortgage his equitable interest. The plaintiff would then have an equity apparent **[302]** on the face of the bill to make Pownall his trustee. It is said that he can only be allowed to amend his bill by adding parties; but if I give him leave to amend in that particular, he cannot do so to any effectual purpose without stating all these things. He must shew an equity against the party whom he makes defendant.

There is no doubt as to the propriety of the demurrer. The defendant cannot be the plaintiff's trustee unless the plaintiff shew that the father in fact, as well as by possibility, had an interest in these premises.

Demurrer allowed, with liberty to the plaintiff to amend upon payment of the defendant's costs of the demurrer.

Dec. 8th.—The plaintiff amended his bill by introducing statements and charges to the following effect:—That at the date of the assignment to Frost, T. W. Barker was of the age of seventeen years or thereabouts, and that he departed this life on or about the 6th May, 1831, under the age of twenty-one years; and that thereupon the beneficial interest in the leasehold premises resulted to and became vested in John Barker. That, although the beneficial interest in the leasehold premises resulted, as before mentioned, and it is so recited in the assignment to Frost, yet it is sometimes alleged by the defendants, or one of them, that the said T. W. Barker took a vested interest in the premises, by virtue of the assignment of the 1st November, 1828, and at times it is also insisted by the defendants, or one of them, that the defendant Pownall, in whom the legal estate of the said premises became vested, by virtue of such assignment, is a trustee thereof for the legal personal repre-**[303]**-sentative of the said T. W. Barker, who, it is also alleged by the defendants or one of them, is a necessary party to this suit; whereas the plaintiff charges that no one has yet taken

out administration to the said T. W. Barker, so that the plaintiff is at present unable to make the personal representative of the said T. W. Barker a party to this suit. And plaintiff charges and insists that under the circumstances of this case the said defendant, C. E. Pownall, is and ought to be declared a trustee for the plaintiff, as such assignee as aforesaid of the legal estate of the said leasehold premises.

To the bill so amended (see 4 Sim. 485) the defendants Frost and Pownall severally demurred: first, for want of equity, and, secondly, because the personal representative of T. W. Barker was not before the Court.

Mr. Chandless, for the defendant Frost. Barker, the son, took a vested interest under the deed of November, 1828. It will be said that that deed was only to take effect in the event of his attaining twenty-one. It is clear, however, that he had an immediate interest under the deed, although, previously to his attaining twenty-one, the trustee had a discretionary interest in applying the profits to his maintenance. By this deed the trusts are declared of the whole equitable interest, and no express trust is declared for Barker the father. He might have inserted a limitation to himself if he pleased, but he has not done so, and with good reason; for if he had, and Barker the son had married and left children, and died under twenty-one, the children would have been unprovided for. The same argument applies, if this be considered a resulting trust for Barker the father. There is no case in which the construction has been put upon a trust of this nature contained in a deed, though there are a variety of cases relating to such trusts under a will. But trust deeds of this **[304]** sort are looked at with the same indulgence as wills: *Sheldon* v. *Dormer* (2 Vern. 310). In regard to wills, there are two classes of cases, involving trusts of this sort, and in which it has been held that the party, though dying under twenty-one, takes an immediate vested interest. The first class is where real estate is devised to a party "when" he shall attain, or "upon" his attaining twenty-one: *Boraston's case* (3 Rep. 19 a.), *Doe d. Hunt* v. *Moore* (14 East, 601) (which goes further than *Boraston's case*, there being no devise of the immediate interest); *Bromfield* v. *Crowder* (1 N. R. 313), *Doe d. Roake* v. *Nowell* (1 M. & S. 327), *Goodtitle d. Hayward* v. *Whitby* (1 Burr. 228), *Stanley* v. *Stanley* (16 Ves. 491). The other class is where a legacy is bequeathed to a person at twenty-one, and the interest is bequeathed to him, or a trustee is appointed for him in the meantime: *Hanson* v. *Graham* (6 Ves. 239), *Murray* v. *Addenbrook*.(*i*)

The other ground of demurrer is that there is no personal representative of Thomas William Barker before the Court, and no allegation of a surplus owing to the plaintiff after payment of the intestate's debts. The question on the construction of the deed could not be decided in the absence of the personal representative, and therefore, as an excuse for not making him a party, the plaintiff alleges that no one has yet taken out administration of his **[305]** effects. That, however, is not a sufficient allegation: *Cawthorne* v. *Chalie* (2 S. & S. 127).

Mr. G. Richards, for the defendant Pownall. The cases which have been cited apply. T. W. Barker took a vested interest under the deed of November, 1828, although he died before he came into possession. Upon the construction of that deed, the child being a minor, the trustee has the disposition of the rents and profits for his benefit, until he attains twenty-one, and then the care and management of the property is to be his. Suppose the same provision had been made for a girl, who might probably have married under twenty-one, would it have been contended, in case of her dying under that age leaving issue, that the issue were not to take? Yet that argument would hold, if the construction relied on by the plaintiff is correct. *Edwards* v. *Symons* (2 Marsh. 24; 6 Taunt. 213), *Doe d. Wheedon* v. *Lea* (3 T. R. 41).

To meet the other ground of demurrer the plaintiff alleges that, no administration having been granted, he is unable to make Thomas William Barker's representative a party. But by applying to the Ecclesiastical Court he might have remedied

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(*i*) 4 Russ. 407. Legacy to A. and B. "when" they shall attain twenty-one, share and share alike; "and I appoint C., the father, in trust for the same, and trustee for them during their minority;" and in case of the death of either, the survivor to take the whole; and in case they both die in their minority, then over: A. and B. take a present vested interest: *Branstrom* v. *Wilkinson*, 7 Ves. 421. So where legacies were given to children, "provided" they attained twenty-one, with an appointment of trustees and guardians to see to their education: *Mills* v. *Robarts*, 1 Russ. & Mylne, 555. And see *Judd* v. *Judd*, 3 Sim. 525; *Hunter* v. *Judd*, 4 Sim. 455.

that defect. If a plaintiff, so situated, is not the next of kin, he must cite the next of kin. If they do not appear, he must himself procure letters of administration. Here the party is himself the representative of the next of kin of the deceased, and might have taken out letters of administration.

It is said that the deed of assignment to Frost is fraudulent and void. But there is no allegation that Pownall had notice of the fraud, and he was therefore bound to convey as directed by his cestui que trust. That being so, the legal estate is vested in Frost, and whether it is vested for Frost's benefit, or in trust for the plaintiff, is a matter of **[306]** indifference to Pownall, and he ought not to have been made a party to the suit.

Mr. Simpkinson and Mr. Keene, for the bill. This is an amended bill, and the amendments principally consist of a statement that Thomas William Barker died under twenty-one, intestate, and that no one has taken out administration of his effects. To that amended bill, both as regards relief and discovery, the defendant Frost has put in a general demurrer, although to the original bill he put in a full answer. It is clear that if a party demurs to a bill, and answers any part which is covered by the demurrer, the answer overrules the demurrer. The same principle applies in a case like the present, where the amendments are so trifling that the defendant, in effect, both answers and demurs to the same bill: *Hilliard* v. *White* (Mitf. Pl. 3rd ed. 242), *Spurrier* v. *Fitzgerald* (6 Ves. 548), *Atkinson* v. *Hanway* (1 Cox, 360), *Bosanquet* v. *Marsham* (4 Sim. 573). If the plaintiff had made a totally different case by his amended bill, the defendant's right to demur to the amended bill could not have been disputed; but here the relief sought by both bills is the same, and the facts stated are substantially the same.

Proceeding, however, to the main ground of the demurrer, the first question is, whether the defendants are not estopped from disputing the plaintiff's title? All the title which the defendant Frost possesses is derived from the deed of assignment, and that deed expressly recites that Barker, the father, took by way of resulting trust. The present bill impeaches this deed for fraud in the defendant Frost. Then, can he turn round and say—It is true I committed the fraud complained of, but you in fact had no title to the premises, and although under that deed alone I am in possession, yet I insist that you cannot set it up against me? When a transaction between A. & B. is impeached for fraud alleged to have been committed by **[307]** B., the Court will not go into the question whether A. had good title. The only question will be fraud or no fraud. It would seem, therefore, that as between the defendant and the plaintiff, this consideration of estoppel alone is fatal to the demurrer. To meet the question, however, upon the ground of construction, it is difficult to say how the cases upon wills have any reference to that of a deed. Besides, in none of those cases were the words in question precisely similar to the present. Here the word used is "upon"; there the vesting was to take place "when" and "as" the individual had attained twenty-one. The word "upon" in a will imports a condition precedent, unless there be any thing in other parts of the will repugnant to that construction. Suppose an estate is given to A. till B. returns from Rome, and when B. returns, then to C., can it be contended that before B. returns from Rome the estate vests in C.? [The Lord Chief Baron. But suppose it is given to trustees upon trust to give him the rents and profits till he returns from Rome, and when he returns to give it to him absolutely.] In *Spencer* v. *Chase* (9 Mod. 30) a father devised lands to trustees and their heirs until his son should come of the age of twenty-five years, and then in trust for him and the heirs of his body, remainder to the right heirs of the father; and the Court was of opinion that the son had no vested interest until twenty-five. That case is scarcely distinguishable from the present. [The Lord Chief Baron. In that case the decree was inconsistent with the dictum.] At all events, there is no case upon a deed which has any bearing upon the present, except that of *Campbell* v. *Prescott* (15 Ves. 500), and there it was held that the shares did not vest. It was a case of personalty only, but the principle of that case will equally apply to realty. In *Edwards* v. *Symons* and *Doe* v. *Lea* there were limitations over after the devise to the children which distinguishes those cases from the present.

[308] Then, as to the objection for want of parties. [The Lord Chief Baron. You consider the demurrer for want of parties, to be matter of form; but, in fact it involves the other question: for there can be no want of parties here, unless the estate was vested in the son.] Under any circumstances the objection cannot be taken by

demurrer after having been taken by answer. The bill has been amended, by stating that T. W. Barker died under twenty-one, intestate; but that does not vary the merits of the answer. Therefore the answer overrules the demurrer. Besides, in a case like this, the plaintiff was not bound to take expensive proceedings to cite the next of kin; 2 Madd. Ch. Pr., chap. 7; *Bowyer* v. *Covert* (1 Vern. 95).

Mr. Chandless, in reply, being called upon to address himself to the sole question, whether Frost's demurrer was overruled by his answer to the original bill, contended that, as every matter relating to T. W. Barker had been omitted in the original bill, the amended bill brought forward substantially a new case.

THE LORD CHIEF BARON. It appears to me that the question turns upon the construction of the deed of assignment to Frost. If his answer to the original bill had been put in as a defence to the same case which now appears upon the record, I should have thought, both upon principle and authority, that his present demurrer came too late. But it appears that the original bill was founded on a different case from that which is now put forward, not giving rise at all to this objection as to the nature of the son's interest, and therefore the defendant has a clear right to meet the new matter introduced either by demurrer or plea. Here the amended bill discloses the very objection, the omission of which precluded the defendant from de-**[309]**-murring to the former bill, and therefore I think that his demurrer is not inconsistent with his original answer. That puts both his pleadings in the same predicament; and the question now is whether all the proper parties are before the Court. That question turns upon the construction of the deed, under which it is supposed that Barker, the father, can claim a resulting trust.

It appears to me that it will be less expensive to the parties to decide this question now, as my opinion is strong upon it, than to reserve it for the opinion of the full Court or of a court of law. My opinion is that the father took no resulting trust under this deed, but that this was a vested interest in the son; and consequently that the son's personal representative must be before the Court to enable the Court to make a decree; and that the want of parties in this respect is not a mere defect in form. The bill states that the son died intestate and unmarried, but it does not proceed to say that he did not contract such debts as his personal representative would be called upon to pay; therefore such representative, not being bound by proceedings in a suit in which he was not present, might afterwards open the decree by taking out administration for the purpose of paying the creditors. The decree in this suit would not affect such a proceeding; and, therefore, supposing the son to have taken a vested interest under the deed, the absence of his personal representative would be a good ground for demurrer. Now, as to the deed, it is quite clear that this was an absolute assignment to trustees for the benefit of the young man during his minority and that the legal estate was to be transferred to him at twenty-one. If there is any difference between a deed and a will in cases where the instrument admits of two constructions, the deed is to be taken the more strongly against the grantor. Here the father makes an absolute provision for the son, but does not enable the son to contract in relation to the property till he arrives at twenty-one, at which period **[310]** the trustees are to convey to him the legal estate. Suppose they do not convey it to him at twenty-one, they would apply the rents and profits according to his direction, even if he did not call for a conveyance till he was forty. It would be a continuance of the equitable estate. The purpose was that it should be vested in him. If he had married and had children, the trustees would have held it for his children. Upon these grounds, I think that the personal representative of the son ought to appear. It is very true that upon either construction of the deed the father would ultimately take the son's interest, and it may be probable that in either case the plaintiff would have the same benefit. But it appears to me that if he claims through a personal representative of the son, as I think he must, he ought either to clothe himself in that character, or at all events make the personal representative a party to the suit. The demurrer must be allowed; but I shall give the plaintiff liberty to amend by adding parties.

Demurrer allowed.

ANONYMOUS. 1836.—A general answer, if it include an answer to all the particular charges, is sufficient.

[S. C. 6 L. J. Ex. Eq. 80.]

In a bill filed by occupiers against a rector to establish a modus, one of the interrogatories was, "And whether the said defendant hath not now, or whether he had not at some time, and when, in his possession, custody, or power," four books, which were specified in the bill.

The defendant denied that he had in his possession, custody, or power, the four books in the bill mentioned, or that he had then or ever had had any books relating to the matters inquired after by the bill, save and except those which he had set forth in the schedule to his answer. He then annexed to his answer a schedule of books.

[311] An exception having been taken to the answer for insufficiency,

Mr. Walker, for the exception, contended that an answer to a general charge, though it include an answer to a particular charge, is insufficient. He cited *Wharton* v. *Wharton* (1 S. & S. 235).

Mr. Duckworth, contrà.

Per Curiam. The defendant says, first, I have not the four books you mention: secondly, I have set forth in a schedule all the books I have, and, excepting what I have there set forth, I never had any books. The proposition of Sir John Leach, in *Wharton* v. *Wharton*, is too general. Dolus latet in generalibus in some cases, but not in all. The opinion of a Judge on grammar is not of so much force as his opinion upon law.

Exception overruled.

THOMPSON *v.* HODGSON. July 4th, 1836.—Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the Master's clerk.

[S. C. nomine *Thompson* v. *Dodgson*, 6 L. J. Ex. Eq. 80.]

Mr. Wray moved that the sale in this cause might be conducted by an auctioneer, in the country to be approved by the Master. He said that the estate was insolvent, and that it was advisable to avoid the expense of sending the Master's clerk into the country.

Motion granted.

[312] JONES *v.* THOMAS. July 9th, 1836.—Papers and documents produced by the defendant for the plaintiff's inspection, ordered, upon motion before hearing, to be re-delivered to the defendant, the plaintiff having had full opportunity to inspect them.

[S. C. 6 L. J. Ex. Eq. 312.]

Mr. Metcalfe moved, before hearing, for the re-delivery of certain letters and other documents, which had been left with the defendant's clerk in Court, under the usual order for production. That order was dated the 23rd January, 1828, since which time the plaintiff had had every opportunity of inspecting them. The object of the present motion was that those letters and documents might be produced on a commission to examine witnesses; the defendant undertaking to return them on the return of the commission.

Mr. Roupell, for the plaintiff, opposed the motion, on the ground that the usual order for production implied an order for the safe custody of the papers. He likewise contended that the circumstance of the plaintiff's having had ample time to inspect these documents was not a sufficient reason for granting this motion, as they might be wanted on the trial of the action to which this cause related.

THE LORD CHIEF BARON. The usual order for production of papers and documents is for the purpose of inspection, and not of safe custody. As to the other objection, it may be true that the papers might be wanted on the trial of the action, but I must not assume facts for the purpose of depriving a party of his documents.

He ought to have them back again unless any thing special is shewn to the contrary. He offers to bring them back again on the return of the commission.

Motion granted.

[313] GREGORY *v.* GREGORY. Nov. 8th, Dec. 12th, 1836.—Testator having devised a real estate to his three executors upon trust, to sell and apply the produce of the sale as part of his personalty, and having given to one of his executors an option to purchase the estate at a certain price, the two other executors conveyed it to him and joined in a receipt for the purchase money. The purchase money was, in fact, not paid, and afterwards the third executor became bankrupt: Held, that the two other executors were answerable to the residuary legatee for the deficiency.

[S. C. 6 L. J. Ex. Eq. 52. See 4 Y. & C. Ex. 571.]

James Gregory, the elder, by his will, after directing the payment of his just debts, gave, devised, and bequeathed unto his nephew John Gregory, his son James Gregory, and his son-in-law James Pollit, all those his two closes or parcels of land called the Checkers, otherwise Pilkington Fields, then in his own occupation, and also all and singular his stock, utensils in trade, household goods and furniture, and other personal estate and effects whatsoever and wheresoever, to hold the same unto the said John Gregory, James Gregory the son, and James Pollit, their heirs, executors, &c., upon trust, that they, or the survivors or survivor of them, or the heirs, executors, &c. of such survivor, should absolutely sell and dispose of the said two fields, stock, and other effects and premises, and by and out of the proceeds of the sales pay or retain to his said son James Gregory, and to his daughter Ann, the wife of the said James Pollit, 1000l. a piece, which he gave and bequeathed to them accordingly. And after payment of those legacies the testator bequeathed all the residue of the money to arise from the sales aforesaid, and of all his estate and effects whatsoever, unto his said son and daughter, and unto his grandson James, the son of his late brother John Gregory, their respective executors, administrators, and assigns, to be equally divided amongst them, share and share alike as tenants in common. The testator then provided, that in case his said grandson should die under twenty-one, without leaving issue, then his share of the residue should go to the other residuary legatees. Provided also, and it was the testator's express will, mind, and direction, that in the sales of the said two closes, his said son James Gregory, his heirs and assigns, should have the option of taking the same at the price or sum of 700l., and no more, if they should think proper. **[314]** And the testator appointed the said John Gregory, James Gregory the son, and James Pollit to be his executors.

The testator died in December, 1804, without revoking his will, leaving the several parties named in it surviving him. The three executors proved the will, but the entire management of the testator's property was left to James Gregory, the son, who immediately upon the testator's death took possession of the personal estate, and received the rents and profits of the real estate, and paid the testator's debts. He likewise elected to purchase the two closes, upon the terms mentioned in the testator's will, and accordingly that property was conveyed to him in indentures of lease and release, dated in January, 1808, which were executed by John Gregory and Pollit. That conveyance was expressed to be made in consideration of 700l., paid by James Gregory the son, and a receipt for the purchase-money was endorsed on the deed, and signed by John Gregory and Pollit. In fact, however, no part of the purchase-money was ever paid by James Gregory the son, and in 1816 he became bankrupt.

The present bill was filed by James Gregory the grandson, against the executors and the assignees of James Gregory the son, praying a general account of the testator's estate, and, if necessary, that the defendants, John Gregory and Pollit, might be personally charged with the sum of 700l., and interest thereon.

The defendants, John Gregory and Pollit, by their answer, admitted that they had executed a deed, which they believed to be a conveyance of the closes in question to James Gregory the son, and that they had joined in a receipt for the purchase-money. But they said that they had done this merely for conformity as trustees, and that they had never interfered with or received any part of the testator's estate.

The question was whether, under these circumstances, **[315]** they were to be

made answerable for the non-payment of the purchase-money by James Gregory the younger?

Mr. James Russell, for the plaintiff.

Mr. Koe and Mr. Girdlestone, for the several defendants.

Dec. 12th.—ALDERSON, B. In this case the only question is whether I should direct in my decree that John Gregory and James Pollit, the trustees under the will of James Gregory, the elder, should be charged with the sum of 700l. and interest, which it is contended they ought to have received from James Gregory, the son, their co-trustee; and whether I should further direct an inquiry as to what other sums have been lost to the estate by their wilful default.

These parties were two of the three executors under the will of James Gregory the elder. That will contained a clause expressly giving an option to James Gregory, the son, the third executor, to purchase for the sum of 700l. certain closes, which had been devised to the executors in trust to be sold for the general purposes of the will. James Gregory, the son, availed himself of this option, and a conveyance was accordingly, in January, 1808, executed by John Gregory and James Pollit to James Gregory, the son, of the lands in question; and on the back of the conveyance they both signed a receipt for the purchase-money. Now, in fact, neither of them received it, but it remained unpaid by James Gregory, jun., who became a bankrupt in 1816.

It is contended that in this case the parties are trustees, not executors, and that the rule as to their liability stands on different grounds from that of executors. In the case of executors, if they join in the receipt of money which may be lawfully received by each, the better opi-**[316]**-nion is that they are all liable, seeing that the receipt must in that case be reasonably taken to amount to an admission, by each, of his having an actual controul over the money received. It is not worth while to canvass the law on this subject minutely, or to discuss the exceptions, some of which may be found in the books, to the above rule. But the case of trustees who join in receiving for conformity is different. There, those only are chargeable by whom the money was actually received. But both executors and trustees are liable for breaches of trust or for gross neglect. The principles are fully stated by Lord Thurlow in *Sadler* v. *Hobbs* (2 Br. C. C. 114) and by Lord Eldon in *Brice* v. *Stokes* (11 Ves. jun. 324).

Now here James Gregory, the son, could only lawfully possess himself of the estate, by availing himself of the conditional option given by the will. The duty of the others, whether co-executors or co-trustees, was to see that that condition was performed by him. Without that they ought not to have conveyed at all. Having conveyed, and having affirmed by signing the receipt that they had performed their duty in that respect, I think they must be taken to have received the money, and that it does not lie in their mouths to say that they have committed a breach of duty in leaving the money in the hands of their co-trustee, the purchaser of the estate.

Lord Redesdale, in *Joy* v. *Campbell* (1 Sch. & Lef. 341), speaking of the case of executors, lays it down that the true question is whether the receipt purports that the money was under the controul of both executors, and if so, the one who did not receive it is still responsible as if he had. That principle is also applicable to this case. Here the receipt purports that the money, as it ought to be, was under the controul of John Gregory and James Pollit, and, there-**[317]**-fore, makes them responsible. If, indeed, one of them had received the money, the case would have been different as to the other who had not received it. But here, neither of them having received it, I am of opinion that both have been guilty of a breach of duty, and that both are liable to make good the loss arising therefrom. I propose, therefore, to add to my decree a direction to the Master to inquire whether these things are so, and if he finds the facts as above suggested, to charge these parties with the receipt of 700l., and with interest at 4l. per cent. But I do not think it necessary to direct him to charge them with any other sums beyond those which they may have actually received.

Decree accordingly.

MABER *v.* HOBBS. Nov. 8th, Dec. 12th, 1836.—E. B., a single woman, transferred certain stock, her property, into the joint names of herself and two trustees; and on the day of the transfer, she and the trustees, without reference to any

marriage on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust, to pay the dividends to E. B. for her life, for her sole and separate use, independent of any husband whom she might marry; and, after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint; and, in default of such appointment, in trust for E. B., her executors, administrators, and assigns. E. B. afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband: Held that, whether or not under the deed of settlement the wife had power, as against her husband, to make this assignment, the joining the husband in the deed of assignment was a confirmation of the deed of settlement, and consequently that the assignment by the wife was valid.—Quære, whether, notwithstanding the case of *Davies* v. *Thornycroft*, 6 Sim. 420, a trust for the separate use of a single woman is valid against an after-taken husband? The 54th and 56th sections of stat. 6 Geo. 4, c. 16, are not confined to mere personal obligations by the surety, but are applicable to cases where the property of the surety is assigned as a collateral security for the debt of the principal.—Where the whole consideration money is paid to the grantor of an annuity, and out of that money the attorney immediately receives from the grantor the amount of his bill of costs, this is not an illegal retainer within the Annuity Acts.

[S. C. 6 L. J. Ex. Eq. 12. For former proceedings see 1 Y. & C. Ex. 585.]

Elizabeth Brook, spinster, transferred two several of 800l. new 3l. 10s. per cent. Bank Annuities, and 21l. Long Annuities, her property, into the names of herself and of John Wood Wilkes and Henry Frederick Gray, in the books of the Governor and Company of the Bank of England, and by an indenture of settlement, bearing date the 9th of April, 1828, which was the day of the transfer, **[318]** and made between herself of the one part, and the said J. W. Wilkes and H. F. Gray of the other part, it was declared that the said J. W. Wilkes and H. F. Gray, their executors and administrators, should stand possessed of the said two sums of stock, and the dividends and annual produce thereof, upon trust, to permit the said dividends and annual produce to be received by, or otherwise to pay the same into the hands of the said Elizabeth Brook during her life, for her sole and separate use, independent of any husband with whom she might intermarry, and so as the same should not be subjected to his debts, controul, or engagements; and her receipt only, or the receipt of any person or persons whom she might from time to time appoint to receive the same, was to be an effectual release and discharge for the said dividends, &c. And immediately after her death, upon trust, that the said trustees, and the survivor of them, his executors and administrators, should stand possessed of, and interested in, the said Bank and Long Annuities, upon and for such trusts, intents, and purposes as the said Elizabeth Brook should, notwithstanding her coverture, by her last will and testament, to be executed as therein mentioned, direct or appoint; and for want of such direction or appointment, in trust for the said Elizabeth Brook, her executors, administrators, and assigns.

After the execution of this deed, a marriage took place between Elizabeth Brook and the defendant John William Hobbs; but it did not appear that the deed had been made in contemplation of that or any other marriage.

Soon after the marriage the husband, being in want of money, applied to the plaintiff for an advance of 300l. This was agreed to in consideration of an annuity of 27l. for certain lives, to be secured by the covenant of the husband, and by the appointment and assignment of the wife of the dividends of the stock during the lives for which the annuity should be payable. The plaintiff ac-**[319]**-cordingly paid the consideration money into the hands of Mrs. Hobbs, who immediately handed it over to her husband. The latter then paid out of it 45l. to the solicitor for his bill of costs.

The annuity deed, which was executed by Hobbs and his wife of the one part, and the plaintiff of the other part, after reciting the transfer of the stock into the names of Mrs. Hobbs (then Elizabeth Brook) and her trustees, and likewise the deed of trust, witnessed that, in consideration of the sum of 300l. paid as thereinafter mentioned, the said J. W. Hobbs granted, bargained, sold, and confirmed unto the plaintiff, his executors, administrators, and assigns, one annuity or clear yearly sum of 27l., to have,

hold, receive, and take the same, unto the plaintiff, his executors, administrators, and assigns, during the lives of Hobbs and his wife, and the plaintiff and other persons named in the deed. And it was further witnessed that, in consideration of the sum of 300l. to the said Elizabeth Hobbs, in her own proper person, in hand paid by plaintiff, the said J. W. Hobbs did covenant with plaintiff for the payment to him, his executors, administrators, and assigns, of the said annuity, by half-yearly payments on the days therein mentioned. And it was further witnessed that for securing the due payment of the annuity, the said Elizabeth Hobbs, in the exercise of the power or authority given to or vested in her by the indenture of settlement, and of all and every other powers and authorities, and with the consent and approbation of her said husband, did direct and appoint, bargain, sell, and assign unto the plaintiff, his executors, &c., all the interest, dividends, and annual produce to arise and become payable during the lives aforesaid, for or in respect of the said two sums of stock vested in the names of the before named trustees, upon the trusts of the said settlement; and all right, title, &c. of her, the said Elizabeth Hobbs, of, in, to, or out of the said dividends, interest, and annual proceeds, and every part thereof, or of, in, to, **[320]** or out of any other estate, monies, stocks, funds, and securities, which the said Elizabeth Hobbs might or should thereafter have, take, or be entitled to, under or by virtue of the said indenture of settlement, and the yearly dividends, interest, and annual produce thereof; to have, hold, receive, and take the premises unto the plaintiff, his executors, &c., upon trust, out of the said dividends, interest, and premises, to retain the said annuity in the manner in the annuity deed mentioned, and to pay such costs, charges, and expenses as the plaintiff, his executors, &c. should sustain or be put unto by reason of the non-payment thereof, and to pay the residue from time to time unto, or to permit the same to be received by the said Elizabeth Hobbs or her assigns, for her and their own use and benefit. The deed then contained a power of attorney from Elizabeth Hobbs to the plaintiff, authorizing him, his executors, &c., to sue for, recover, and take the said dividends, interest, and premises when due, and to give receipts for the same; and also a declaration that every receipt or discharge which should be given, made, or executed by the plaintiff, his executors, &c., concerning the premises, should be binding and conclusive on Elizabeth Hobbs. The deed also contained a proviso for repurchase of the annuities by Hobbs and his wife, or either of them, their or either of their assigns.

The annuity was regularly paid to the plaintiff until the bankruptcy of Hobbs, which took place on the 23d of November, 1832. The plaintiff refused to prove for the amount of his annuity, under the fiat, but in February, 1833, after Hobbs had obtained his certificate, he filed the present bill against Hobbs and his wife, the trustees under the deed of settlement, and the Governor and Company of the Bank of England, praying for an account and satisfaction of the arrears of the annuity; that for that purpose the stock might be transferred into the name of the Accountant-General; and that in the interim any transfer **[321]** of the dividends for the benefit of the defendants Hobbs and wife might be restrained.

The grounds of defence were, first, that Mrs. Hobbs was not a principal in the annuity deed, but only a surety for her husband, and that the plaintiff not having proved for the annuity under the fiat, he had lost his remedy against both the defendants, the bankrupt being discharged by his certificate; and, secondly, that if Mrs. Hobbs was a principal in the annuity deed, all her interest in the property thereby assigned, subject to the plaintiff's claims, passed upon the bankruptcy of the husband to his assignees, and they ought therefore to have been parties to the suit. The defendants Hobbs and wife likewise insisted by their answer that the mode of payment of the consideration money was illegal. It will be seen, however, that they did not press this objection at the hearing.

Mr. Boteler and Mr. Wood, for the plaintiff. It is objected to this bill that the wife was only surety for the husband, and that the plaintiff ought to have proved under the fiat before he sued the surety. But the 55th section of the Bankrupt Act applies only to those cases where there is a mere personal undertaking by the surety, and not where the grantee of the annuity has taken the precaution to have it charged as a permanent fund. [Alderson, B. Is there any authority for saying that that section is merely confined to personal obligations?] There is no express authority to that effect; but it cannot be that the bankruptcy of one of the parties puts an end to the charge which the other has taken the precaution to make. The legislature could not have intended such a result without more peculiar words. However, even supposing

that in an ordinary case the statute would have the effect contended for, here the plaintiff could not sue the wife personally, but only the fund settled to her separate use. In **[322]** other cases the surety might sue the principal afterwards, but here it would be impossible so to do.

But it is not necessary to pursue the question of suretyship, because in fact the agreement was with both the husband and wife, and the grantee made the wife a principal in the transaction. The money was paid into the hands of the wife. It will be said that the plaintiff has departed with his remedy, because part of the consideration money was paid over to the solicitor, but the manner in which that was done was legal; *Mouys* v. *Leake* (8 T. R. 411), *Hurd* v. *Girdlestone* (1 Marsh. 407; 6 Taunt. 8), *Aston* v. *Gwinnell* (3 Y. & J. 136). [Alderson, B. In *Barber* v. *Gamson* (4 B. & A. 281) the same point occurred. The whole money was paid down by the grantee, and part of it paid over to the attorney. The question is, who is liable originally to the attorney? If a person granting an annuity agrees originally with the attorney for payment of his costs, the grantee is not responsible as for a fraudulent retainer. In many of the cases there is an express stipulation to that effect.] In *Mouys* v. *Leake* there was no express stipulation, and yet the deed was supported. At all events, the Court has a discretionary power as to setting aside this deed on the ground of retainer: *Barber* v. *Gamson*, *Williamson* v. *Gould* (8 Moore, 109; 1 Bing. 234), *Gorton* v. *Champneys* (8 Moore, 302; 1 Bing. 287), *Girdlestone* v. *Allan* (1 B. & C. 61).

Mr. G. Richards, for a defendant, a prior incumbrancer on the fund.

Mr. Simpkinson and Mr. Kenyon Parker, for the defendants Hobbs and wife. The question is, whether Mrs. Hobbs had power to pledge these Bank Annuities, either as principal or surety? Before her marriage she was en-**[323]**-titled to them absolutely. Afterwards she executed a deed, dated the 9th of April, 1828, not in contemplation of her marriage with Hobbs, but being a spinster, by which she conveyed the Bank Annuities to trustees for her separate use, independent of the control of any future husband. The question is whether, notwithstanding this, the fund did not belong absolutely to her husband. Property may undoubtedly be given to the separate use of a married woman; but property given or conveyed to the separate use of a spinster, without reference to her marriage with any particular person, vests in the husband whom she afterwards marries. This property therefore vested in Hobbs, and she had no power to assign it: *Newton* v. *Reid* (4 Sim. 141), *Woodmeston* v. *Walker* (2 Russ. & M. 197), *Massey* v. *Parker* (1 M. & K. 174). That being so, the Court cannot grant relief in this case in the absence of the assignees of Hobbs, who are the parties most materially interested in the fund. On reference to the annuity deed, it will be found that Hobbs enters into no covenant for securing the annuity on these funds. He only covenants to pay the annuity; though, even if he covenanted beyond that, it would not remove the objection for want of parties. At all events, the assignees are entitled to be heard on this question. But should the Court be against the defendants on this point, the next question is, what was the real transaction between the parties? Was it a joint contract for the benefit of Hobbs and his wife, or substantially for the sole benefit of Hobbs? Was not the payment made to Mrs. Hobbs for the mere purpose of giving colour to the transaction, so as to attempt to affect her separate interest? According to the plaintiff's own deed, it was not a grant of annuity by the wife, but the husband. It is true that the whole consideration was in the first instance paid to Mrs. Hobbs, but the defendants swear that the whole contract was with **[324]** Hobbs alone, and that he, conceiving that his wife had a separate interest in this property, applied to her to guarantee the payment of the annuity out of her separate estate. She did so, under the belief that her act was merely that of a surety, and not that of a principal. Assuming that she was a surety, the case is within the 54th and 55th sections of the Bankrupt Act. The latter of these sections must be construed with reference to the former.

The defendants make no objection, on the ground of illegal retainer under the annuity acts.

Mr. Bethell and Mr. Hallett, for the defendants, the trustees of the settlement. The trustees are to see that all parties interested are before the Court. Whether the assignees should be parties depends on a question on which a difference of opinion exists in the Court of Chancery; the Vice-Chancellor holding that a trust for the separate use of a single woman is valid against the party whom she may afterwards marry, while other Judges hold the reverse. The cases which occurred before the

Vice-Chancellor are *Benson* v. *Benson* (6 Sim. 126) and *Davies* v. *Thornycroft.*(*b*) In the latter the express point was decided; and his Honor took a distinction between the clause against alienation and the clause for separate use. On the other hand, all the observations in *Massey* v. *Parker* tend to shew that the doctrine, as to a clause against alienation being good or otherwise against a subsequent marriage, applies with the same force to a trust for separate use. A proviso **[325]** against alienation is part of the trust for separate use. That trust is only a creature of a court of equity, and originates in a desire to protect a woman in contracting a marriage. The object of it is not to put a perpetual restraint upon her acts.

Mr. Boteler, in reply. All the cases which have been cited are those of legacies to a woman's separate use, with or without power of anticipation. The clause against anticipation has been held to be bad, and the gift to the separate use, simply, has been held by the Vice-Chancellor to be good. This is the case of a lady, who being sole, executes a deed, by which she vests her own property in trustees, for her separate use during her life, and not to be subject to the debts of any husband she might marry, with a clause enabling her to dispose of the property by will after her death. That indenture was sanctioned and confirmed by the husband whom she does marry; a circumstance which alone is sufficient to support the deed, even if the Vice-Chancellor's decision be wrong. The husband acts upon it and adopts it, and complains of no fraud. It is to all intents and purposes the same as if he had been a party to it. In the case of *The Countess of Strathmore* v. *Bowes* (1 Ves. jun. 22) a deed of this nature was established against Bowes, the husband, although he had no notice of it, and complained of fraud. Here the husband absolutely sanctions the deed.

With reference to the Bankrupt Act the question is whether, when the deed was executed, the grantee of the annuity did not elect to consider the wife not a surety but a principal, and whether he did not pay the money to her upon that understanding. Considering, however, the wife as a mere surety, the 54th section of the statute only shews that the annuity creditor is entitled, not bound, to prove against the bankrupt. He may rely on the estate **[326]** and not on the bankrupt. The legislature could not intend to deprive the creditor of that remedy. The "value" of the annuity under the 54th section is not equivalent to the annuity itself. [Alderson, B. Supposing the annuity to be charged on the estate of the bankrupt, your argument is well founded; you may hold the annuity and not prove. But if charged on the estate of the collateral surety, he is not bound by this clause of the statute to pay you more than the value. The object of the statute was to make the bankrupt a free man, by enabling his estate to pay off the annuity debt; not to compel the surety to pay it off, and to stand in the situation of the annuitant. Your present argument makes the bankrupt liable in future. Your better argument is that the wife is not a surety.]

ALDERSON, B. If I could be satisfied that the wife was a collateral surety, I should say that the plaintiff ought to have proved under the fiat. But I do not at present see that she is a surety. With respect to the other point, it does not appear that the deed of settlement was made in contemplation of a particular marriage; therefore, as it may be necessary for me to give my opinion upon the question which has been so much litigated, I will defer my judgment until a future day.

Dec. 12th.—ALDERSON, B. In this case I took time to consider a question of great nicety, on which the most eminent authorities were supposed to have entertained different opinions. I was apprehensive that it might have become necessary for me fully to weigh and consider them, in order that I might come to a conclusion whether I would adopt the one or the other as the basis of my present judgment.

The defendants contend that the suit is defective for want of parties, inasmuch as the assignees of the defendant Hobbs had a clear interest in the fund, the subject of the dispute; and were, therefore, entitled to be heard. **[327]** And no doubt that would follow, if the assignees had any claim.

(*b*) 6 Sim. 420. The effect of this case is to give testators power to reverse the general rule of law, by which the personal property of an unmarried woman becomes, upon her marriage, primâ facie the property of the husband. It seems a fair subject of speculation whether this decision may not lead to inconvenient results. The current of modern authorities is the other way. In addition to the cases cited in argument in the principal case, see *Tullett* v. *Armstrong*, 1 Keen, 428.

It appears that in the year 1828, Mrs. Hobbs, then Miss Brook, assigned over the stock in question to the two defendants, Willis and Gray, as trustees, in trust for her sole and separate use and benefit, independent of any husband with whom she might intermarry. Upon looking through that deed, which contains no gift over in favour of any other person, it would follow that it could not prevent Miss Brook, at any time before her marriage, from requiring a re-assignment of the stock by the trustees; nor after her marriage could it prevent her, jointly with her husband, from successfully making the same claim. The case of *Wallwyn* v. *Coutts* (3 Mer. 708) shews that a mere voluntary trust of this sort may at any time be varied by the party making it at his own pleasure. And the case of *Newton* v. *Reid* (4 Sim. 141) shews that on application by husband and wife, a transfer would be directed of the fund. It may be also true that the husband might have had a right, without the assent of his wife, to claim the fund; subject, however, to the care which a court of equity would take in case there was no other sufficient settlement upon the wife. But this case turns, as it seems to me, on the confirmation of this voluntary settlement by the husband, on the occasion of the grant of the annuity to the plaintiffs. By that deed the husband not only affirmed what had been previously done by the wife, but gave, so far as he could, an interest to the plaintiff consequent thereupon, as a security for the advance of 300l.

After this, I think the husband could not have set up his right as husband to the fund in question, nor had his assignee any right to interfere—at any rate so far as the interest of the plaintiff is concerned; which is the only question with which I have to do at present.

[328] I am therefore of opinion that, subject to the claim of the prior incumbrancer, the plaintiff should have a decree, and that his costs should be paid out of the fund, if sufficient. He must pay the costs of the prior incumbrancer, with a like remedy over for those costs against the fund.

Decree accordingly.

HUGHES *v.* GARNER. Nov. 8th, Dec. 12th, 1836.—In a bill, to which a plea of purchase for valuable consideration without notice might be pleaded, it is not necessary to charge notice; and if the plaintiff does charge notice, it is sufficient for him to charge it generally, without averring facts as evidence of the charge. Therefore, under a general charge of notice, evidence of particular facts and conversations may be given.—The testimony of one witness, though uncorroborated by circumstances, is a sufficient ground for a decree, if the answer deny the fact upon belief only, although the answer be positive, and there are no other means of contradicting the fact.

[See p. 731, post.]

In 1793 James Hughes, the father of the plaintiff, executed a mortgage of certain property situate at Conway, in the county of Carnarvon, and of which he was seised in fee, to Richard Lloyd, for the term of 500 years, for securing the repayment of 100l. and interest. In June, 1795, James Hughes, in contemplation of a marriage which was soon afterwards solemnized between him and Alice Griffith, settled the mortgaged premises upon himself for life, with remainder to the use of his intended wife for life, with remainder to trustees upon trust to preserve the contingent remainders, with remainder to the use of such child or children of the marriage for such estates, &c. as James Hughes should by deed or will appoint; with remainder, in default of appointment, to the use of the first and other sons of the marriage successively in tail.

About the year 1808 James Hughes sold part of the settled premises to one Badcock, who took possession of them; and in 1815, Badcock still being in possession of them, sold them to the defendant, Mrs. Garner, for 250l. In this transaction John Evans, since deceased, acted as the solicitor for the defendant, and prepared the deeds of conveyance, which were indentures of lease and release, executed by Badcock of the one part and the defendant of the other part, and dated respectively the 9th and 10th October, 1815.

[329] James Hughes, having survived his wife Alice, died in the month of January, 1834, without having executed the power of appointment limited by the settlement. He left the plaintiff, his eldest son and heir in tail.

The bill, after stating the foregoing facts, and also that the mortgage had been paid off by James Hughes, who had taken no assignment of the term, but that the defendant had afterwards taken an assignment of it in trust for herself, prayed that the defendant might be restrained from setting up that term in bar of an action of ejectment which had been brought against her by the plaintiff.

The bill charged that the defendant pretends that she was a purchaser of the premises without notice of the plaintiff's claim, or else that she was a purchaser from some person who purchased without notice, whereas the plaintiff charges the contrary to be the fact, and that it was well known, suspected, or believed when the defendant's alleged purchase took place, that James Hughes was only tenant for life of the premises, or at least had no power to convey the fee, and so it would appear if the defendant would set forth a true statement of the abstract which had been delivered to her or her attorney previous to such alleged purchase, and what appeared upon it; and also a statement of what deeds were delivered to her, &c. That John Evans was employed by the defendant as her attorney to transact the alleged purchase, and to investigate the title for her, and that he prepared the conveyance, and also the assignment of the term to her trustee, and that while he was so employed as her attorney or solicitor, he had various conversations with James Hughes relative to the deeds of settlement of June, 1795, and that he had notice given him, or he knew, believed, or suspected that the contents were such as described in the plaintiff's bill.

The defendant by her answer admitted that she had purchased the premises of Badcock, who was in possession of them, and who had represented himself to be the owner of **[330]** them in fee; that upon the advice of her friend, counsellor N., she had employed John Evans as her attorney to conduct the purchase, and that Evans prepared the deeds of conveyance, which were afterwards perused and approved of by counsellor N. She denied, however, that Evans had prepared the deed of assignment, inasmuch as the term had not been assigned to her trustee until after the plaintiff had commenced his ejectment, when, the existence of this term being ascertained, the deed by which it was assigned was prepared by Mr. Lloyd, who was then her attorney. She denied that she, or, to the best of her belief, John Evans, or any of her agents, had ever had notice or had ever heard of the settlement of 1795, or had ever any reason to suspect or believe its contents. She also denied that any abstract of title, or any deeds or papers connected with the title, had ever been delivered to her, or, as she believed, to Evans. She further denied, to the best of her belief, that any conversations such as were charged in the bill had taken place between Evans and Hughes, though, if such had taken place, she insisted that they ought not to affect her, inasmuch as they related to matters independent of any transaction of business between Evans and the defendant.

In support of the plaintiff's case, the evidence of Mr. Henry Rumsey Williams, the plaintiff's solicitor, was read. He stated that he well knew John Evans; that in July, 1815, Evans was employed for the defendant in investigating James Hughes's title to the premises; that in the course of that investigation he applied to Hughes for leave to peruse the settlement of 1795, and that accordingly Hughes mentioned the subject to the deponent; that some doubt being suggested by Hughes as to the propriety of producing it, the deponent advised him to produce it; that in consequence of what passed between the deponent and Hughes, the deponent, in the presence of Hughes, shewed Evans the settlement; that Evans read it, and after he **[331]** had finished reading it, said that counsellor N. had advised, and would advise, on the title, for Mrs. Garner, and that she would act accordingly.

Mr. G. Richards, for the plaintiff.

Mr. Simpkinson and Mr. Girdlestone, for the defendant. The defence is that Mrs. Garner is a purchaser for a valuable consideration without notice. In order to meet that case by anticipation, the bill suggests that she pretends she is a purchaser for valuable consideration without notice, whereas the plaintiff charges the contrary: and one question will be whether under that charge the plaintiff can be let into evidence of the particular facts which the witness Rumsey Williams deposes to. Then, in order to make out a case of a particular notice, and to shew that the general allegation of the defendant is not correct, the plaintiff goes on to charge that it was well known at the time of the alleged purchase that James Hughes was only tenant for life, and also that Evans, from his conversations with Hughes, had special notice to that effect. But not one of these special charges is supported by evidence.

The whole of Rumsey Williams's testimony goes to prove a totally distinct issue. He speaks to conversations, not between Evans and Hughes, but between Evans and himself. His evidence, therefore, is quite beside the issue tendered by the bill, and ought not to be received in support of the special charges, more especially as those charges, as well as the general charges, are distinctly denied by the answers.

It comes then to the question, whether the general allegation that the plaintiff had notice is sufficient to let in Rumsey Williams's evidence? Now notice is only an inference drawn from certain facts, and those facts must be charged. In *Hall* v. *Maltby* (6 Price, 240) the plaintiff claimed by **[332]** his bill the tithe of sheep, which he alleged had been improperly removed from the parish, with the intention of defrauding the plaintiff, and the bill contained a charge of fraudulent removal. The defendant denied the charge. The plaintiff then went into evidence, and examined witnesses, who swore not only to the removal, but to an admission by the defendant that he had made the removal with intent to defraud the plaintiff; but Richards, C. B., said that he should entirely lay out of the case all that had been sworn as to the declaration of the defendant, because nothing of the kind was stated in the bill. *Hall* v. *Maltby* is supported by other decisions, which shew that the Court will not admit evidence to support a mere general charge, amounting only to an inference of fact: *Mulholland* v. *Kendrick* (1 Molloy, 359), *Anon.* (1 Molloy, 363), *Margareson* v. *Saxton* (1 Y. & C. 525). [Mr. Richards. *Hall* v. *Maltby* refers only to confessions. It has been decided that if you state your fact you are at liberty to give evidence of conversations to support it: *Small* v. *Attwood* (Dom. Proc. 1836).] If a fact is put in issue, you may possibly give conversations in evidence to support it; but not if you only put in issue an inference arising from unknown facts. If that could be done, it would follow, that in almost every case where fraud or notice is charged, the defendant could not meet it. A charge of notice must be dealt with in the same way as a charge of fraud. Is a defendant to come to prove a negative without one fact charged? It happens that Evans is dead and Rumsey Williams has it all his own way: but suppose Evans was living, there is nothing in the bill to lead the defendant to meet the facts now offered in evidence. What is there to induce the defendant to examine Evans as to the settlement having been shewn to him? [Alderson, B. Certainly the Court could not decide on **[333]** this testimony, if Evans were living, without directing an issue. There is that in your favour.] The death of Evans cannot alter the necessity of stating facts on the record. [Alderson, B. All the facts within the defendant's personal knowledge ought to be charged. To that extent the cases go, no doubt. But here, even if the record had given the defendant the opportunity of speaking upon the fact suggested, she could only have spoken as to her belief. Evans being dead, I think I must decide the question of fact myself.] If your Lordship is of opinion that the defendant is wrong in law, it comes to the question whether a decree can be made upon this evidence. All the facts from which the inference is drawn are denied. The evidence is such as could only be met by a general denial, and if so, will the Court put the case in a state of further investigation? Now a decree will not be pronounced, or an issue directed, on the evidence of one witness contradicting the answer, without corroborating circumstances. [Alderson, B. The notice denied by the defendant is not inconsistent with notice to her attorney.] If the Court thinks fit to direct an issue, it is submitted that there ought to be an order that the answer be read at the trial of the issue. It will be read, not as evidence, but as a declaration on oath, to enable the jury to judge which party speaks the truth: *Ibbotson* v. *Rhodes* (1 Eq. Ca. Abr. 229, pl. 13; 2 Vern. 554). [Alderson, B. That is a strange decision, for if the answer does not satisfy the Judge, why should it be supposed to satisfy the jury?] *Keen* v. *Cant* (17 June, 1743; Serjeant Hill's MSS.), *Pember* v. *Mathers* (1 Bro. C. C. 52), and *Milton* v. *Edgeworth* (5 Bro. P. C. Toml. ed. 313), are authorities to the same effect. Upon the whole, we submit first, that Rumsey Williams's evidence ought not to be read; secondly, that if read, it is not of sufficient weight to contradict **[334]** the answer; thirdly, that if there be any doubt, an issue ought to be directed, with an instruction that the answer be read at the trial on the defendant's behalf.

Mr. Richards, in reply. The plaintiff claims as a purchaser under the indentures of 1795, and has an equal equity with the defendant. It is said that notice has not been duly charged; but, in fact, notice need not have been charged at all. Where a bill is filed to restrain the setting up an outstanding term in bar of an ejectment, the

Court will grant relief in all cases except one—that of the defendant being a purchaser for valuable consideration without notice. Suppose this defendant had so pleaded: did any one ever hear of any other than an ordinary replication? When you reply to a plea, you do not charge evidence; you reply generally. It is clear, therefore, in this instance, that, supposing there had been no other charge than the first, the plaintiff would have been able to enter into evidence of notice. It is immaterial whether Rumsey William's evidence supports the charge of conversations between Hughes and Evans, because there is a substantive charge that Evans had notice. The cases which have been cited in support of the argument, that the facts from which notice is inferred must be charged, apply only to admissions.

Dec. 12th.—ALDERSON, B. In this case, the prayer of the plaintiff's bill is that the defendant may be restrained from setting up, as a defence at law, an outstanding term which she has got in, to protect her from an action of ejectment at the suit of the plaintiff. It appears that the plaintiff claims as eldest son and heir of James Hughes, under a settlement made by him before his marriage with Alice Griffith. The settlement is dated 20th June, 1795. The defendant has purchased this estate by a subsequent conveyance for a valuable consideration.

[335] The rule in equity is that a person claiming under a subsequent deed cannot set up a prior outstanding estate, unless he be a purchaser for valuable consideration without notice. That must, therefore, be made out by the defendant; and the plaintiff is fully at liberty, I think, in answer to that defence, to shew any facts establishing notice. I am of opinion, therefore, that on these pleadings I ought to hear the evidence of Mr. Henry R. Williams, although the facts there deposed to are not charged in the bill. Then, if so, is notice to the defendant made out? In her answer, she denies all notice; and if the facts sworn to by Mr. Williams were opposed by the defendant's oath in her answer, I ought not to determine between the two conflicting oaths. But they are not inconsistent with each other. The notice sworn to by Mr. Williams is one to the attorney of Mrs. Garner, and if that were not mentioned to her, her answer would be perfectly true. But notice to her attorney is, in effect, notice to her. It is said she purchased from Badcock. If she purchased from Badcock with notice, then, in order to make a good defence, she should go further, and shew that Badcock purchased for valuable consideration, and without notice. But this defence is neither suggested nor proved.

I have carefully looked at Mr. Williams's deposition, and it is full and clear on the point of notice. I think the plaintiff should have the decree he prays; but, under all the circumstances, without costs.

Decree accordingly.

The Court will not vacate the enrolment of a decree on the mere ground that it was obtained with extraordinary haste.

Feb. 22nd, 1837.—The decree so pronounced was drawn up and passed on the 23rd January, 1837, and enrolled on the 9th of February following. After the enrolment some conversation took place between the plaintiff's clerk in Court and the defendant's solicitor, in the course of which the latter said that the defendant intended to petition for a rehear-**[336]**-ing. The plaintiff's clerk in Court replied that in that case the defendant must give notice of his intention to the plaintiff's solicitor or clerk in Court. The defendant accordingly gave that notice; but the plaintiff having refused to act upon it,

Mr. Simpkinson and Mr. Girdlestone now moved that the enrolment might be vacated, on the ground that it had been made with improper speed. They cited *Anon.* (1 Ves. sen. 326), *Kemp* v. *Squire* (1 Ves. sen. 205), *Anon.* (1 Vern. 131), *Parker* v. *Dee* (3 Swanst. 529, n.), and *Stevens* v. *Guppy* (Turn. & Russ. 178). In *Manners* v. *Bryan*,(*f*) before Lord Lyndhurst, there was no breach of confidence on the part of the solicitor who enrolled the decree, but only extraordinary speed, and yet his Lordship ordered it to be vacated. The vacating enrolments is discretionary with the Court; indeed it may be doubted whether enrolment is necessary at all in this Court. In the Court of Chancery the decree is signed by the Vice-Chancellor and Chancellor; but the statutes relating to the Equity jurisdiction of the Court of

(*f*) Not reported.

Exchequer take no notice of enrolment; and it is laid down by some authorities that it is not the practice of this Court to enrol: *Dodson* v. *Oliver* (1 E. & Y. 755), Seton on Decrees (p. 395).

Mr. G. Richards, contrà. The defendant does not say that any surprise was practised upon her. There was a period between the 24th of January and the 9th of February, during which she might have taken the ordinary mode of entering a caveat. She does not say that she intended to do so. The question is concluded by authority: *Barnes* v. *Wilson* (1 Russ. & Mylne, 486), *Balguy* v. *Chorley* (1 M. & K. 640). Even **[337]** if the defendant had given due notice that she meant to proceed to a rehearing, that would not prevent the enrolment; but here the decree was enrolled before the conversation in question took place.

Mr. Simpkinson, in reply. It is clear, even from the modern cases which have been cited, that vacating the enrolment is entirely discretionary with the Court. Lord Hardwicke went further than modern judges, and vacated enrolments entirely on the ground of rapidity in obtaining them. *Barnes* v. *Wilson* is at variance with *Manners* v. *Bryan*, decided by the same learned judge. Enrolment in this Court is of rare occurrence.

THE LORD CHIEF BARON. If the present question stood upon principle merely, or upon the early cases only, I should be much disposed to grant the present motion. The number of interests and of facts comprised in a suit in Equity, is frequently so great that it behoves the judge to use every possible caution in seeing that nothing material is omitted in the decree; and I presume that it is on that account that after a decree has been pronounced, a Court of Equity, almost as a matter of course, upon certificate of counsel, grants a rehearing. It would certainly be very inconvenient if in every case the party seeking to vary the decree should be compelled to file his bill of review, or enter his appeal, when he might have all that he wishes by a rehearing. On that ground I am disposed to think that Lord Hardwicke took a wise view of the question; and that where it is bonâ fide the intention of a party to rehear a cause, it is in the discretion of the Court to vacate the enrolment.

But the modern cases on this subject, in the Court of Chancery, are very strong and of a contrary complexion. Therefore, before I decide upon this motion, I must consult those authorities. I should say, however, that con-**[338]**-siderable latitude is allowed to all Courts, in the regulation of their own practice. In matters of law they take the authority of other Courts as binding upon them; but that observation does not apply so strictly to questions of practice.

Upon a subsequent day his Lordship said that he thought the defendant ought to have entered a caveat, and upon the authority of the cases cited for the plaintiff, he refused the motion.

Motion refused.

CROPPER *v.* KNAPMAN. Nov. 11th, 1837.—Under the usual decree against an executor to account, the Master is not at liberty to investigate a disputed account arising out of partnership transactions between the testator and the executor, the latter swearing that the balance is in his favour; but, under such circumstances, the plaintiff may have relief by supplemental bill, without exhibiting an interrogatory in the original suit for the examination of the executor.—Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executors, though collusion between them is neither charged nor proved.

[S. C. 6 L. J. Ex. Eq. 9. See further, 4 Y. & C. 249, 577.]

The original bill was filed in 1831 by the residuary legatees under the will of William Gibbon, against Knapman and Gibbon, the executors under that will, praying for an account of the personal estate and effects of the testator which had come to their hands; that after the payment of the debts and legacies the residue might be ascertained, and paid to the plaintiffs, according to their respective interests; and that, in taking the account, the defendant Knapman might stand charged with the sum of 627l., with interest thereon at 4l. per cent. from the 1st of July, 1828, which sum was alleged to be due from Knapman to the testator, at the time of his death, for money lent, &c.

Knapman, by his answer, denied the debt, but stated that he and the testator had been engaged together in a certain building speculation, upon which he had originally advanced 627l.; that part of this money had been repaid in the course of the several transactions between him and the testator mentioned in the schedule to his answer, but **[339]** that there yet remained a balance due to him from the estate of the testator of 85l.

The cause came on for hearing before Lord Lyndhurst, in February, 1834, when a decree was made, referring it to the Master to take the common account. No order was made with respect to the alleged debt of 627l.

In taking the accounts before the Master, the above sum of 627l. was claimed by the plaintiffs, as the balance of the partnership account in the hands of Knapman. On the other hand, Knapman denied the debt, and claimed the balance before referred to of 85l.; and upon his objection that the Master, under the decree, had no authority to take the accounts connected with the building speculation, the Master declined going into them. No interrogatory with respect to these accounts was exhibited before the Master, nor was any special application made to the Court for that purpose.

Under these circumstances, a supplemental bill was filed against Knapman and his co-executor Gibbon, to render effective the object of the original bill. After charging that Knapman had been applied to by the plaintiffs, but had refused to come to a full account of his receipts and payments in respect of the above building speculation between him and the testator, and that the other defendant, his co-executor Gibbon, refused to take any proceedings against him to compel him to come to such account, &c., the bill prayed that an account might be taken of all monies received and paid by Knapman and the testator respectively, on account of the above speculation, that the balance due from Knapman might be ascertained, and that he might be charged with such balance in taking the accounts directed by the decree in the former suit, the plaintiffs being willing, in the taking of the accounts under such decree, that credit should be given to Knapman for what, if anything, should be found due to him from the estate of the testator, in respect of **[340]** the joint speculation; and that the bill might be deemed and taken as and for a supplemental bill to the original bill, &c.

Knapman, by his answer to this bill, denied that the plaintiffs had applied to him to account, or that he had refused to comply with such application, except as before stated; and Gibbon denied collusion with Knapman, or that he had been applied to, or had refused to take proceedings to compel him to come to such account. He stated that he was a stranger to the matters inquired after, and submitted that he ought not to have been a party to the suit, and that the bill ought to be dismissed against him, with costs.

Knapman dying in August, 1835, the suit was revived against his executors.

Mr. Simpkinson and Mr. Sutton Sharpe, for the plaintiffs. If the original bill had been framed so as to entitle the plaintiffs to an account of these building transactions, it is clear that the mere circumstance of the defendant's swearing that the balance was in his favour would not prevent the plaintiffs from having the account: *Knebell* v. *White* (ante, p. 15), *Davenport* v. *Davenport* (1 Sim. 512), *Dominicetti* v. *Latti* (2 Dick. 588). That being so, the question is, whether this decree, which omits to direct an account essential to the justice of the case, ought to stand? It is submitted that the defect may be cured by a supplemental bill: Mitf. Pl. 61, *Simmons* v. *Gutteridge* (13 Ves. 262), *Jones* v. *Jones* (3 Atk. 110), *Dormer* v. *Fortescue* (3 Atk. 124). This is a debt in the hands of Knapman. The affairs of the testator cannot be fully wound up without this account. If any balance is due from Knapman, that is, in the contemplation of a court of equity, actual assets received. And it is immaterial how **[341]** it is received. It is said that this bill cannot be sustained by residuary legatees, unless the co-executor collude with or refuse to sue the debtor executor. But suppose the co-executor for a long series of years has not sued, and says that nothing is due; that is the best proof that he refuses to sue. Besides, even if he had sued his co-executor, the defendant might have objected that the residuary legatees were not made parties. Putting, however, the case of co-executors out of the question, suppose a man engaged in a partnership transaction dies without coming to a settlement with his partner, and his executor refuses to sue the partner, alleging that nothing is due; are the residuary legatees to be bound by his opinion? In such a case it is not necessary to prove direct fraud in the executor. If he will not take steps for the recovery of the debt, the residuary legatees may; otherwise an insolvent executor would always

have power to prevent the legatees' redress, by interfering between them and the accounting party. How does the present case differ from that, except in this circumstance, that here the party who is charged as debtor, and who was partner with the testator in this building transaction, was himself one of the executors? The rule that residuary legatees cannot sustain a bill against a debtor to the estate without proof of collusion between him and the executor, applies no more to this case than the other. It has never been held that it is necessary to prove collusion where the debtor to the estate is himself one of the executors. Whether the debt was incurred by a sole executor, or one of many executors, is immaterial. In the latter case, the residuary legatees have an equal right with the co-executor to call him to account in a court of equity for his receipts and payments. Here, part of Knapman's receipts was a sum due from him to the testator. Of that he became, by the fact of his executorship, trustee for the residuary legatees. In the case of a stranger debtor, there is no privity **[342]** between him and the residuary legatees, and for that reason the legatees cannot call upon him to account. But the case is quite different where the executor is himself the debtor.

With reference to the pleadings, if the original bill had been so framed as to enable the plaintiff to obtain this account, the defendant should, upon the filing of the present bill, have pleaded that matter in bar, or raised that defence by his answer. He does not, however, say, by his pleadings, that the first suit protects him, and he cannot now raise that objection at the bar. The first suit, however, never could have protected him. The plaintiffs have a right to have the accounts taken as between the executors, and also in respect of the partners. Where justice cannot be obtained in the original suit, whether the new matter arise before or since the original suit, that is the case for a supplemental bill. This is in the nature of an original bill, except so far as engrafting the debt of Knapman on the accounts in the other suit. The fact, whether Knapman will have to pay the plaintiffs, will depend on the balance of accounts in the other suit. The event of this suit, should the plaintiffs succeed, must be rendered contingent on the accounts in the first suit.

Mr. Temple and Mr. Blunt, for the defendant. The original suit and this suit cannot be connected, and the parties ought not to be put to the unnecessary expense of this suit. The original decree was right. It was for a general account against the two executors. *Simmons* v. *Gutteridge* points out the rule to be adopted in these cases. Under the original bill Knapman was bound to account, and the plaintiff might have exhibited an interrogatory before the Master to ascertain whether Knapman was or not indebted on a particular account. If the Master refused to admit the interrogatory, then it might have been proper to have had a supplemental bill. In *Simmons* **[343]** v. *Gutteridge* Lord Erskine, after observing that a debt due by the executor to the testator's estate is assets, and that therefore an interrogatory should in all cases be pointed to the inquiry whether he has assets arising from such a debt, proceeds to say, "If the answer to that interrogatory is that there is a long account, and he cannot say that the balance is against him, the Master must take that answer, and a bill must be filed." Such a case as that, however, is a special case, and not this case. All that is meant to be said is that upon special circumstances involving long accounts, the parties may come before the Court by bill. They must, therefore, either pledge themselves by affidavit that there is such an account, or give some evidence of it, before they involve the testator's estate in useless expense. Here there is a mere suggestion against the defendant's positive oath. The Master has not made his report, and the plaintiffs may at this moment apply for an interrogatory, on the authority of *Simmons* v. *Gutteridge;* but they cannot do so without some evidence. [Alderson, B. The case of *Simmons* v. *Gutteridge* is only to the effect that if the plaintiff choose to put the interrogatory, that is the ordinary course. But here the defendant is adverse to that course: why, then, should the plaintiffs not file their bill at once? Why should they be compelled to go through an unmeaning ceremony?] An executor indebted to his testator's estate is not like a common debtor. The testator has placed confidence in him, and the Court will not permit a bill to be filed against him except in an extreme case. The testator says that the executor's oath is to be sufficient for the guidance of the Court in relation to his affairs. It is said that if Gibbon had filed his bill against Knapman alone, the latter might have said that the residuary legatees were necessary parties. That is not so. The reason why residuary legatees may file a bill against a sole executor is that the sole executor cannot sue himself. But where

there are several execu-[344]-tors, one may sue another in equity, and the residuary legatees are not necessary parties. But then it is said that there is collusion between the executors; there is, however, no express allegation to that effect, and without such an allegation the bill is demurrable. [Alderson, B. Where is your authority for that proposition? If you satisfy me that allegation or proof of collusion is necessary, I shall dismiss this bill.] Primâ facie the party having the legal estate is the party to sue; and therefore, in the case of two executors, and a third person debtor, the two executors must sue; but if one of the executors is from circumstances not in a situation to sue, the only protector left is the other executor. The rule of a Court of Equity is that those parties only shall appear upon the record who are necessary to protect particular interests. The residuary legatees had a clear right to sue Knapman quà executor, but not quà debtor. In the latter character the co-executor alone was entitled to sue him. [Alderson, B. In *Simmons* v. *Gutteridge* Lord Erskine says that if the executor cannot answer whether a balance is due from him to the testator's estate, a bill must be filed. According, therefore, to your argument, that is a bill by a co-executor, and not by legatees.] That is the inference to be drawn from that dictum; and it is submitted that even such a bill could only be filed upon a special case made that the executor would not or could not act in the original suit. Here the executor can act in the original suit. Another circumstance is that the plaintiffs have taken a decree to revive the original suit, and they have filed this bill as an original bill, in the nature of a supplemental bill. If in this suit they prove the defendant to owe 100l. on the building transaction, they may have the costs of this suit against him; and yet, in the other suit, he may shew that there is a balance in his favour. The Court therefore ought, at all events, to retain this bill till the accounts are taken in the other suit, and see what evidence there is [345] against him. His oath is to be taken primâ facie in his favour. The plaintiffs come too soon with the supplemental suit.

Mr. Simpkinson, in reply. *Bowsher* v. *Watkins* (1 Russ. & M. 277) is an express authority to shew that the plaintiffs have a right to sue the debtor executor without charging collusion with the co-executor. [Alderson, B. Where there is an equitable demand, which cannot be enforced at law, it is not necessary to charge collusion with the executor; and this will be the case, à multo fortiori, where the accounting party is the executor. That appears to have been Lord Hardwicke's opinion in the case referred to in *Bowsher* v. *Watkins*. Now here there is an equitable demand against the executor.] It is clear that the legatees may enforce that demand against him. It is no answer to this to say that the co-executor might have filed a bill. It is not denied that he might; but if he had, he must have made the residuary legatees parties. If not, the only result would have been that the defendant would have insisted that his right to retain was equal to the plaintiffs' right to sue.

The objection as to the costs of this suit is immaterial, because the plaintiffs only ask that this may be considered as a supplemental bill, and may be brought before the same Master as the original bill.

ALDERSON, B. I do not think that this is a case of collusion; but it appears to me that the plaintiffs are entitled to the relief which they pray, against the defendants Knapman and Gibbon. It appears that the original or first bill was filed by the plaintiffs against Knapman and Gibbon, the two executors of William Gibbon the testator, for the purpose of having an account taken of the assets of the testator which had come [346] to their hands. On that occasion there was a special charge made by the bill, that Knapman had received a sum of 627l., the amount of a debt due from himself to the estate of the testator; and that, on taking the account, he ought to be charged with that sum. Now, by his answer, he expressly negatived this debt, and, on the other hand, he stated that, instead of any sum being due from him, there was a balance of about 80l. due from the testator's estate to him. In that state of the case the cause came to be heard before Lord Lyndhurst, and he was satisfied with the answer of Knapman, and directed an account to be taken before the Master in general terms, excluding the debt of 627l. Subsequently the parties went before the Master, and, on that occasion, the plaintiffs claimed the same amount of debt, when the Master, in the execution of Lord Lyndhurst's decree, excluded this sum from his consideration, it appearing that this sum of 627l. was claimed, not as a debt due in the ordinary way, for money lent to Knapman, but as the balance of an account between Knapman and the testator, upon a joint speculation in buildings, in which

they must be considered partners, and in that respect liable in equity to account the one to the other, but in no respect liable at law. Under these circumstances, there being no charge in the bill of any account to be taken between Knapman and the estate of the testator, the Master and Lord Lyndhurst excluded its consideration, and treated it as coming within the rule laid down by Lord Erskine in *Simmons* v. *Gutteridge*, that a bill must be filed for the purpose of taking such an account, unless the executor admit explicitly that the debt is due to the testator's estate.

In consequence of this defect in the original bill, a supplemental bill has been filed, in order to give the parties an opportunity of making that case from which they were excluded by the form of the previous bill. A supplemental bill, according to the authorities, may be filed for the pur-**[347]**-pose of supplying defects in the original bill, and even in aid of the decree. This seems to fall within that principle; it is a bill filed to supply a defect in the former bill, and in aid of a decree pronounced by Lord Lyndhurst, between legatees on one side and executors on the other. It is admitted that if this bill is properly filed, the answer of the executors gives the plaintiff a right to this account. The defendants do not state any thing in their answer, which excludes the account from the Master's office; and the moment they admit an open account of this nature, it becomes convenient for a Court of Equity to adjust it finally. Therefore, without pronouncing what may be the ultimate result, I shall direct it to be taken as prayed by the bill.

I think that Gibbon should have his costs in this suit.

I do not think that it was necessary to charge collusion between the defendants. The executor of an executor who was a partner is out of the rule.

Decree accordingly.

BAINBRIDGE *v.* LORD ASHBURTON. Dec. 14th, 1836.—Trustee, after devising certain real estates to different persons, gave and devised all his real estates, not before disposed of by his will, to A. B., his executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit: Held that, under this devise, the trust estate passed.

[S. C. 6 L. J. Ex. Eq. 73. Referred to, *Doe d. Roylance* v. *Lightfoot*, 1841, 8 M. & W. 553.]

By the will of Lady G. Beauclerk, certain real estates were vested in Aubrey, Earl of Burford, Thomas Brand, and Alexander Adair, and their heirs, upon certain trusts for the benefit of the plaintiffs. The will contained a direction that upon the death or refusal to act of either of the trustees therein named, or of any future trustee or trustees to be appointed for the purposes therein mentioned, or any of them, a new trustee or trustees should from time to time be named or chosen by such trustees, or the survivors or survivor of them, in order to continue and carry on the same trusts; to the end that there might always be three persons in being for the support and management of the affairs of the said trusts.

[348] The trustees all died without ever having executed the power of appointing new trustees. Mr. Adair, who was the survivor of them, by his will, after devising certain specific real estates to various persons, gave and devised all his real estates, not therein before otherwise disposed of, unto the defendant, Lord Ashburton, described in the will as the testator's godson Alexander Baring, his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit.

The defendant having declined to appoint a new trustee, on the ground that, under the circumstances, the power of appointment was no longer capable of being carried into effect, the present bill was filed for the purpose of having a new trustee appointed, and that the defendant might convey the trust property to him; and the only question was whether the trust estates were devised to the defendant by the will of Mr. Adair.

Mr. Simpkinson and Mr. Heberden, for the plaintiffs. The principle is that, under general words in a will, a trust estate will pass unless a contrary intention can be collected from other parts of the instrument: *Marlow* v. *Smith* (2 P. W. 198), *Ex parte Sergison* (4 Ves. 147), *Roe d. Reade* v. *Reade* (8 T. R. 118), *Lord Braybroke* v. *Inskip* (8 Ves. 417). The cases, which seem at first sight at variance with this principle, in

reality support it: *Duke of Leeds* v. *Munday* (3 Ves. 348), *Attorney-General* v. *Buller* (5 Ves. 339), *Ex parte Brettell* (6 Ves. 577), *Ex parte Morgan* (10 Ves. 101), *In re Horsfall* (1 M'Clel. & Y. 292). In the majority of those cases, in which it was held that the legal interest in the trust estate did not pass to the devisee, there was either a direction to pay **[349]** debts, or legacies were charged on the estate, or there were other words from which it was to be inferred that all the estates coming to the devisee were to be enjoyed by him beneficially. Any words, however, to have that effect, must be very clear and precise. In *Ex parte Brettell* a general residuary devise to the testator's natural son and his heirs, "to and for his and their own proper use and behoof," was held by Lord Eldon not to pass a trust estate. But in the subsequent case of *Lord Braybroke* v. *Inskip*, Lord Eldon explained that the mere words "own use and behoof," &c., would not affect the general rule unless there were other parts of the will which had that tendency.

Mr. De Gex, for the defendant, submitted to the judgment of the Court.

ALDERSON, B. In *Lord Braybroke* v. *Inskip* Lord Eldon put the case upon this ground, that in order to prevent the trust estate passing to the devisee, there must be words to confine the devisee to that property in which he was to have the beneficial interest; and he explains the case of *Ex parte Brettell*, as not turning merely upon the words "to his own use and behoof," but upon the circumstances of the case. The devise was to an infant, who was the testator's natural son, and Lord Eldon thought that, taking the whole will together, the testator intended the devisee to take an estate which he could enjoy as beneficially as he could his own.

Here the words of the will are very general, and there is nothing to prevent the Court from putting upon them as large a construction as possible, in order to give effect to the intention of the testator. It would be a very minute distinction to draw any line between the words "benefit" and "behoof." The decree must therefore be as prayed.

Decree accordingly.

[350] EX PARTE ANNESLEY. IN THE MATTER OF THE STRATFORD BRIDGE IMPROVEMENT ACT. Nov. 15th, 1836.—Under the stat. 59 Geo. 3, c. 12, lands belonging to the parish are vested in the churchwardens and overseers of the parish, as a corporation. Therefore, where feoffees to charitable uses were empowered to sell and convey their lands to the commissioners under an improvement act: Held, that the petition for the investment of the purchase money should be presented in the names of the churchwardens and overseers of the parish in which the charity was established.—Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation.

[S. C. 6 L. J. Ex. Eq. 81.]

Under an act passed in the 9th year of the reign of King George the Fourth, for maintaining and repairing the bridge over the river Avon, near Stratford-upon-Avon, all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants in tail or for life, husbands, guardians, trustees, feoffees in trust for charitable and other purposes, committees, executors and administrators, &c., are authorised, for the purpose of carrying the act into execution, to sell and convey any houses, buildings, lands, tenements and hereditaments of which they may be seised in fee simple to the commissioners appointed by the act. The act then directs that the purchase money (exceeding 200l.) shall be paid into the Bank of England, with the privity of the Accountant-general of this Court, to his account, "Ex parte the commissioners for repairing the bridge," &c., to be applied in the purchase of lands to be settled to the like uses, &c., and that in the meanwhile, and until such purchase shall be made, the money shall be invested in the name of the Accountant-General in the purchase of 3l. per cent. Consolidated or 3l. per cent. Reduced Bank Annuities; the dividends from time to time to be paid, by order of the Court of Exchequer, to the person or persons who would for the time being have been entitled to the rents and profits of the lands thereby directed to be purchased.

Under the will of Sir Hugh Chesnall, Knt., certain freehold messuages and lands

situate at Stratford-upon-Avon were at the time of the contract after mentioned, vested in six persons, as feoffees in trust for the relief of the poor of the parish of Clifford Chambers. In 1834 a contract was entered into between the feoffees and the commissioners under the act, for sale of part of the **[351]** premises, consisting of a blacksmith's shop, with its appurtenances, to the commissioners, at the price of 185l., and soon afterwards a proper conveyance to the commissioners was executed by five of the feoffees (the other refusing to join), and the purchase money was paid into Court.

A petition was afterwards presented, in the name of the rector of the parish of Clifford Chambers and the feoffees, praying that until an eligible purchase of lands could be found the purchase money might be invested in the purchase of 3l. per cent. Consols, in the name of the Accountant-general, and that the dividends might be paid to the petitioners; and an order was made to that effect. It occurred, however, to the counsel for the petitioners, that a difficulty would arise from the unwilling feoffee refusing to join in appointing an attorney to receive the dividends. Accordingly, the order not having been drawn up,

Mr. Faber applied to the Court to vary the order, by directing the dividends to be paid to the feoffees, or any of them, or such person as they or any five of them should appoint.

The Lord Chief Baron said that the charity estates were taken out of the feoffees by the stat. 59 Geo. 3, c. 12, s. 17,(*a*)[1] and vested in the churchwardens and overseers **[352]** of the parish; and he suggested that the petition would probably, on that account, require amendment. His Lordship referred to *Doe d. Jackson* v. *Hiley*.(*a*)[2]

The petition was accordingly amended by making the churchwardens and overseers of Clifford Chambers co-petitioners with the willing feoffees, striking out the name of the unwilling feoffee, and praying that the investment might be made in the names of the churchwardens and overseers, and that the dividends might be paid to the rector of the parish for the time being.

Mr. Faber, on mentioning the petition again, stated that it was proposed to pay the dividends to the rector, in order to avoid the expense of a new power of attorney upon every change of churchwardens and overseers.

(*a*)[1] Which enacts, "That all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered, to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish," &c. The words, "belonging to such parish," are to be taken in their popular sense: *Doe* v. *Terry*, 4 Ad. & Ell. 274.

(*a*)[2] 10 B. & C. 885. In *The Attorney-General* v. ———, 7th April, 1837 (ex relatione), it appears that the Vice-Chancellor held that the 59 Geo. 3, c. 12, did not apply to copyholds. A reference had been directed to the Master to appoint trustees for a charity estate, consisting of copyholds, and to approve of a new scheme. The Master refused to appoint trustees; holding, on the authority of *Doe* v. *Hiley*, that the copyhold was vested in the churchwardens and overseers; but he approved of a scheme. The report was excepted to, on the ground that he ought to have appointed trustees; but that, if the copyholds vested in the churchwardens and overseers, then that the Court had no power to direct a scheme. The Vice-Chancellor said that it would be very extraordinary if copyholds could be vested in the churchwardens and overseers as a corporation under the act, as it would deprive the lord of all his fines; and whatever might be the case as to freeholds, which it was not necessary for him to consider, the Court of King's Bench had not decided that copyholds were within the act, and he certainly should not do so. The exceptions were allowed, and it was referred back to the Master to review his report. His Honour seemed to doubt the authority of *Doe* v. *Hiley:* it has, however, been treated as law in *Doe* v. *Terry*, 4 Ad. & Ell. 274; *Doe* v. *Cockell*, id. 478.

[353] THE LORD CHIEF BARON asked whether the act, which made the churchwardens and overseers a corporation for these purposes, did not give them a common seal, under which they might appoint an attorney, whose office would not cease on a change in the body. Upon referring to the act, however, this appeared not to be the case, and accordingly his Lordship made the

Order as prayed.

SMITH *v.* SMITH. Nov. 15th, 1836.—The circumstance that the party who has the administration of the testator's real and personal effects is an uncertificated bankrupt, and was not appointed to his office by the testator, is not a sufficient reason to induce the Court to appoint a receiver before answer, where several of the parties interested decline to join in the application. Quære, how far parties, claiming in different interests, can join as plaintiffs in a bill of revivor and supplement?

[S. C. 6 L. J. Ex. Eq. 70. See further, 3 Y. & C. Ex. 328.]

William Smith, by his will, after directing payment of his just debts, &c., gave, devised, and bequeathed all his real and personal estate, whatsoever and wheresoever, unto his daughter, Ann Smith, and three other persons, their heirs, executors, administrators, and assigns, upon trust, out of the rents, dividends, and produce of his said real and personal estate to raise and pay certain annuities, and amongst them an annuity of 10*l.* per annum to his grandson Frederick Smith, for his life, and an annuity of 35*l.* per annum to his son, Henry Sweeting Smith, for his life; which latter annuity the testator directed his trustees to pay into the proper hands of his son by monthly, quarterly, or half-yearly payments, at their discretion, and so as his receipt only should be a discharge, and not the receipt of any assignee or assignees under any authority derived from him; and upon further trust to pay and divide the surplus income and produce of his said real and personal estate unto and equally between his children respectively, save, as therein mentioned, as to the share of his son Joseph Smith. And from and after the decease of his said children, the testator directed that his said trustees should receive and take the rents, issues, and produce of all his said real and personal estate and **[354]** effects, and pay and divide the same unto and equally between all his surviving grandchildren who should then be living, share and share alike, until the youngest should attain twenty-one years; and upon the youngest of them attaining such age, upon trust that they the said trustees, and the survivors or survivor of them, should sell and dispose of all his said real and personal trust estate and effects, and turn the whole thereof into ready money, and pay and divide the same, with such parts thereof as should consist of monies and securities for money, unto and equally between all such of his said grandchildren, and the children or child of any such grandchild as might be then dead, leaving lawful issue; such children or child to take only his or their parent's share. And the testator appointed Ann Smith and the three other trustees to be his executors.

The testator died in November, 1824, leaving several children surviving him, amongst whom were Henry Sweeting Smith, his eldest son and heir-at-law, and Ann Smith his daughter. Ann Smith proved the will in May, 1825, and took upon herself the execution of the trusts, and entered into possession of the real and personal estates. The other executors renounced probate, and by deed disclaimed the trusts. Ann Smith died in October, 1834, having previously made her will, whereby she appointed William Bevan and John Farr her executors. The latter alone proved the will, the former renouncing probate.

In Trinity Term, 1835, Frederick Smith, the testator's grandson, filed his bill against John Farr, and against the children and other grandchildren of the testator, praying that accounts might be taken of the testator's personal estate, and of the rents and profits of his real estate come to the hands of Ann Smith and John Farr, or either of them; that a receiver might be appointed; that Farr might be restrained by injunction from further interference with **[355]** the testator's property, and that the rights and interests of the several parties might be ascertained.

In October, 1835, Frederick Smith died, and soon afterwards the present bill was filed by his widow, who was his administratrix, and his infant children, against the same parties as were defendants to the original suit, praying that the former suit

might be revived; that the arrears of Frederick Smith's annuity might be paid to the widow; that under the circumstances stated in the bill, the defendant Henry Sweeting Smith might be decreed to account for all sums received by him on account of the real and personal estate of the testator, and might be restrained from collecting or receiving any part of that estate; and that a receiver might be appointed, &c.

The present bill charged that the plaintiffs had discovered that upon the death of Ann Smith letters of administration de bonis non of the testator, William Smith, had been granted to the defendant, Henry Sweeting Smith, and that, by virtue of such letters he had entered into possession of the testator's personal estate, and had also, as the testator's heir-at-law, entered into the possession of the real estates. The bill then contained charges against Smith, of which the details are contained in the affidavits hereafter referred to.

The defendant not having yet put in his answer, a motion was now made for a receiver, upon the affidavits of Joseph Smith, one of the testator's sons, M. A. Smith, the widow of Frederick Smith, and other persons. Those affidavits stated that the defendant, having upon Ann Smith's death come into the rents and profits of the testator's estate, immediately changed his residence, and lived at much greater expense than before; that he had constantly refused to pay the share which Ann Smith, if living, would have been entitled to, of the dividends and rents, to the parties interested therein, or to pay the arrears of Frederick Smith's annuity to his widow; that the defendant had very **[356]** little property beyond what he was entitled to under the will, and his half-pay as a lieutenant in the local militia, and that he was an uncertificated bankrupt; that Frederick Smith occupied a house belonging to the testator, for which, at the time of this motion, there was due 146l. for rent; that on the other hand, at the death of Ann Smith, there was due to F. Smith 100l. for the arrears of his annuity; that the widow was ready and willing to pay the difference (46l.), but was afraid of so doing by reason of the embarrassed circumstances of the defendant; that the defendant had, in October, 1836, distrained the goods of the widow for 178l. rent, which goods were replevied; that the defendant had misapplied the monies of the testator, and if permitted to continue in the receipt of them, the greater part would be lost to the estate of the testator, &c.

The defendant, by his affidavit, denied all the allegations on the other side as to the change in his mode of living, except that he admitted having changed his abode on Ann Smith's death, for the purpose of more conveniently administering the testator's estate. He stated that, shortly after the death of Ann Smith, he, as her heir-at-law, with the full consent and approbation of the several adult parties interested, either on their own behalf or that of infant children, received the rents and profits of the testator's real estate, and administered his personal estate which had been left unadministered; and that his brother, Joseph Smith, the deponent on the other side, was one of his bondsmen on taking out letters of administration de bonis non. That all which the deponent had received of Ann Smith's share had been paid by him to the parties entitled, but that part of it had not been paid over to him. That in addition to the rent, which he stated to be 178l., there was a debt due on an unsettled account between the estate of Frederick Smith and that of the testator. That the deponent had always paid the annuities as soon as due, and frequently in advance. He then stated that he was **[357]** possessed of income beyond what he took under the will and his half-pay; but he admitted that he was a bankrupt thirty-eight years ago, and he could not recollect whether he obtained his certificate; he stated, however, that shortly after his bankruptcy he entered his Majesty's service, and that his affairs were settled by his father.

Mr. Simpkinson and Mr. Kenyon Parker, for the motion. This is not the case of an application against an executor or trustee appointed by the testator himself. In that case it would be more difficult to object that the party was in embarrassed circumstances or a bankrupt; for if the testator chose to appoint such a person, no one, probably, would have a right to complain. But this is the case of a person upon whom the trusts of the will have devolved by operation of law, and in whom, as it appears on the face of the will, the testator had no confidence. In bequeathing the annuity of 35l. to this son, the testator studiously guards against the payment of it to any person except to the party himself, giving the trustees a discretionary power to dole it out as occasion might require,—either weekly, monthly, or quarterly.(*a*)

(*a*) But the same clause was added to the bequests to other annuitants.

The affidavits establish that the party is an uncertificated bankrupt, and has little or no property, and that upon the receipt of the testator's property he changed his house and mode of living. Besides, he has omitted to pay the annuities. This is a strong case. The application is made on behalf of almost all the parties beneficially interested; and, under such circumstances, independently of the fact of bankruptcy, the plaintiffs are entitled to a receiver: *Brodie* v. *Barry* (3 Mer. 695). The point as it relates to an uncertificated bankrupt has also been decided: *Gladdon* v. *Stoneman* (1 Madd. 143). In these cases the receiver was appointed before answer. Here, though the party **[358]** has not put in an answer, he has answered the plaintiffs' affidavits.

Mr. Piggott, for defendants entitled to annuities in possession and shares in the residue. The testator never intended that Henry Smith should have any controul over the rents and profits. The language of the will is very strong to that effect. Where a trustee or executor appointed by a testator becomes bankrupt after the date of the will, although the fact of bankruptcy is known to the testator, a receiver will be appointed: *Langley* v. *Hawk* (5 Madd. 46). Here the trust was not imposed upon the party by the testator, but by operation of law.

Mr. G. Richards and Mr. Puller, for the defendant, Henry Sweeting Smith. If at the hearing it is impossible for the plaintiffs to have a decree, your Lordship will not make an interim order for a receiver. This suit has been attempted to be revived on the death of Frederick Smith, the plaintiff; the new plaintiffs being the widow and children of Frederick Smith. But the suit so revived is irregularly framed, the plaintiffs not having a common interest. The children take by substitution, and cannot therefore join as plaintiffs with the widow, who claims through Frederick Smith. The bill, therefore, as the record now stands, must be dismissed at the hearing and on that ground alone this motion ought to be refused.

Another ground on which the Court will dismiss this application is the nature of the interest of the parties who make it. Now, one of the plaintiffs, the widow, has no interest in the rents and profits. She claims the arrears of an annuity, but having been in possession of the testator's property, she has satisfied herself what was due for arrears. So far from being entitled as representative to **[359]** any portion of the rents, she admits that there is a debt of 46l. due from her. What interest then has she in this application? The other plaintiffs are the great-grandchildren of the testator. They have no claim upon the rents and profits now; though they have an interest, but only a contingent interest, in the corpus. It is not said, however, that the defendant has mismanaged the rents. Some only of the defendant's brothers concur in this application. They who do ought to have filed a cross bill, and the defendant would then have had their responsibility for costs.

With respect to the personalty, there is no allegation that any personal estate is now outstanding. The letters of administration were obtained by the defendant so far back as 1824, and it is not said that he did not then perform his duty as administrator. Besides, the very man who now attempts to throw a slur upon his character was his bondsman to the Ecclesiastical Court. No application was made for a receiver till after a distress was put in. It was well known to all parties that he was an uncertificated bankrupt; his bankruptcy having occurred thirty-eight years ago.

Mr. Simpkinson, in reply. The question as to the widow is not whether she had an interest when the bill of revivor was filed: but whether her husband had an interest when he filed the original bill. If he had, and there were arrears of the annuity at his death, those arrears were property received by his widow as his personal representative. Now, it is not said that when the bill of revivor was filed the annuity had been all paid to Frederick Smith. On the contrary, it appears upon both affidavits that there was an arrear to the amount of 100l. His representative, therefore, had an interest to take the accounts quoad that arrear, more especially when it is sworn, and not denied, that the defendant has actually dis-**[360]**-trained upon her for the whole of the rent due from her, without giving her any credit for the arrears of the annuity. With respect to Frederick Smith's children, it is true that they have no present interest to be paid the rents and profits, but they have an interest to see the rents and profits properly applied. If the annuities are not kept down by the trustee under the will, and he appropriates them to his own use, might not the annuitants come for satisfaction on the corpus of the estate or on the reversion; upon the surplus or residue?

The objection as to the misjoinder of the plaintiff is immaterial. It is said that

the widow and children cannot be plaintiffs in the same bill, the former claiming by representation, and the latter proprio jure. But as to her this is a bill of revivor, as to them a bill of supplement, arising from matters which have occurred since the filing of the original bill. Suppose a bill filed in reference to real estate, and the plaintiff devises it to A. B., and dies. A. B. has a right to file a supplemental bill, or an original bill in the nature of a supplemental bill, to have the benefit of the proceedings in the former suit: he cannot file a bill of revivor, not representing the original plaintiff. Now, if the original bill respects personal as well as real estate, then the new bill would adopt the form of this. It would be a bill of revivor by the personal representative, and an original bill in the nature of a supplemental bill by the party entitled to the realty. If Frederick Smith had lived, he would have been entitled as one of the testator's grandchildren; but under the will his share devolves to his children, and that brings the case within the principle referred to. It is true that his children take but a limited interest, but that is not enough to deprive them of the right to this application. A bill was filed in Chancery by a person whose sole interest was this—that the testator by will directed that he should receive the rents of a certain property and be allowed a poundage to be **[361]** paid by the executors. Lord Eldon, however, held that a bill was sustainable by that party against the executors for an account, receiver, and injunction. The plaintiff there had only a scintilla of interest, but Lord Eldon said that, small as it was, he had an interest to support the claim.

Whatever may be the allegations of the bill as to the outstanding personal estate, the defendant admits that he has received, since the death of Ann Smith, the rents and profits of the leasehold estates.

THE LORD CHIEF BARON. I do not feel myself called upon to decide the question how far this bill has been properly filed as a bill of revivor and supplement, or how far the parties have been properly joined as plaintiffs; my opinion proceeds on the ground that this motion is made without any sufficient reason, before any answer is put in; it being admitted that such an application must be made on special circumstances. The case which has been referred to in support of the motion states that where all parties interested concur in the application, it may be made. It says the receiver was appointed, all parties being before the Court and consenting. Do all consent here? First, they say that the defendant is interested—of course he does not consent. His brothers are interested, and some of them do not consent. It appears to me that that alone is a sufficient answer to this application. It must be a strong case to induce the Court to dispossess a party who is interested, and who has the legal title, unless the other parties consent. It is very true that the mode in which he came possessed of the property, particularly if he had not the legal title, might, under ordinary circumstances, give rise to objections, because, taking the property as he did, after he had been dispossessed of it by his father, and upon surviving his sister, there might be sufficient ground for raising questions prejudicial to his character. But when you look at the circumstances of the case, you do **[362]** not see that he labours under the odium of volunteering his services on this occasion. It is true that the father did not make him his executor, and seems to have had some doubt about the assignees' interest interfering to deprive him of the benefits of the will, because that clause in the will, which has been referred to, looks as if the testator doubted whether a proper provision would be made for his son if his share was given to him absolutely. But that was in the year 1822, and the son took possession twelve years after—namely, in 1834; and when he took possession it is not alleged that he was objected to; and one of the parties interested was actually his surety to the Ecclesiastical Court: therefore the circumstances of his taking possession are not so prejudicial to him as they would otherwise be.

Then, when the three trustees have renounced, and his sister is dead, what is to be done? He is the only person who can interfere. He must do so for the benefit of others, if not for his own. He has himself an interest; he has a share of the rents and profits during his lifetime. Then what are the facts which have occurred since his possession to induce any one to say that the consent of these parties to his possession was improperly given, or that these parties ought now to be hostile to him? When did he change his mode of living? Not till 1834. The affidavits say that upon coming into possession he changed his residence and adopted a more expensive mode of living. That naked fact alone is not sufficient to support this application.

The objection, if any, was existing when the supplemental bill was filed, but not before. When did this new mode of living operate upon the minds of the parties? No new fact is alleged, except the defendant's change of residence, and his living on another part of the property. It appears, therefore, to me that there is a want of a body of facts for the purpose of supporting the present proceeding.

[363] What may be the nature of the case, when the answer is put in, I do not know: but when it is considered that this was an amicable bill, I do not know why I should step out of the usual course to appoint a receiver against the defendant in possession. It must be a strong case to authorize such a proceeding. I have already said that the general statement of the change in his mode of living is not sufficient for such a purpose. In addition to that, there are no specific statements of the defendant's misapplication of the property; and no statement that the annuities were not paid up to the time of the bill being filed. There is no fact, therefore, to induce the Court to change the possession, except the distress. Upon that, I admit that the plaintiff, Mrs. Smith, may be entitled to have an account taken, and to have an acquittance, and to set off the money due to her husband's estate for the arrears of the annuity. Still it appears, by her own affidavit, that she owes 46l. to the testator's estate, and there being unquestionably a sum due for rent, the defendant distrained. Under these circumstances, I see no reason why he should not have distrained, or why that proceeding should now operate to his prejudice. I confess it appears to me that this application is founded on some little resentment; and as there are no circumstances against the defendant now which did not exist when the bill was filed, or before it was filed, I think the motion must be refused, with costs.

Motion refused.

WILKINSON *v.* L'EAUGIER. July 1st, 1836.—The plaintiff may shew exceptions for cause against dissolving the common injunction, although he may have given notice of shewing cause on the merits; and it will be sufficient if the exceptions are filed before cause is actually shewn.—Upon an action brought to recover a sum of money lent upon the security of an I O U, and upon a bill filed to discover whether the money had not been lent for the purpose of gaming: Held that the defendant was bound to state by his answer whether it was so lent; it being still a question open to argument in a court of law, whether money lent at play, or for the purposes of play, is recoverable in an action at law.—Quære, whether money lent for the purpose of gaming is recoverable in an action at law, and whether an I O U is a security within the statute 9 Anne, c. 14?

The plaintiff having obtained the common injunction, the defendant put in his answer, and obtained, on the 20th June, an order nisi to dissolve the injunction. On the **[364]** 24th June the plaintiff gave notice to the defendant that he would shew cause on the merits against dissolving the injunction. On the 27th June, the day on which cause was to have been shewn, the Court did not sit. The plaintiff then gave notice to the defendant that he had abandoned his intention of shewing cause on the merits, and meant to shew exceptions for cause; and on the 28th of June he filed his exceptions and obtained the usual order thereon.

Mr. James Russell and Mr. Beavan, for the defendant, now moved that the order of the 28th of June might be discharged for irregularity, with costs; contending, first, that the order nisi was imperative that unless cause was shewn on the 27th the injunction should be dissolved; and, secondly, that if the plaintiff, under the circumstances, was at liberty to shew cause after the 27th, he was bound to shew the same cause as he would have shewn if the Court had sat on the 27th, and therefore it must be upon the merits, and not by way of exceptions.

Mr. Simpkinson and Mr. James, contrà. It is sufficient to shew cause on the first day on which cause can be shewn: *Jadis* v. *Ruscoe* (1 Younge, 538). It is likewise immaterial whether the cause shewn be on the merits or by way of exceptions; for although two days' notice is necessary for shewing cause on the merits, that does not apply to exceptions; nor does the order nisi state what cause is to be shewn. [The Lord Chief Baron. The question is whether you ought not to have filed your exceptions on the 27th.]

Mr. Russell, in reply, contended that the situation of the parties ought not to be affected by the accidental circumstance of the Court not sitting on the day appointed

[365] for shewing cause. He cited *Pikehouse* v. *Hickman* (not reported) and *Goodman* v. *Whitcombe* (1 J. & W. 589).

THE LORD CHIEF BARON. The plaintiff could not comply literally with the terms of the order nisi, because the Court did not sit on the 27th of June. It is admitted that if the Court had sat on the 27th, the plaintiff would have been within the time to shew cause. Whether a party, for the purpose of shewing cause, can avail himself of a matter which occurred after the day appointed for shewing cause, may be doubtful; but here, the matter existed on that day. If it had occurred afterwards, I should feel the force of the objection that he could shew no cause on the 28th, which he could not on the 27th. But the real cause here is that there is no sufficient answer. That existed at first; and, supposing I had sat here on the 27th, all that was necessary to have been done was to file exceptions. Now, the plaintiff originally thought that he would shew cause on the merits, but he afterwards changed his mind, and decided on shewing exceptions for cause, thinking that as long as the Court did not sit he was quite in time if he had his exceptions ready before he came to shew cause. That is the fact, and the only question is whether the exceptions ought not to have been filed on the 27th. Now, for the reasons I before stated, I think that he was in sufficient time, although the exceptions were not filed till the 28th. It appears to me, therefore, that the order of the 28th was properly made, and that the present motion must be dismissed: but as there is no decided case upon the point, it must be dismissed without costs.

Order accordingly.

[366] July 9th.—The bill stated that early in the year 1834 the plaintiff, being then resident at Paris, occasionally visited a club or gaming-house, called the Salon des Etrangers; that the defendant, L'Eaugier, was a member of the club, and superintended and participated in the profits of the gaming; and that he was in the habit of making loans to the persons present to enable them to continue their play; that the plaintiff had from time to time borrowed of the defendant various sums of money for the purpose of gaming, which had uniformly been repaid; that on one occasion, having borrowed of the defendant 2000 francs, he gave the latter his I O U for the amount; that on the following day, or soon afterwards, the plaintiff repaid the 2000 francs to the defendant, but omitted to take back the I O U; that notwithstanding such repayment, the defendant had, upon the return of the plaintiff into this country, commenced an action upon the I O U in the Court of King's Bench, for the purpose of recovering the amount of the 2000 francs and interest. The bill then prayed that the I O U might be delivered up to be cancelled, and for an injunction to stay proceedings at law.

The bill having interrogated whether the sums therein mentioned were not, and particularly whether the sum of 2000 francs was not, employed by the plaintiff for the purpose of gaming, and the defendant having answered equivocally upon that point, an exception was taken to his answer.

Mr. Simpkinson and Mr. James, for the exception.

Mr. James Russell and Mr. Beavan, contrà, contended that it was not necessary for the defendant to answer the question, it being perfectly immaterial to the case made by the bill: for, admitting the transaction to be illegal in this country under the statute of Anne (9 Ann. c. 14), it was not illegal at Paris.

[367] THE LORD CHIEF BARON. In *Robinson* v. *Bland* (2 Burr. 1077) Lord Mansfield decided that money lent at play is recoverable in an action, notwithstanding that the security itself upon which the money is lent is void under the statute of Anne; and he accordingly held that the contract in that case, which was made in France, might be enforced here. I always respect Lord Mansfield's opinions, and received my first legal impressions from his judgments; but I have lived to see many of his decisions overruled, as in the case of assurance of enemies' property, which he held to be legal, on the notion that assurance is a beneficial traffic, and ought not to be repudiated, but which has been decided by all other judges to be illegal. I cannot therefore take it for granted that the judges would decide this case as Lord Mansfield decided *Robinson* v. *Bland*, though I own I should decide it the same way. Upon this consideration, if the party is desirous of trying the question at law, I do not think he ought to be precluded from so doing. With great reluctance, therefore, I must allow the exception.

Exception allowed.

Nov. 22.—The defendant by his answer stated that the Salon des Etrangers was a club established for the usual purposes of a club-house, and that games of chance with dice and cards were there carried on; that such games are recognised by the laws of France; that the defendant was an attendant at the club at a fixed salary; that the plaintiff applied to the defendant, who was in one of the refreshment rooms of the club, for the loan of 2000 francs, which the defendant lent him upon his written acknowledgment; that this sum was not lent for any particular purpose, and that the defendant did not know whether the plaintiff applied it to gaming purposes, though he might have **[368]** done so. The defendant denied that the 2000 francs had ever been repaid to him.

The plaintiff having obtained the common injunction, and an order nisi having been obtained to dissolve it

Mr. Simpkinson and Mr. James now shewed cause against dissolving the injunction. There is sufficient ground of suspicion in this case to induce the Court not to dissolve the injunction. It is clear that the sum in question was lent for the purpose of gaming, which distinguishes this case from that of *Robinson* v. *Bland*. In *Robinson* v. *Bland* there was no finding by the jury that the money was lent for the purpose of play. The question, therefore, whether money so lent is recoverable in an action, was not before the Court. That question, however, came before the Court of Common Pleas, in the case of *Davis* v. *Viola* (E. T. 1784, Hill's MSS.), in which the case of *Robinson* v. *Bland* was commented upon. That was an action on the case upon premises brought for the purpose of recovering money lent at play. There were counts upon promissory notes and money counts. The plaintiff was unable to prove the defendant's signature to the notes, but called a witness to prove the amount of the money lent, as acknowledged in the notes, and five guineas besides. Under all the circumstances, the Chief Justice left it to the jury to say whether the money had been knowingly lent or advanced for the purpose of play, and, if so, he directed them to find for the defendant. The jury found a verdict for the defendant, and the counsel for the plaintiff moved for a new trial, on the ground that the contract was not within the statute of Anne, but the Court refused the application. In another case, which occurred before Mr. Justice Gould, his Lordship was of the same opinion as the Court of Common Pleas. No argument can be raised on the other side that the money having been legally lent in France may be re-**[369]**-covered in England, because it seems clear that money lent for the purpose of gaming is not recoverable in France: Code Civil, arts. 1964, 1965. At all events, even if the Court should think the action maintainable on the money counts, the void instrument must be delivered up to be cancelled.

Mr. James Russell and Mr. Beavan, contrà. The Court can come to no conclusion upon the question of foreign law, because that is a question of fact to be determined by the Master. However, the articles which have been cited from the Code Civil refer only to money lost and won, not to money lent at play.(*a*) With respect to the written security, the plaintiff may have a right to have it delivered up to be cancelled, if the defendant fail at law; but if he obtains a verdict, there is no equity confessed by the answer upon which the Court will order the instrument to be delivered up.

THE LORD CHIEF BARON. If I had any satisfactory evidence of what the law of France was, I should be disposed to enter fully into the question which has just been argued. But there is not sufficient in these pleadings for the Court to proceed upon; and I agree with Mr. Russell in thinking that a more distinct case ought to be raised by the bill and answer in order to determine the question in equity. As to the written instrument, I see no reason why I should now order it to be delivered up to be cancelled, for it is not precisely similar to other instruments which have been made use of in transactions of this nature. There is a difference between a bill of exchange, which is negotiable, and an I O U, which is only evidence of the debt.

Injunction dissolved.

(*a*) The conclusion drawn from them by a learned commentator is in these words: "Le joueur qui n'a pas payé ce qu'il a perdu ne peut être forcé à le payer; et le joueur qui a reçu ce qu'il a gagné ne peut être contraint à le rendre." Code Civil, par Rogron, p. 902.

[370] LEWTHWAITE *v.* CLARKSON. Nov. 22nd, 1836.—If, upon demurrer for want of parties, the plaintiff gave notice of submitting to the demurrer within two days before the day on which the demurrer is set down for argument, he cannot amend his bill without a special application for that purpose.—Submitting to a demurrer for want of equity puts the bill out of court, and it can only be restored under special circumstances.—By fine and settlement made after marriage, certain lands, of which the wife was seised in fee before the marriage, were conveyed to her separate use for life, or to the use of such person or persons as she, notwithstanding her coverture, should appoint; with remainder in default of appointment, in trust for herself for life, with remainder to her two daughters in fee. The wife afterwards joined with her husband in the deposit of the title deeds of the premises, by way of equitable mortgage, for securing the repayment of the husband's debts: Held, that the deed of settlement gave the wife no power of appointing in fee, and that the mortgagee had no claim upon the estate as against the two daughters.

[S. C. 7 L. J. Ex. Eq. 19; 1 Jur. 793.]

Ruth Clarkson, one of the defendants to this suit, had filed a demurrer for want of parties, and Robert Field and Ruth his wife, and Eliza Clarkson, three other defendants, had filed a demurrer for want of equity, and these demurrers were set down to be argued on the 10th November. Briefs to argue the demurrers had likewise been delivered to the defendants' counsel on the 8th. On the 9th November the plaintiff's solicitor gave notice to the defendants' clerk in court that the plaintiffs submitted to the several demurrers; and shortly afterwards a further notice was given that the plaintiff's counsel had obtained an order to amend his bill by adding parties, or otherwise as he might be advised, upon payment of 30s. costs to Ruth Clarkson, and the like costs to the other defendants.

A motion was now made to set aside the order so obtained for irregularity, with costs, or that the plaintiff might pay the taxed costs of the demurrer.

Mr. Spence, for the motion, insisted, with respect to the demurrer for want of parties, that the bill could not be amended as of course, where the demurrer had not been submitted to at least two days before the day for argument: 1 Fowl. Pr. 320: at all events, after having been set down for argument it could only be amended upon payment of taxed costs: *Downes* v. *East India Company* (6 Ves. 586), *Anon.* (9 Ves. 221). With respect to the demurrer for want of equity, he contended that the plaintiff's submission put the bill out of Court as against the two defendants who so demurred; and, therefore, that the bill must be taken to be dismissed as against them, with full costs. And for this he cited Kirkley's Orders, p. 6, where it is stated that "if the demurrer be to the whole bill, and allowed or submitted to, the defendant is to stand dismissed with costs."

[371] Mr. Monro, contrà. It must be admitted that, to amend a bill after demurrer allowed for want of equity, requires a special application; but that is not the case where the demurrer is only for want of parties. Although a demurrer for want of parties has been set down for argument, a plaintiff may amend without a special application until it is actually argued. The only substantial question in these cases is the costs. Here, the plaintiff has obtained an order to amend as against all the defendants, and the only real question is whether he shall pay 30s. or full costs. The defendants themselves are of that opinion, for their motion is in the alternative—either that the order to amend may be discharged, or that the plaintiff may pay them the taxed costs of their demurrers.

THE LORD CHIEF BARON. How could the plaintiff have proceeded upon his bill if the demurrer for want of equity had been allowed? It is clear that he could not have amended a non-existing bill. The question therefore is whether by submitting to the demurrer he should be allowed an advantage which he otherwise could not have obtained; and it seems to me that, according to the strict practice of the Court, he should not. If the matter had been originally brought to my notice, I should certainly not have allowed the amendments as a matter of course; at the same time, under the circumstances, I am desirous that the expense of a new bill should be saved. Therefore, upon payment of the costs of the demurrer for want of parties and of this

application, let the order stand for amending the bill for want of parties, and let the demurrer for want of equity be set down for argument.

Order accordingly.

[372] Dec. 8th.—On this day the demurrer of the defendants Robert and Ruth Field and Eliza Clarkson came on for argument.

The bill stated that by indentures of lease and release, dated in August 1815, and a fine duly levied in pursuance thereof, certain estates situate in the county of Westmoreland, were conveyed by Thomas Clarkson and Ruth his wife to John Clarkson and Henry Sill and their heirs, to the use of the said Ruth Clarkson for her natural life, to and for her own sole and separate use and benefit, or to the use of such person or persons as the said Ruth Clarkson, by writing under her hand, should at any time, notwithstanding her then present or any future coverture, direct or appoint, and in default of such direction or appointment upon trust to pay the rents and profits of the said premises unto the proper hands of the said Ruth Clarkson, during her life, for her sole use and benefit, wholly independent of the said Thomas Clarkson; and from and after the decease of the said Ruth Clarkson, leaving the said Thomas Clarkson her surviving, to the use of the said Thomas Clarkson and his assigns during his life; and from and after the decease of the survivor of them the said Thomas Clarkson and Ruth his wife, to the use of Ruth Clarkson (afterwards Ruth the wife of Robert Field) and Eliza Clarkson, the daughters of the said Thomas Clarkson and Ruth his wife, their heirs and assigns, as tenants in common; and after the decease of either of them the said Ruth Clarkson and Eliza Clarkson, the daughters, to the use of the survivor of them, her heirs and assigns; and in case of the decease of the said Ruth Clarkson and Eliza Clarkson, the daughters, under the age of twenty-one years, and without issue then living, to the use of the right heirs of the said Ruth Clarkson the mother.

The bill then stated that on the 14th February, 1831, Thomas Clarkson and his wife borrowed of the plaintiff the sum of 240l., and that for securing the repayment thereof with interest, Thomas Clarkson executed a bond **[373]** to the plaintiff, and Ruth Clarkson deposited with him the indentures next mentioned; and that she signed and gave to him the following memorandum in writing, viz.:—"Be it remembered, that on the 14th day of February, 1831, the several deeds and writings enumerated and specified in the schedule hereunder written were delivered by Thomas Clarkson of &c., yeoman, and Ruth his wife, to Thomas Lewthwaite of &c., innkeeper, in pledge to secure to the said Thomas Lewthwaite, his executors, administrators, and assigns, the repayment of the sum of 240l. this day lent and advanced by the said Thomas Lewthwaite to the said Thomas Clarkson and Ruth his wife, and interest for the same after the rate of 4l. 10s. per cent. per annum. As witness the hands of the parties, the day and year first above written.

"Schedule.

"12th and 13th February, 1787. Indentures of lease and release, the release made between Christopher Wilson of the first part, James Wilson of the second part, and James Jenkinson of the third part."

The bill then stated that by the last-mentioned indentures the premises were conveyed to the use of James Jenkinson in fee simple, and that James Jenkinson died, having devised the premises to his daughter, the said Ruth Clarkson, then Ruth Jenkinson, in fee simple.

The bill then alleged that Thomas Clarkson had, at different times, with the consent of his wife, borrowed several other sums of the plaintiff, namely, 100l. on his bond, 60l. on his promissory note, and another 60l., which had been procured by the plaintiff from one Willan, for which the plaintiff and Clarkson had given Willan their joint promissory note; that it was expressly agreed that the deposit of deeds already mentioned should remain as a security for these debts, as well as the original debt; that the sum of 34l. 6s. only had ever been paid in reduction of the whole debt; that Thomas Clarkson had died intes-**[374]**-tate and insolvent, and that no person had taken out letters of administration of his effects.

The bill prayed that it might be declared that the memorandum operated as an appointment of the hereditaments to the plaintiff, by way of equitable mortgage, for securing the sum of 240l., with interest, &c., and that the plaintiff was entitled to

tack the after-borrowed sums to the original sum; that an account might be taken of principal and interest due to the plaintiff, and that payment might be made, or the defendants stand absolutely foreclosed; but in case the Court should be of opinion that the defendant Ruth Clarkson had only power to appoint the premises during her life, then that, in default of payment, she might be decreed to make to the plaintiff an absolute appointment or demise of the premises for her life, &c.

To this bill the defendants, Robert and Ruth Fields, and Eliza Clarkson, demurred; first, for want of equity, and, secondly, because neither the legal personal representatives of Thomas Clarkson nor those of Willan were parties to the bill. The second ground of demurrer, as has been already seen, was not contested.

Mr. Spence and Mr. Rogers, for the demurrer, were stopped by the Court.

Mr. Monro, for the bill. The limitations in this deed are to the wife for her life, or to the use of such person or persons as she shall appoint; and in default of appointment, there is another limitation to the wife for her life. This shews that it was intended she should have an absolute power of appointment in fee. If the power is to be considered as extending to her life only, it is altogether a useless limitation. The deed must be taken most strongly against the grantor, and effect must be given to all the clauses. There are no words limiting the operation of **[375]** the power to such uses as she shall appoint during her life; therefore, as the subsequent uses are only to take effect in default of appointment, they cease upon her exercising the power in favour of the plaintiff.

THE LORD CHIEF BARON. The deed contains no limitation in favour of such persons as the wife shall appoint in fee. It only means that she may designate certain persons, to whom she may appoint during her life, and that construction is aided by the words both before and after the power of appointment. The two daughters cannot be affected by any appointment she makes. It is a very plain case.

Demurrer allowed: bill dismissed with costs.

Monro then suggested that the defendants should make some application to dismiss the bill.

THE LORD CHIEF BARON. No: the demurrer, for want of equity, being allowed, the bill stands dismissed.(*a*)[1]

MOORE *v.* PRIOR. Dec. 7th, 1836.—Where a decree had been pronounced in the Court of Chancery for the general administration of a testator's assets, a bill filed in this Court by an annuitant under the will against the executors was stayed, although the decree in Chancery was not drawn up.

[S. C. 6 L. J. Ex. Eq. 74; 1 Jur. 512.]

William Phelps, deceased, by his will bequeathed various legacies and devised various real estates, and by a codicil he bequeathed an annuity of 30*l.* to Sarah Prophett for her life, which was afterwards, in November 1835, assigned for valuable consideration to the plaintiff. William Phelps having, after the date of his will, contracted for the purchase of certain real estates, and having died without completing that purchase, a suit was instituted **[376]** in the Court of Chancery (*a*)[2] by his heir-at law, to whom those estates had descended, for the purpose of charging the testator's personal estate with the purchase-money for the descended estates remaining unpaid. This suit was followed by several others in the same Court relative to the affairs of the testator. Amongst them was a suit instituted in May, 1835, by Anthony Sproule, the personal representative of one of the legatees, on behalf of himself and the other unsatisfied legatees, against the real and personal representatives of the testator, praying the payment of the legacies, and particularly a legacy of 1000*l.* due to the plaintiff; and in case the testator's personal estate should be exhausted by payment of the purchase-money for the descended estates, then that the legacies might be raised and paid out of the descended estates.(*b*) The last-mentioned suit, which was the suit of *Sproule* v. *Prior*, together with the other suits, came on

(*a*)[1] See *Field* v. *Sowle*, 4 Russ. 112.
(*a*)[2] See *Phelps* v. *Sproule*, 1 M. & K. 231.
(*b*) See *Pollexfen* v. *Moore*, 3 Atk. 272

for hearing before the Vice-Chancellor on the 2nd November, 1836, when it was decreed, in all the suits, that it should be referred to the Master to take the usual accounts of the testator's personal estate, and also of the testator's debts, funeral, and testamentary expenses, and of the legacies, and the annuity given and bequeathed by his will and codicil.

At the time this decree was pronounced the present suit was pending in this Court. The bill had been filed in January, 1836, against the same persons as were defendants in *Sproule* v. *Prior*, praying payment of the annuity, and for that purpose seeking the same relief against the personal and descended real estates of the testator as had been sought in the case of *Sproule* v. *Prior*. The same solicitor acted for the plaintiff in each cause.

A motion was now made on behalf of all the defendants (except one who had ceased to have an interest) that all **[377]** further proceedings in this suit might be stayed. In support of the motion an affidavit was read, stating that immediately after the decree in Chancery was pronounced, notice of that fact, and of the purport of the decree, was served on the solicitor of the plaintiffs in this suit; that the decree was then in the course of being drawn up, and would be perfected and prosecuted with all due diligence; that by virtue thereof the testator's estate and effects would be administered among the creditors and legatees; that the plaintiff would be at liberty to make out his claim before the Master to whom the causes in Chancery stood referred; that consequently the present suit was unnecessary, and if proceeded in would be stayed, together with all further allowance of costs. The affidavit then stated that, notwithstanding this notice, the plaintiff had proceeded with the present suit.

Mr. Simpkinson and Mr. Bethell, for the motion. *Hayward* v. *Constable* (ante, p. 43) is an authority to shew that the Court will stay these proceedings. The nature of the proceedings in the Court of Chancery was to bring to it the whole administration of the personal estate in which this plaintiff is interested. It has therefore possessed itself of that. A question was raised in the cause of *Sproule* v. *Prior* as to the right of the annuitants to have their claims satisfied in priority to the claim of the heir at law; and that was decided in their favour. The decree in Chancery is a perfect decree, declaring the whole of the equities of the annuitants and the legatees of Phelps. Nothing can be said in answer to this fact, except that the decree has not been actually drawn up; but it is in the progress of being drawn up, and is only delayed by the conduct of this plaintiff. It is remarkable that the attorney who acts for the plaintiff in this suit was the **[378]** attorney in the cause of *Sproule* v. *Prior*, and that both bills are signed by the same counsel, and are, mutatis mutandis, the same. There being, therefore, an identity of purpose in these suits, it would be a useless waste of the testator's assets to permit the suit in this Court to continue. Even if the plaintiff obtained a decree here, he must go into Chancery to participate in the fund.

Mr. Temple and Mr. Kenyon Parker, contrà. No decree has been yet drawn up in Chancery. It would be a novelty for the Court to say to a suitor, You shall go no farther in your proceedings here, because it is averred that there will be a decree in another Court, under which you may have relief. The Court only acts on the inspection of the decree itself, from which alone it judges whether there is any need of further proceedings in this Court. In *Hayward* v. *Constable* it was manifest that the two suits were for the same purpose. Here, that is by no means evident. It is, in fact, not known what the decree will be; and the Court cannot act upon a mere affidavit as to the general result of the decree. In *Jackson* v. *Leaf* (J. & W. 232) Lord Eldon said that he did not remember any instance where one Court had enjoined a party from proceeding in another Court of equity, though he stated that in the same Court an injunction would lie where there were different suits for the same purpose. Now, even admitting that the present suit is instituted for the same purpose as the suit in Chancery that circumstance alone ought not to induce this Court to stay these proceedings. *Sproule* v. *Prior* is the first case in which *Pollexfen* v. *Moore* (3 Atk. 272) was overruled. Upon the hearing of this case, your Lordship may be of a different opinion upon the point of law.

Mr. Simpkinson, in reply.

[379] THE LORD CHIEF BARON. It appears to me that no purpose will be gained by this suit, and that there is no reason why the plaintiff should not obtain the relief which he seeks in the Court of Chancery, where the account will be taken of

all the legacies and personal estate of the testator. Let the proceedings be stayed till the further order of the Court, but let the question of costs be reserved.

Order accordingly.

SELBY *v.* GILLUM. Dec. 13th, 15th, 1836.—Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given.—Where a testator made special provision for the maintenance of his younger children until receipt of their portions, and stated the sum appointed for the maintenance of the sons to be "in lieu of interest:" Held, that the daughters were not entitled to interest on their portions, although there was a general clause in the will that the trustees should stand possessed of the trust funds, and the interest, dividends, and annual produce thereof, for the benefit of the daughters, upon their attaining 21.

Stephen Fryer Gillum, by his will, after devising certain estates in Essex, in aid of his personalty, for the payment of his debts, gave and devised his estates in Northumberland to trustees, of whom the plaintiff was the representative of the survivor, upon trust for securing certain annuities; and subject thereto (and also charged and chargeable with the sum of 6000l. as a provision for his eldest daughter Anne Gillum, to be raised and paid as thereinafter mentioned, and with the further sum of 16,000l., by way of provision for his younger children, Elizabeth, Margaret, Marianne, Henry George, Isabella Selby, and Charlotte Sarah, to be raised and paid in such proportions, at such times, and with such interest for the same, or with such monies in lieu of interest for the same, in the meantime, as thereinafter mentioned), to the use of his son, Stephen Fryer, in case he should live to attain the age of twenty-one years, and to his heirs and assigns for ever. The testator then proceeded as follows:—"And as for and concerning the said sum of 6000l. hereinbefore mentioned and intended by me as a provision for my said eldest daughter, and which I do hereby charge upon my said estates hereinbefore devised to the use of my son Stephen **[380]** Fryer as aforesaid, my will is, and I do hereby direct that the same shall be raised by sale or mortgage of a competent part of the said hereditaments and premises charged therewith, within the space of two years next after my said son Stephen Fryer shall have attained the age of twenty-one years; or in case he shall die under that age, then within two years after his decease; and the same, immediately after it shall be raised, shall be paid to my said daughter Anne; and in the meantime, until the same shall be raised and paid, the annual sum of 300l., as and by way of interest for the said sum of 6000l., shall be paid to my said daughter by equal half-yearly payments on the 12th day of May and the 11th day of November in every year, from and after my decease, out of the rents and profits of the said hereditaments and premises, until the said principal sum shall be raised and paid, &c. And as for and concerning the said sum of 16,000l. hereinbefore mentioned and intended by me as a provision for my younger son and younger daughters, and which I do hereby also charge upon my said estates devised to the use of my son Stephen Fryer Gillum, my will is, and I do hereby direct, that the sum of 5000l., part of the said sum of 16,000., shall be raised by mortgage or sale of a sufficient part of my estates and hereditaments charged therewith, and paid to my son Henry George immediately upon his attaining the age of twenty-one years; and that in the meantime, and in lieu of interest for the same, the following sums of money shall be paid to my said trustees, to be applied in and for the maintenance and education of my said son Henry George, that is to say, the annual sum of 100l. when he shall be under ten years of age, the annual sum of 150l. while he shall be above ten and under fifteen years of age, and the annual sum of 200l. while he shall be above fifteen and under twenty-one years of age. Provided always, that in case my said son Henry George shall depart this life before he shall attain the said age of **[381]** twenty-one years, then and in that case the said sum of 5000l., intended for him, and being part of the said sum of 16,000l., shall not be raised or paid, but the hereditaments charged therewith shall thenceforth be freed and exonerated from the said sum of 5000. And I will and direct that the said sum of 11,000l., residue of the said sum of 16,000l., shall be raised in like manner as aforesaid within the space of two years next after my said son Stephen Fryer shall have attained his age of twenty-one years, or in case he shall die under that age, then within two years after his decease; and when and so soon as the same

shall be raised and paid, the sum of 2200l., being one equal fifth part or share, shall be paid to my said daughter Elizabeth, to and for her own use and benefit, in case she shall then have attained the age of twenty-one years; and if not, then upon her attaining the said age; and in the meantime the same shall be invested by my executors and trustees for her benefit in the manner hereinafter mentioned. And as for and concerning the remaining four fifth parts of the said sum of 11,000l., the same shall be laid out and invested by my said executors and trustees, in their names, &c. in some of the public stocks or funds of this kingdom; and they my said executors and trustees, &c. shall stand and be possessed of and interested in the stocks, funds, and securities so to be purchased, and of and in the dividends, interest, and annual produce thereof, upon the trusts following—that is to say, in trust for my said daughters Margaret, Marianne, Isabella Selby, and Charlotte Sarah, and to be equally divided between them, share and share alike, the same shares to be interests vested in them my said daughters respectively at their respective ages of twenty-one years. Provided always, that if any one of my said daughters, Elizabeth, Margaret, Marianne, Isabella Selby, and Charlotte Sarah shall depart this life under the said age of twenty-one years, then the part or share of such daughter so dying **[382]** under the said age of twenty-one years shall be upon trust for the survivor of them my said daughters, and shall be equally divided between them, share and share alike; but in case any two of them my said daughters Elizabeth, Margaret, Marianne, Isabella Selby, and Charlotte Sarah shall depart this life under the said age of twenty-one years, then the sum of 6600l., part of the said sum of 11,000l., shall be paid to the survivors of them my said daughters, and the sum of 4400l., residue thereof, shall be paid to and divided between my said daughter Ann, and my son Henry George, on their severally attaining the age of twenty-one years, in equal shares and proportions." [The will then contained provisions in the event of the deaths of others of the children.] "Provided always, that it shall be lawful for my said executors and trustees, &c., from time to time during the minority of my said son Stephen Fryer to apply for the maintenance and education of him my said son such sum or sums of money out of the rents and profits of the hereditaments and premises so devised to him as aforesaid as they shall think proper, not exceeding the following sums of money—(that is to say), the annual sum of 100l. while he shall be under ten years of age, the annual sum of 150l. while he shall be above ten and under fifteen years of age, and the annual sum of 250l. while he shall be above fifteen and under twenty-one years of age; and that during the respective minorities of my said daughters (except my eldest daughter, Ann, whose maintenance is hereinbefore provided for), to apply such sum or sums of money as they my said trustees or trustee for the time being shall think proper, not exceeding the annual sum of 100l. for each such child whilst under ten years of age, the annual sum of 125l. for each such child whilst above ten and under fifteen years of age, and the annual sum of 150l. for each such child whilst above fifteen and under twenty-one years of age, from and out of the rents and profits of the said hereditaments and premises charged with the provi-**[383]**-sions made for them my said daughters by this my will, in, for, and towards the maintenance and education of such daughters respectively as aforesaid." The testator then, after giving his trustees power to lease, and other powers relative to his real estates, and after bequeathing several legacies and annuities, bequeathed the residue of his personal estate to his trustees, their executors, &c., upon trust to invest the same in the public funds, and to stand possessed of the dividends thereof in aid of his real estate, in satisfaction of the several charges thereon; and subject thereto, in trust for all his children by name (except his eldest son), equally to be divided amongst them, share and share alike, and to be paid to them at their respective ages of twenty-one years, with benefit of survivorship in case of the death of any under twenty-one.

The testator, by a codicil to his will, after reciting that he had charged his Northumberland estate with the sum of 16,000l., for the benefit of his younger children, and that he had then three more children since the making of his will, viz., Georgiana, Catherine, and Prideaux William, charged the same estates with the additional sum of 6000l. for the benefit of the younger children. He then directed that his son Henry George should, out of the 22,000l. so constituted, receive the sum of 4000l. only, to be paid to him at twenty-one, instead of the 5000l. provided by the will; but that the annual provision for his maintenance should remain the same as before. The testator then directed a sum of 4000l. to be raised in like manner for

his son Prideaux William, to be paid him at twenty-one; that until that time, in lieu of interest, the same sums should be applied for his maintenance as had been provided for that of Henry George; and that, in the event of his dying under twenty-one, his share should not be raised. The testator then proceeded as follows:—"And whereas by my said will I have given to each of my said daughters Elizabeth, Margaret, Marianne, Isabella Selby, **[384]** and Charlotte Sarah, the sum of 2200l.; now my will is that each of my said daughters shall be entitled to receive the sum of 2000l. only, in lieu of the said 2200l., such respective sums of 2000l., to be raised in the same manner, and to vest in and be payable to my said daughters respectively at the time in such manner as in my said will is directed concerning the said sum of 2200l. thereby given to them respectively as aforesaid; and I do will and direct that the like sum of 2000l., part of the same charged upon my estates as aforesaid, shall be held by my said trustees, in trust for each of my said daughters, Georgiana and Catherine, to be an interest vested in them my said daughters respectively, at their respective ages of twenty-one years: Provided always that in case one of my said daughters, Elizabeth, Margaret, Marianne, Isabella Selby, Charlotte Sarah, Georgiana, or Catherine shall depart this life under the age of twenty-one years, then the part or share of such daughter dying under the said age shall be in trust for the survivors of them my said daughters, equally to be divided between them; but in case any two of them, my said daughters, shall depart this life under the age of twenty-one years, then, instead of the directions contained in my said will with regard to the happening of such an event, I do will and direct that the sum of 12,000l., part of the sum of 14,000l. hereby intended for the benefit, shall be paid to the survivors of them my said daughters, and the sum of 2000l., residue thereof, shall be paid to and divided between my daughter Anne, and my sons Henry George and Prideaux William, on their severally attaining the age of twenty-one years, in equal shares and proportions." The testator then made provision for the event of other children dying under twenty-one.

The testator died in October 1826, leaving the several children named in the will and codicil surviving him. Three of these, however, died under the age of twenty-**[385]**-one, namely, Henry George, Georgiana, and Catherine. Of the others, Anne attained her majority in the lifetime of the testator, and married the defendant Steele; and Stephen Fryer attained his majority in October, 1833, and Elizabeth and Margaret in the years 1832 and 1834.

The questions in the cause were—

1. Whether, inasmuch as two years had elapsed since Stephen Fryer Gillum had attained his age of twenty-one years, all the younger children, or such only as had attained twenty-one, were entitled to have their portions raised and invested for their benefit; and whether such as were so entitled had a right to interest on their portions, as well as specific sums for their maintenance during their minority?

2. Whether the share of Henry George Gillum in the sum of 2000l., which was provided by the codicil for Anne, Henry George, and Prideaux William, in the event of two of the younger daughters dying under twenty-one, merged in the estate upon the death of Henry George under twenty-one?

3. Whether, if it did not merge, it survived to Anne and Prideaux William, or descended to the personal representative of Henry George?

Mr. James Russell, for the plaintiff.

Mr. Bethell, for the personal representative to Henry George Gillum. By the terms of the will, Henry George Gillum, dying under twenty-one, was not entitled to the sum of 5000l. thereby provided for him, because in the will is an express provision against his taking a vested interest during his minority. But the 4000l. provided for him by the codicil was a vested interest in him before twenty-one, and as such is transmissible to his personal representative. If the testator had intended otherwise, he would have repeated in the codicil the direction, which he had **[386]** before given in the will that the share of Henry George should merge upon his death under twenty-one. But that the testator has omitted to do, although in the same codicil he does give such a direction in regard to the share of Prideaux William. That being the apparent intention of the testator in regard to the 4000l., it is reasonable to suppose that he likewise intended Henry George to take a vested interest in the one-third of the 2000l. bequeathed to him in the event of the death of two of his younger sisters. That one-third he took as tenant in common, and consequently it has descended to his representative.

Mr. Hayter, for the defendants, Mr. and Mrs. Steele, contended that the share of Henry George in the 2000l. survived to Mrs. Steele and Prideaux William, and that the testator had throughout his will avoided the use of words creating a tenancy in common; he had, on the contrary, taken pains to make express provision for the case of every individual daughter dying.

Mr. G. Richards, for the younger daughters of the testator. The general principle is admitted that where portions are charged by will on real estate, the time of raising is the time of payment. But here the testator appoints a time of raising these portions independently of the time of their payment, namely, within two years after his son, Stephen Fryer Gillum, should attain twenty-one years of age. The portions, therefore, are raisable at that period, whether the daughters are of age or not; the time of raising them being fixed by the instrument by which they are created: *Codrington* v. *Lord Foley* (6 Ves. 364, 379). The money must be raised and invested immediately, and paid to the daughters at their respective ages of twenty-one. They are likewise entitled to certain specific sums for mainte-**[387]**-nance out of the rents of the real estate, and to interest on their portions. There is an express direction in the will that the trustees shall stand possessed of the funds to be purchased for the younger daughters, and of the dividends, interest, and annual produce thereof, in trust for their benefit. He then referred to *Courtney* v. *Ferrers* (1 Sim. 137).

Mr. Russell, in reply.

Dec. 15th.—ALDERSON, B. On examining the will and codicil carefully, which are very incorrectly worded, the case does not appear to present much difficulty. It seems clear that the testator intended to give specific legacies of money to his children, as charges on his real estate, on their attaining twenty-one, and to give to all, except his daughter Anne, maintenance till that period.

In the legacies to the sons he speaks of this maintenance being in "lieu of interest." There the interest would have exceeded the sum for maintenance, and that clearly shews his intention that only maintenance should be there given, negativing interest.

In the case of the daughters, whose specific portions were smaller, he gives maintenance expressly, but says nothing about interest; probably because the amount was less than the maintenance.

These circumstances would lead me to conclude, as to his intention, that he did not mean to give interest. The only passage in the will to the contrary is that referred to by Mr. Richards, in which the testator directs the trustees, after raising the remaining 4-5ths of the 11,000l., to stand possessed of the interest and dividends, in trust to divide it equally amongst the four daughters. But all the rest of the will and the codicil is wholly inconsistent with this clause if taken literally. Throughout, he speaks **[388]** of the legacies to his daughters as specific sums of money payable at twenty-one. On the whole, I do not doubt that only maintenance is due.

Secondly, I think it quite clear that, taking the will and codicil together, as they ought to be taken, the testator has clearly expressed his intention, that in case Henry George did not attain twenty-one, his legacy should merge. All the legacies are postponed as to the time of payment, in consequence of the minority of the legatees, and a separate provision during minority is made for them. This clearly brings the case within the general rule of legacies charged on land, and not within any of the exceptions.

Thirdly, I think, that in the events which have happened, namely, the deaths of two of the daughters under twenty-one, and that of Henry George Gillum before those deaths both happened, Anne and Prideaux only take one-third. I think the intention of the testator was to give the 2000l. to them, not as survivors of Henry George Gillum, but in specific thirds.

And as to the one-third which would have gone to Henry George Gillum if he had survived, I think that his personal representative has no claim to it. If transmissible at all, its payment depends at all events on his attaining twenty-one, and he not having done so, it sinks into the estate.

I think, therefore, that I must, on the whole will,

Declare that on attaining twenty-one, in the events which have happened, each of the surviving daughters will be entitled to one-fifth of 12,000l., and that Prideaux William Gillum is entitled to 4000l., and also to a one-third share of 2000l., in consequence of the contingency of the deaths of his two sisters and brother Henry George

Gillum; that Anne is entitled, in addition to her 6000l., to one-third of 2000l. also, under the same contin-**[389]**-gency; that the legacy to Henry George Gillum has merged, and also the contingency of one-third of 2000l., and that his personal representative is not entitled to anything; that the 12,000l., and the share of Anne, 666l. 13s. 4d., is raisable now, and that the share of P. S. Gillum will be raisable on his attaining twenty-one; that the younger children are entitled to maintenance till twenty-one, at the rates specified, and not to interest on their portions.

MILLS *v.* CAMPBELL. Dec. 8th, 1836.—A demurrer in bar of relief, without mentioning discovery, where the bill merely prays discovery is bad.—A bill for a commission to examine witnesses abroad, in aid of a defence to an action at law, is not a bill for relief.—Where a bill for discovery against an assured alleged that he had been employed to procure the goods which were the subject of the policy: Held, that a demurrer to the discovery would not hold, although the bill stated that the defendant had been paid and satisfied the full value of the goods; the object of the bill being to ascertain whether he was not a mere agent.—A bill brought by the Lloyd's underwriters and the Corporation of the London Assurance in respect of policies underwritten by each of those parties respectively, is not multifarious; although the Lloyd's policies are not under seal, and those of the London Assurance are under seal.—Since the Reg. Gen. Hil. Term, 4 Will. 4, a defendant in an action of assumpsit brought on a policy of insurance, must plead the plaintiff's want of interest specially.—Upon the coming in of the defendant's answer, in an insurance cause, the Court refused to allow the plaintiffs to amend their bill by adding charges relative to matters which might, with proper diligence, have been originally put in issue by the plaintiff.—The laches of the plaintiffs, in a bill for discovery in aid of a defence at law, is not a ground for depriving them of a commission for the examination of witnesses abroad, though it is a ground for putting them to more severe terms.

[S. C. 7 L. J. Ex. Eq. 2, 5; 1 Jur. 865.]

The bill, which was filed by underwriters against an assured, who had brought actions against the plaintiffs on the policies, prayed for discovery, and a commission to examine witnesses abroad in aid of the plaintiffs' defence to the actions, and that in the mean time the defendant might be restrained from proceeding in the said actions, and from commencing any other action against the plaintiffs.

The defendant demurred to the bill, alleging, as cause of demurrer, "that it appears by the said complainants' own shewing in their said bill, that they are not entitled to demand any such relief thereby against this defendant as is prayed by their said bill: wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly asks the judgment of this Honorable Court whether," &c.

Mr. Spence, for the defendant, having stated the nature of the bill and demurrer,

Mr. G. Richards, for the plaintiff, objected that the demurrer being to relief only, and not to discovery and relief, could not be supported. Had the bill prayed relief, the demurrer to the relief would have included the discovery; **[390]** but the bill not praying relief, the defendants ought to have demurred specifically to the discovery. The defendant could not be allowed to demur ore tenus to the discovery, for then his objection would be inconsistent with his demurrer, as it appeared on the files of the Court.

The Lord Chief Baron being extremely unwilling to entertain this objection,

Mr. Simpkinson, amicus curiæ, said that Lord Lyndhurst had laid it down that you cannot, on a bill for mere discovery, demur to the relief, and ore tenus demur to the discovery; you must confine yourself to what is covered by the demurrer on the record.

Mr. Spence and Mr. Purvis, for the defendant. In *Crow* v. *Tyrrell* (2 Mad. 408) it was held that asking for the production of papers and documents is not asking for relief, but no such decision has ever been made in regard to a commission to examine witnesses abroad. It is submitted, therefore, that this is a bill for relief. But even if it be not, we submit that a demurrer to the relief extends to every thing contained in the bill, whether it be for relief, or simply for discovery, *Wallis* v. *Duke of Portland*

(3 Ves. 494), *Lord Kensington* v. *Mansell* (13 Ves. 240), Wigram on Discovery, p. 150. Even admitting that the first part of the demurrer is bad, it will be saved by the words, "for divers other good causes," &c.

Mr. Richards in reply observed that in the cases cited on the other side the form of the demurrer did not appear. He also contended that praying for a commission to examine witnesses in aid of a defence at law, could **[391]** not turn the bill into a bill for relief: *Chimelli* v. *Chauvet* (1 Younge, 302).

THE LORD CHIEF BARON said that he was sorry to decide against the defendant on a question of form, but that there would be no distinction between one demurrer and another, if he did not say that this was a demurrer to relief which was not sought by the bill. He should, however, give the defendant liberty to amend his demurrer, upon payment of costs, and undertaking not to proceed in the actions till the demurrer should have been argued.

Order accordingly.

Dec. 19th.—The amended demurrer now came on for argument. The bill purported to be brought by certain persons therein named, described as of Lloyd's Coffee-house, in the city of London, merchants and underwriters, and also by the corporation of the London Assurance. It stated that on the 7th of August, 1835, George Robinson & Co., as well in their own names as in the names of all other persons to whom the same might appertain, effected two policies of insurance, one whereof was underwritten by the Lloyd's underwriters, and the other by the London Assurance, upon the ship "Clio," bound from Liverpool to Para in the Brazils, and upon certain arms, accoutrements, musical instruments, and other goods on board the said ship. That the said ship sailed from Liverpool on the said 7th August, having, as it was alleged, the said goods on board, and proceeded on her voyage until the 30th September, when, as was alleged, she anchored off a place called Se-**[392]**-linas, in South America, which was in her course to Para. That by certain papers which had been produced by the defendant to the plaintiffs in support of his claim on the policies, it was alleged that, on the 3rd of October, 1835, the ship was attacked and destroyed by pirates, and the goods so insured were stolen and taken away and became wholly lost to the defendant. That the plaintiffs had lately, and since the said pretended loss, discovered that the goods mentioned in the policies were ordered by the defendant, in order that he might supply the Brazilian government therewith, and that the Brazilian government had employed the defendant to ship the said goods on board the said ship, for the purpose of being brought from Liverpool to Para, and that the said shipment was made by the defendant in consequence of a contract that had been made with the Brazilian government, that he would procure the said goods, to be shipped and conveyed to Para, for the benefit of the said government. That amongst the papers produced by the defendant there was a copy of a letter, dated Para, 27th September, 1834, written and sent by the defendant to Messrs. Bates & Barrows, of Birmingham, ordering the goods comprised in the policies. [The bill then set forth the letter, in which the defendant stated that he had contracted with the Brazilian government to furnish them with the accoutrements, and requested his correspondents to execute the order.] The bill then stated and charged as follows:—"That since the loss of the said ship, your orators have ascertained, as the fact and truth is, that the said Brazilian government have paid the said defendant hereto for the said goods, and for each and every of them, and for all the costs which he has been put to in relation thereto, and that in fact there is now nothing due and owing to the said defendant in respect of the said goods, the said government having satisfied the said defendant every thing in respect thereof. And your orators further shew **[393]** that the defendant has nevertheless commenced actions, &c. And the said defendant sometimes pretends that the said Brazilian government have not paid him for the said goods, whereas your orators charge the contrary to be true, and that previously to the shipment of the said goods, the said Brazilian government entered into a contract in writing with the said defendant, relating to the said goods; and so it would appear, if the said defendant would set forth a full, true, and particular account of each and every contract which he has entered into with the said Brazilian government, relating to the said goods and every part thereof, and when and where such contract was entered into, and the particulars thereof. And your orators charge that the said defendant, at the time that the said contract was entered into with the said Brazilian

government, received a very considerable sum of money in respect of the said goods, and has from time to time, since the said contract, received large sums of money in respect of the said goods, and so it would appear if the said defendant would set forth a full, true, and particular account of all and singular the sums of money received by the said defendant from the said Brazilian government, in respect of the said goods; and the defendant sometimes pretends that the said goods form an item in account between himself and the said Brazilian government, whereas your orators charge the contrary to be true, and that in such account the said Brazilian government have given credit to the said defendant for the said goods, and so it would appear if the said defendant would set forth, as he ought to do, a full, true, and particular account of the dealings and transactions between himself and the said government, of and relating to the matters aforesaid; and whether there is not a large sum of money now due and owing by him to the said government upon a balance of account."

[394] Mr. Spence and Mr. Purvis, for the demurrer. The allegations in the bill as to the defendant having been paid by the Brazilian government are perfectly inconsistent with each other. First, the bill states that the defendant has been paid in monies numbered, and then that the Brazilian government has given the defendant credit for the goods in account. Such a mode of pleading is inadmissible. Besides, it is not stated in the bill when the defendant was paid, and he may have been paid subsequent to the actions. Let it be conceded, however, that he has been paid to the full extent stated in the bill. For what purpose is the discovery sought? If the Brazilian government have paid him upon a consideration that has altogether failed, they may recover the money in an action against the defendant. That, however, is not a matter in which the plaintiffs are interested, and could afford them no defence to the actions brought by the defendant against them. The discovery therefore which they seek in aid of what, if proved, would be no defence at law, cannot be granted, and upon that ground the demurrer ought to be allowed: *Mendizabel* v. *Machado* (1 Sim. 68), *Robertson* v. *Lubbock* (4 Sim. 161).

The other objection to the bill is on the ground of multifariousness. The bill is brought, in respect of two distinct policies, by two distinct parties, one of whom, being a corporation, have affixed their seal to the policy in which they are concerned. It follows that the actions which have been brought against these parties are distinct in their nature, and must be met by different pleas. How, then, can one injunction be granted to restrain the defendant in both actions? If this mode of pleading be allowed, the commission and injunction must go in the name of all the plaintiffs, although some of them may not have an interest, or not a joint interest with the others, in **[395]** the discovery, which is contrary to the known rule upon the subject: Mitf. Pl. 187, 4th ed.

Mr. Simpkinson and Mr. G. Richards, for the bill. If it appeared clear upon the face of the bill that the defendant, as seller, had agreed to furnish these goods to the Brazilian government, and had been paid for them, no doubt he would be liable to refund the money to the buyers, and in that case the present plaintiffs might fail in their defence at law. But that is not the case made by the bill. The bill states that the defendant has been paid, but inquires under what circumstances. Now if the plaintiffs are entitled to an answer to any part of the bill, the demurrer going to the whole discovery must be overruled. It is stated that Campbell entered into a contract with the Brazilian government, and one part of the bill calls on him to set forth the terms of the contract. In the action which he has brought he has averred the interest to be in himself, but the contract, if discovered, would shew what real interest he had; and it is to defend the actions in this particular that we call upon him for discovery. If it appear that he had no interest, and was fully satisfied, it is clear that he must be restrained in these actions: *Godsall* v. *Boldero* (9 East, 72). If he has been satisfied his demand, it is new for a party to bring an action, and then demur to the discovery in aid of the defence. The discovery sought is not in aid of an action, but in aid of a defence to an action; and therefore, if this demurrer be not overruled, a judge in equity will have to decide whether certain facts do or do not constitute a good defence at law; which is contrary to the functions of such a judge: *Bishop of London* v. *Fytche* (1 Bro. C. C. 94). But it is not necessary to dwell upon this: the real question is whether, considering that a policy of assurance is merely a contract of indemnity, this defen-**[396]**-dant, who admits by his demurrer that he has been fully paid and satisfied, shall be allowed to continue these actions. Some of the charges of the bill may not be so strong as others; but it is enough to say that there is a charge that

he has been paid for the goods and for all costs incurred, and that there is nothing due and owing to him in respect of the goods.

The other objection to the bill is untenable. It is every day's practice for underwriters to join in one suit in respect of different policies: *Kensington* v. *White* (3 Price, 164), *Irving* v. *Viana* (M'Clel. & Yo. 563), *Janson* v. *Solarte* (ante, p. 127). [Mr. Purvis. In those cases the policies were underwritten by all the plaintiffs.] In *Shackell* v. *Macaulay* (2 Sim. & Stu. 87), Sir John Leach said that underwriting causes were not to be reasoned upon as affording general rules in matters of pleading; and it is clear that it would be highly inconvenient to require a separate bill for every policy. [The Lord Chief Baron. If I remember right, the frame of the bill in *Shackell* v. *Macaulay* was something like the present, but there the commissions were to be directed to two different places, so that the evidence taken under them might come back at different times.] That circumstance made the objection for multifariousness much stronger in that case than in the present. But at all events the defendant is too late in this objection. After permission to amend he could not put in a demurrer for multifariousness, and therefore he cannot be permitted to make the same objection ore tenus.

Mr. Spence, in reply.

THE LORD CHIEF BARON. As to the objection for multifariousness, it appears to me that there is no distinc-**[397]**-tion in principle between this case and those which have been cited, where the underwriters having been sued upon different policies, the Court has not put them to file different bills to restrain the actions. The circumstance that one of the policies in this case is under seal, and the other not under seal, can make no difference. Formerly the only difference would have been that in the actions on the policies the corporation of the London Assurance might have pleaded specially that the plaintiff had no interest, while the others would have given that fact in evidence under the general issue. But the late act (3 & 4 Will. 4, c. 42; Reg. Gen. H. T. 4 Will. 4) renders it necessary for underwriters, even in assumpsit, to plead specially in matters of this nature. Therefore, in fact, the two actions would be met by the same sort of plea. Upon these grounds it appears to me that the first objection fails.

Upon the other point I own that I at first entertained some doubts; but I think I shall come to a just conclusion if upon that also I overrule this demurrer. If Mr. Spence's mode of construing this bill were correct throughout, the observation would apply that credit having been given to the defendant upon a consideration which had failed, the money must be refunded; and in that view of the case it would appear upon the bill that he had no interest in the policy. But I am not called upon to confine myself to that view of the case. When a party demurs, his demurrer ought to embrace all that was reasonably intended by the bill. Undoubtedly the bill might have been better framed. The intention was to see whether Campbell was not a mere agent of the Brazilian government. One part of the bill states that he has been paid, and as to that there are sufficient allegations; for what does it signify whether the other part of the bill is not so strong? Then, in what character was he paid? **[398]** The bill suggests as an agent. It says that he was employed "to procure the goods," not to sell them. If he was employed to procure them, he is like any other agent; and if paid, he can have no right to maintain the action. If, on the other hand, he was the seller, he is bound by his contract with the Brazilian government in case he does not deliver the goods; and in that case, I admit that if he was paid he must refund. The question then turns upon whether he was seller or agent, and as to that the plaintiffs are entitled to discovery. The demurrer, therefore, must be overruled.

Demurrer overruled.

Nov. 17th, 1837.—The defendant then put in his answer, in which he set forth verbatim an agreement between himself and the Brazilian government, dated the 24th of September, 1834, by which it was stipulated that the defendant, who was residing at Para, should send for the arms and accoutrements to England; that they were to be provided according to certain patterns, and to be shipped on account of the contractor, and conveyed as far as Para, and then delivered to the agents of the Brazilian government; and that half the purchase money was to be paid to the defendant before the delivery, and the remainder upon delivery. The defendant then stated that in pursuance of this agreement he ordered the goods in question, and on the 20th of February, 1835, received from the Brazilian government one-half of the amount; but that he gave security to that government for the due performance of the contract, and

held himself liable to them in case it was not performed. He admitted the capture and loss. He insisted that the arms having been shipped on his own account, and himself being liable to the Brazilian government for the moiety of the purchase-money which he had been paid antecedently to the loss, he ought not to be restrained in the actions. He admitted, however, that he had not repaid the moiety of the purchase-money, but that the [399] Brazilian government, having taken the circumstances into consideration, had given him time to fulfil his engagement, and that he had in consequence written to Messrs. Bates & Barrows for a further supply of arms.

A motion was now made, on behalf of the plaintiffs, for liberty to amend their bill, without prejudice to the injunction, by adding certain charges and inquiries as to whether any contract had been entered into by the defendant and the Brazilian government for giving time for the fulfilment of his engagement; what were the particulars of the correspondence with Bates & Barrows for the further supply of arms: and lastly, whether any of the arms which had been supplied, and were alleged to be lost, had not got into the hands of the Brazilian government.

Mr. Simpkinson and Mr. G. Richards, for the motion. This is the first time that the plaintiffs have had any information of the defendant's having had time given to fulfil his contract, and of his having ordered a further supply of arms. It becomes, therefore, essential to know the particulars of the new agreement and new order. The first contract that was entered into was in writing, and is given by the defendant verbatim. The probability is that the second was in writing also. It may contain recitals materially affecting the plaintiffs; shewing, for instance, either great laches on the part of the Brazilian government, or that they had got possession of the arms before the pirates seized the ship; or it may shew, what seems probable from some expressions in the answer, that the ship had arrived at the limits within which the goods were to be delivered; in which case the defendant's liability to the Brazilian government would cease. *Janson* v. *Solarte* (ante, p. 132) is an authority for this application.

[400] Mr. Spence and Mr. Purvis, contrà. In *Janson* v. *Solarte* the motion was supported by affidavits as to matters which were in immediate connection with the subject of the bill. Here, the plaintiffs have filed no affidavits, but rely entirely upon their own suggestions derived from the answer. At all events, they ought to shew that the defendant has disclosed matters which are material to their case, and which they could not have known before. The goods insured, and in respect of which the bill was brought, were those mentioned in the contract which is set forth in the answer. Prior to their delivery, those goods were lost, and the defendant having come upon the underwriters for the insurance money, they filed the present bill to ascertain what interest he had in them. Now, whatever that interest was, it can have no reference to any subsequent contract made in relation to other goods; but, even looking at the defendant's actual interest in the goods that were lost, is it probable that the information sought would be material to the plaintiffs? He undertook to furnish goods to the Brazilian government. They were lost, and the defendant having been paid for them became liable to refund. The government, however, instead of calling on him or his sureties to repay, agreed that he should furnish other goods to supply the loss. How can anything arise out of this that would be material to the plaintiffs? But we submit that they should at least have filed affidavits as to materiality.

Mr. Simpkinson, in reply.

The Lord Chief Baron. The only doubt which I have entertained in this case is whether or not there was a sufficient disclosure of the circumstances, before any bill was filed, to lead the plaintiffs to suggest by their bill whether any and what arrangement had been made at any time between the defendant and the Brazilian go-[401]-vernment in respect to this loss. I admit that, in general, if you direct your inquiries to a particular contract made at one particular time, and the defendant discloses some other contract made at another time, which is connected with the matters inquired after, but does not amount to a full disclosure of those matters, this would be ground for allowing you to amend your bill. But where the disclosures already made before the filing of the bill are sufficient to put the plaintiff on inquiry, as the disclosures here were sufficient to put the plaintiffs on their inquiry as to the probability of loss, and the nature of the contracts entered into—I am at a loss to see why the original bill should not have been directed to those subjects. I think there is much in what was said for the plaintiffs as to the first contract being set out in the

answer, and the other not: but still I think the plaintiffs come too late to avail themselves of any inquiries which might arise from this circumstance. The underwriters in this case were aware, when they filed their bill, that the ship had been lost, that the cargo was said to have been taken by pirates, that the party who had ordered the cargo had been in some way paid, and yet that he was seeking to recover the insurance money in an action. Upon the supposition that he had been paid, they make certain inquiries on that head, to which he answers that he has been paid half the amount. They then find their case incomplete without further information as to how and under what conditions the whole was paid. But why could they not have asked him this by their original bill? They might have put to him the questions—Have you been paid the whole? or, if not, how much have you been paid, and upon what terms have you been indemnified as to the remainder? Although one is desirous of giving room for every inquiry in these cases, yet, if a party neglects his opportunities of inquiring in the first instance, he ought not to be allowed to make suggestions afterwards which he should have made at first. I should have thought **[402]** that in this bill the plaintiffs would have pointed their inquiries to every circumstance under which the arrangement could have been made.

The ground, therefore, on which I decide this motion (and it is a little beside the arguments) is this—that the plaintiffs had the opportunities of making the inquiries originally which they now seek too late.

Motion refused.

Dec. 1st.—On this day a motion was made, on the part of the corporation of the London Assurance, that the injunction might be revived, and a commission issue for the examination of witnesses beyond the seas. The motion was supported by affidavit that there were certain witnesses abroad whose evidence was material and necessary for the defence at law.

The motion was opposed on the ground of the laches of the plaintiffs in equity.

ALDERSON, B. It is clear the cause cannot be tried without these witnesses. The laches of the plaintiffs is a reason for putting them on more severe terms, but not for putting the case out of the ordinary course of justice.

Ordered, that the sum claimed be invested in Exchequer bills, within a fortnight, to abide the event of the action, and that interest on the sum claimed, at 4l. per cent. per annum, be paid into Court within the same time.

[403] JONES *v.* MORGAN. Dec. 19th, 1836; Jan. 19th, 1837.—W. J., by a settlement made upon his first marriage, covenanted that, upon the death of his intended wife, he would provide a portion of 100l. to be paid to the children of the marriage in equal shares, upon their severally attaining 21, with interest in the mean time for their maintenance. The marriage took effect, and the wife died in the lifetime of W. J., leaving seven children. W. J. married again, and, by a deed made in contemplation of that marriage, he conveyed land to trustees, upon trust after his death, or in his lifetime, if he should consent, to raise 600l. in trust for the six younger children of his first marriage, to be divided between them in equal shares, such shares to be vested in them at 21. The children attained their ages of 21, and received their portions under the second settlement: Held, that those portions were in satisfaction of the provision made for them by the first settlement.

By articles of agreement under seal, dated the 4th January, 1709, and made between William Jones of the first part, Sarah Morgan of the second part, and John Morgan of the third part (being the settlement executed previously to the marriage between William Jones and Sarah Morgan), it was witnessed that in consideration of the intended marriage, and of the sum of 200l. and certain furniture, the marriage portion of Sarah Morgan, the said William Jones did covenant with the said John Morgan, his executors and administrators, that in case the intended marriage should take effect, and William Jones should happen to survive his intended wife, and there should be one or more child or children of the marriage living at the death of the said Sarah Morgan, then the said William Jones, his heirs, executors, or administrators, should pay or cause to be paid to such child, or among such children (if more than one) equally, share and share alike, the sum of 100l., when and as such child or children should respectively attain the age of twenty-one years, with the interest thereof in the meanwhile for their support and maintenance.

The marriage between William Jones and Sarah Morgan was solemnized soon after the execution of this deed, and in December, 1808, Sarah died, leaving her husband and seven children surviving her. The children all attained the age of twenty-one years.

In the year 1811 William Jones married the plaintiff, who was a widow with several children. Shortly previous to that marriage both parties executed certain indentures of lease and release, dated respectively the 15th and 16th February, 1811. By the release, reciting the intended marriage, and a power of appointment possessed by **[404]** William Jones, but the precise nature of which did not appear upon the pleadings or in evidence, and further reciting that William Jones had determined to exercise that power, and to make the conveyance thereinafter contained for the advancement of his children by Sarah his late wife, it was witnessed that the said William Jones did, in consideration of natural love and affection for his said children, and by virtue of the said power, and of every other power &c., direct and appoint, and did also release and convey a certain messuage called Llwynyr Inn, in the county of Carmarthen, with the appurtenances, unto D. L. Harries and his heirs, to the use of the said William Jones and his assigns for his life, with remainder to the use of James Morgan, his executors, &c., for the term of 1000 years, with remainder, subject to the term, to the use of William Jones the younger, eldest son of the said William Jones, his heirs and assigns. And it was declared that the said term of 1000 years was limited to the said James Morgan, upon trust, that he, his executors, administrators, or assigns, after the decease of the said William Jones, or in his lifetime with his consent, to be signified in the manner therein mentioned, should, by demising, assigning, or otherwise disposing of the said hereditaments, &c., for the whole or any part of the said term, or by and out of the rents and profits of the said premises, levy and raise the sum of 600l. of lawful money, with interest for the same, at or not exceeding 5l. per cent. per annum, in trust for the six younger children, by name, of the said William Jones, by the said Sarah, his first wife, to be divided between them in equal shares as tenants in common, the shares of the daughters to be vested at their age of twenty-one, or marriage, and those of the sons to be vested at their age of twenty-one, or upon their dying under that age, leaving issue. The deed then contained the usual clauses of accruer, maintenance, advancement (the advancement being to the amount of one-half of each **[405]** child's expectant share),and also a proviso that all persons claiming any benefit under the indenture, should, under the doctrine of election, be bound to give effect to the indenture, and to every limitation and provision therein contained.

By another indenture (not mentioned in the bill) bearing date the 18th of February, 1811, and which was likewise executed shortly previous to the marriage of William Jones with the plaintiff, the sum of 400l., part of a sum of 500l., which was owing to the plaintiff, was settled to her separate use for life, with a proviso that upon her decease the principal should be divided equally between the children of William Jones by the plaintiff, and the children of the plaintiff by her first husband; and William Jones covenanted to transfer the sum of 300l. to trustees, upon trust, to pay the interest thereof to the plaintiff for her life, in case she should survive William Jones, and after her decease, to the children of William Jones by the plaintiff. By the same indenture a tenement called Cefeugole, value about 30l. a year, was, in confirmation of her first husband's will, settled upon the plaintiff for life, with remainder to her children by her first marriage; and a farm called Maesllan, value about 50l. a year, to which William Jones was entitled for lives, was settled upon the plaintiff during her life or widowhood, in case she should survive William Jones, with remainder to the heirs of William Jones.

In April, 1832, William Jones died, leaving the seven children of his first marriage surviving him. They all received their shares of the 600l., under the indenture of the 16th of February, 1811, with interest from the time of their father's death. In March, 1834, John Morgan, the trustee, under the articles of agreement of January, 1796, brought his action of covenant against the plaintiff as administratrix of her late husband, to recover the 100l. covenanted to be paid under the articles; whereupon the **[406]** plaintiff filed the present bill to restrain that action, and that it might be declared that the benefits secured by the indenture of the 16th of February, 1811, to the children of William Jones by his first marriage were in lieu and satisfaction of the provision made for them by the articles of the agreement of the 4th of January, 1796.

The plaintiff having obtained the common injunction to stay the proceedings at law,

Mr. G. Richards and Mr. Puller now shewed cause against dissolving the injunction. The children of the first marriage of William Jones are bound to elect between the benefits conferred upon them by the two settlements. No doubt every parent is under a moral obligation to provide portions for his children; but if, after having provided such portions by will or settlement, he, in the course of his life, makes another provision for them, a court of equity will interfere to confine them to one of these provisions, unless it can be shewn that he intended them to have both: *Wood* v. *Briant* (2 Atk. 521), *Seed* v. *Bradford* (1 Ves. sen. 501), *Hinchcliffe* v. *Hinchcliffe* (3 Ves. 516), *Sparkes* v. *Cator* (id. 530), *Garthshore* v. *Chalie* (10 Ves. 1), *Chave* v. *Farrant* (18 Ves. 8). The same principle is applicable here as in the case of legacies, which are adeemed, if the purpose for which they are given is anticipated by the testator in his lifetime. Speaking of such a case, Lord Manners says, "Suppose the testator had by his will left 5000l. to his brother to buy a house in Merrion Square, and afterwards he himself buys one, which he gives to his brother—are there to be two houses bought?" [The Lord Chief Baron. This is not the case of a legacy, but of a debt. It is clearly established, that if a man owes a debt, and afterwards gives his creditor a sum of money equal in amount to the debt, it is to be **[407]** taken as a satisfaction, not as a gift. But the case which has been adverted to of a legacy may stand on a different ground.] It is submitted that the plaintiff is entitled to the benefit of the principles applicable to both cases. But, at all events, this is a debt arising on a marriage settlement. Part of the money in settlement was the wife's marriage portion, and on the strength of that, as well as of his own property, the husband made a provision for the children. It is immaterial, however, in regard to the doctrine as to double portions, whether the wife bring any fortune or not. If out of the common fund provision is made for the children, that is a satisfaction of the moral obligation which the parent is bound to fulfil. [The Lord Chief Baron. Suppose he had lived, and upon the children coming of age the trustee under the first settlement had brought his action, could he have set up the second settlement in answer to that action?] He would be entitled to file a bill in equity declaring that he intended the second settlement as a satisfaction of the first, and calling on the donee to make his election. [The Lord Chief Baron. My difficulty is that the debt in the first settlement is due when the children come of age; that in the second, when the parent dies.] The difference in the time of payment is not sufficient to rebut the presumption that the latter settlement was intended in satisfaction of the former. The general terms of the second deed are sufficient to raise that presumption without any express recital. Presumption of satisfaction is stronger in the case of a deed than in that of a will; because, as Lord Hardwicke observed, legacies naturally imply a bounty (see 3 Atk. 97), and yet a legacy bequeathed by a parent to his child is primâ facie satisfied by any subsequent provision made for that child by the parent. That doctrine, and the general leaning of the court against double portions, is fully stated and discussed by Lord **[408]** Eldon in *Ex parte Pye* (18 Ves. 151), by Lord Alvanley in *Hinchcliffe* v. *Hinchcliffe* (3 Ves. 526), and by Lord Brougham in *Wharton* v. *Lord Durham* (3 M. & K. 478). The onus lies upon the other side to shew that their second settlement was not intended as a satisfaction. The recital as to the children's advancement is very important, and the deed concludes with a remarkable declaration as to election, which cannot be explained, except upon the supposition that the children were intended to elect. It must be admitted that the difference in the subject matter of the gift in each case is evidence, as far as it goes, against satisfaction: *Weal* v. *Rice* (2 R. & M. 251); but it is merely evidence, and liable to be rebutted.

Mr. Simpkinson and Mr. Romilly, contrà. There is no case like the present in its circumstances. There is no doubt as to the general proposition contended for. It is not disputed that either a debt or a portion may be satisfied by payment in the lifetime of the party; with this distinction, however, between them—that in the case of a debt, payment of part is not a satisfaction, while, in the case of portions, it is a satisfaction pro tanto. In other respects the two cases are the same in principle, and turn upon the intention of the party to satisfy the claim. How is that intention manifested here? It is admitted by the plaintiff that the only claim was 100l., arising under articles of agreement between Jones and his first wife. It appears upon those articles that the covenant which the defendants seek to enforce was in consideration

not only of marraige, but of 200l. and household furniture, which were the first wife's property. In consideration of that, Jones covenants to pay the sum of 100l. equally amongst the children on their attaining twenty-one; and **[409]** he covenants further, not merely with reference to the contingent claim of maintenance, but that he will pay interest on the 100l. It is doubtful on the face of the deed from what time the interest is intended to run, but, under any construction of the instrument, it began to run from the death of the first wife. That event took place in December, 1808, and there were seven children of the marriage. In 1811 Jones marries a second wife, the present plaintiff. Though they repudiate their settlement as a marriage settlement, it is stated in the bill to have been made in contemplation of the marriage. The bill omits to allude to the deed of the 18th of February; but if that deed be read in connection with the other, it would appear that Llwynyr Inn was the property of the first wife; at all events there is nothing in the pleadings or evidence to shew the contrary; and it is clear that Jones had not the fee in that estate, the deed reciting, and the bill in general terms alluding to, a power of appointment which he had over it. The deed of the 16th of February is expressly confined to the property of the second wife, and the unsettled property of Jones; and the whole of that is settled upon the children of the second marriage. If the aggregate of the settled property be considered, it will be seen that 100l. and 600l., making in all 700l., formed the entire portion for the children of Jones's first marriage, and that 400l. and 300l., making also 700l., formed the entire portion for the children of his second marriage. Will the Court, then, believe that this sum of 600l. was given in lieu of the 100l. originally settled upon the children of the first marriage? But, independently of these minute circumstances, there is nothing on the face of the second settlement from which to collect that it was meant to be in satisfaction of the first. The cases on the subject are collected in Mr. Sanders's note to *Bellasis* v. *Uthwatt* (1 Atk. 426), **[410]** where it is stated that, in order to raise a presumption of satisfaction, there must be no material variance in the nature of the two provisions or in the time of their respective payments. In this case there is a material variation. Under the first settlement there is a mere personal undertaking on the part of the father to raise the portion; under the second settlement the portion is to be raised out of land. In the former case the money is to be raised upon the death of the first wife and paid to the children at twenty-one, with a proviso that the interest upon the sum shall be applied for their maintenance in the meantime. In the latter case the money is to be raised at a totally different period. As to the eldest son, it is clear that the gift to him of the land in remainder could not be a satisfaction as to him. Suppose any of the children coming of age had demanded of the trustee the portion due to him under the first settlement, could it have been said, in answer to his claim, that he had elected to take under the second? In *Fortescue* v. *Barnett* (3 M. & K. 36) the settlor was not the father, but only the brother of the party for whom the settlement was made; yet it was held that the provision which the settlor had made for his sister and her children, by means of a policy of insurance on his life, was not satisfied by a subsequent provision made for them by his will, and by his putting her in possession of a freehold estate. [The Lord Chief Baron. The gift of the freehold to the sister would be no provision for the children; and he might alter the will the next day.]

Jan. 19th, 1837.—THE LORD CHIEF BARON. This cause came before me upon a motion to dissolve an injunction which had been granted to restrain an action brought against Mrs. Jones and others, who are the personal representatives of her late husband, upon a deed of covenant executed by him in 1796, when he married his first wife, by which, in con-**[411]**-sideration of 200l., which he received together with certain household goods as her fortune, he bound himself to pay 100l., with interest at 5l. per cent., equally between the children he should have by her, when they attained the age of twenty-one years. He had by that marriage seven children. She died, and he afterwards married a lady of the name of Jones, who had some property. Upon this occasion also he executed a marriage settlement. He executed a deed by which his own estate was conveyed to trustees (one of whom seems to have been a connexion of his former wife), upon trust, by mortgage or otherwise, to raise 600l. to be paid in equal portions to the six younger children by his marriage with his former wife, with interest upon those sums from the time they should attain twenty-one years of age, with remainder over in case of their death before that time.

As to the residue of his property, he gave it to his eldest son; and then there is a clause in the deed that the trustees shall execute a power of raising money in his lifetime, if he shall call upon them so to do; so that the trustees are either upon his request in his lifetime to raise 600l. to be paid to the objects of his bounty, or if not requested so to do, then upon his death, to raise the money and pay it to the children.

It appears by the bill that upon the death of Jones the trustees under the second settlement did raise and pay the money to the parties interested, and that the eldest son is in possession of the estate, and that notwithstanding that payment, the trustee in the original settlement has brought his action of covenant against Mrs. Jones, as the personal representative of her husband, in order to recover a portion of the money due under the covenant in that settlement, with interest from the marriage. That portion would be the greater part of 100l., with interest upon it.

The plaintiff in the bill contends that the debt which her husband had covenanted to pay to the children by his **[412]** former marriage was satisfied by the provision he made for them by the deed when he married the plaintiff. If so, Morgan ought not to bring the action, and the injunction must be continued. If, on the other hand, that is not a satisfaction, he ought to be allowed to bring his action. That question is resolved into this—whether the provision made to the children on the second marriage is to be taken in satisfaction of the provision which he made upon his first marriage settlement, which was, in some sort, a specific debt, which he contracted to pay.

It is not necessary to state the authorities, because it is agreed that they may all be resolved into this—that it is a question of intention whether a legacy is to be deemed to be satisfied by payment in the lifetime of a testator, or by a provision tantamount to it; and that it is to be considered the intention of the party that it should be satisfied, unless something to the contrary appear. If, in his lifetime, having made a provision for his children by will, he pays to the children the portion so provided for them, the presumption is that his intention was to anticipate the legacy; and unless there is something to lead to a contrary conclusion, the legacy is held to be adeemed. I have not been able to find any case precisely similar to this, but the principle which I have just stated is fully applicable to this case. It may be also referred to another class of cases, where a party owing a debt, and leaving to his creditor a legacy to an amount larger than or equal to the debt, the presumption is that he meant to satisfy the debt, unless the contrary appear.

Here the principle is applicable to portions created by deed. I know no rule of law which makes any distinction between the case of a will and a deed. By the first settlement, the portion with interest becomes a debt due from the father to his children. Now the father is considering what he shall do upon his second marriage. It is natural he should take into consideration what he has **[413]** done before; and if I find he binds himself to give them at least the same amount of portion as before, I should presume from his subsequent act that he meant to satisfy the debt. Suppose then you take it as a debt. The argument on the other side is that the original portion of 100l. was due to the children at twenty-one, whether the father was alive or not, whereas the last was due only at his death. That is an important argument, no doubt; but I find that the deed made on the second marriage gives the trustees liberty to raise the portions in his lifetime, if he call upon them so to do. One inquires on what event he would call upon them? Why, he would call upon them if it was necessary to advance a child—or a child, upon arriving at twenty-one, should exact payment of his portion under the former deed.

Let me suppose this case: Suppose any of the children in the father's lifetime should say to his father, I wish you to call upon the trustees to pay the portion of 100l. due to me under your first marriage settlement. The father would say, I cannot resist that, but I will call upon the trustees of the second settlement to raise it. I have power so to do, and I will raise the money and pay you by those means. Suppose then the 100l., or a portion of it, equal to the child's share of the 700l., is paid to him, the trustees keeping the rest in their hands till the father's death; and suppose, upon that event happening, the same child should make another call for his share under the first deed; if an action were brought for the amount on the covenant contained in that deed, I am not clear the payment already made might not be the subject of a set-off at law, and, à fortiori, we are not bound by a more strict mode of proceeding in equity.

Then there is a clause in the second deed which, though not very intelligible, can bear no other construction than that the father meant that one provision should be a satisfaction for the other; namely, the clause that the **[414]** party claiming under that deed shall be bound by the law of election. This is clumsily expressed, no doubt; but if it has any meaning, it must mean to refer to the former deed.

Upon the whole, I think, upon the authority of all the cases, and upon principle, that the provision made in 1811 for raising and paying the money to those children is equivalent to satisfaction of the debt for which the father made himself liable to them under the first settlement. The injunction, therefore, must be made perpetual.

Order accordingly.

BARKER *v.* GREENWOOD. Dec. 20th, 21st, 1836; Jan. 18th, 1837.—If a man, being indebted to his own agent, authorize the agent to receive money due to him from his debtor, intending that the agent should thereout pay himself his own debt, he thereby gives the agent an implied authority to receive payment, to the extent of his own debt, in any manner he may think fit; consequently, the amount of the agent's own debt may be written off in account between him and the debtor.—A debtor, who pays the amount of his debt to the agent of his creditor, must pay it in cash, unless he can shew that the agent had authority to receive payment in any other way.

[S. C. 6 L. J. Ex. Eq. 54; 1 Jur. 541. Adopted, *Hanley* v. *Cassan*, 1847, 11 Jur. 1088; *Bridges* v. *Garrett*, 1869, L. R. 4 C. P. 588; *Pearson* v. *Scott*, 1878, 9 Ch. D. 206. Distinguished, *In re Shanks; Ex parte Swinbanks*, 1879, 12 Ch. D. 525. Adopted, *Coupe* v. *Collyer*, 1890, 62 L. T. 928. See further, 3 Y. & C. Ex. 393.]

In the year 1818 Francis Henry Barker, being indebted to the defendant in various sums of money, and having sold to him his life interest in certain property situate at Clapcott and Wallingford, in the county of Berkshire, contracted to sell to him the reversion in fee of that property at the price of 1500l. The contract was not reduced into writing, but the treaty for the sale was conducted by one Churchill, who had for many years acted as solicitor and agent of Barker. The purchase was not completed till the year 1823. In February, 1822, while a considerable sum still remained due from the defendant on account of the purchase money, Barker executed the several conveyances of the property to the defendant, and delivered them to Churchill. He at the same time wrote and sent to the defendant a letter in the following words:—"Dear Sir,—I have executed the conveyance to you of the estate at Clapcott and Wallingford, and the balance of the sum due from you to me you will please to pay to Mr. Samuel Churchill, on the deeds being delivered; the in-**[415]** terest upon the purchase money you will also be so good as to settle with Mr. Churchill.—I am, &c., F. H. Barker."

In March, 1822, the sum remaining due from the defendant to Barker, in respect of the purchase-money, was 10,760l. 4s. 8½d. According to an account kept by Churchill, and in his handwriting, this sum was reduced from time to time by successive payments made by the defendant, the last payment being made on the 10th April, 1823. Affixed to the last item in the account were the following words:—"This account settled with Mr. Greenwood, and the whole sum received by me as agent to Mr. Barker.—Samuel Churchill." The account likewise contained the following item:—"March 25th.—Received of Mr. Greenwood, on further account, as the agent and by the authority of Mr. Barker, 7675l. 19s. 10d." This sum, however, was not actually paid to Churchill, but was, in October, 1822, written off in an account between Churchill and the defendant, Churchill being the receiver of interest and other sums, which were from time to time payable to the defendant. At the time when this transaction took place, the deeds of conveyance which had been executed by Barker, were delivered by Churchill to the defendant.

In March, 1827, a commission of bankrupt issued against Churchill, and Barker, having at that time some claims against Churchill's estate, wrote to the defendant for an explanation of Churchill's accounts relative to the purchase made by the defendant. In answer to this application the defendant wrote as follows:—"On the settlement of the long standing accounts between us by Mr. Samuel Churchill, on the 25th March 1822, there was a balance of 10,760l. 4s. 8½d. due to you which was paid to Mr.

Churchill by two payments; the first payment was 7675l. 19s. 10d. The second payment was 3084l. 4s. 10½d. Mr. East, Mr. C.'s clerk, is acquainted with all the particulars."

Barker having died in February, 1830, the present bill **[416]** was filed by his executrix, charging that the statements made by the defendant and Churchill, that the sum of 7675l. 19s. 10d. had actually been paid, were false and fraudulent; that the giving of credit by Churchill to the defendant for that sum was the result of a collusive scheme between the defendant and Churchill, and was unknown to Barker up to the time of his death, and that it did not amount in law or equity to payment of that sum by the defendant to or for the use of Barker. The bill prayed a declaration that Barker and his representatives had a lien in equity on the purchased estates, for the purchase-money remaining unpaid; and that an account might be taken of such purchase-money; and that in taking the account the defendant might be allowed credit for such sums of money only as he had actually paid to the use of Barker, and not for any monies written off in account between the defendant and Churchill.

The defendant, by his answer, denied the charges of collusion, and stated his belief that Barker was well acquainted with the manner in which the purchase was paid. He also stated that he did not, by using the word "payments" and "payment" in his letter to Barker, mean to represent to Barker that the payment of the sum of 7695l. 19s. 10d. was made in cash, but he used those words solely in explanation of Churchill's accounts as required by Barker, and to shew that in those accounts Barker was entitled to credit for the sums mentioned.

In support of the defendant's case several letters were read to shew that in October, 1822, Barker was indebted to Churchill, and intended that the debt should be paid out of the monies coming from the defendant, but the amount of the debt did not appear.

Mr. Swanston, Mr. Ellison, and Mr. G. Richards, for the plaintiff. The fact that this sum was written off in account between the defendant and Churchill was not **[417]** known until after Barker's decease. It is clear that Barker supposed it had been paid to his agent in cash, Churchill had no authority to settle with the defendant in this manner; at all events it is for the defendant to shew that Churchill had a clear authority to make such an arrangement. An authority to receive payment is not an authority to set off: *Todd* v. *Reid* (4 B. & Ald. 210; 3 Stark. 16), *Russell* v. *Bangley* (4 B. & A. 395). If Churchill departed from his written authority, the defendant cannot rely on any parol variation of his instructions. Such evidence, it is submitted, is not admissible; but even if it be, the Court will not act upon it without submitting the case to a jury. An opportunity should be given to the plaintiff to cross-examine Churchill as to his authority.

Mr. Simpkinson and Mr. Kenyon Parker, for the defendant. If Barker, at the time of writing off this sum, was indebted to Churchill in an equal or larger amount, such a set-off would amount to payment. [Alderson, B. Where a man makes his creditor his agent to receive from his debtor the amount of the debt, the question is whether he does not make all the payments to that creditor payment to himself. *Todd* v. *Reid* is distinguishable from the present case. There, if the broker had retained the money, he would have committed a breach of duty. It was the money of the assured in his hands. Here, if the money had been actually paid to Churchill, it would not have been his duty to pay it over to Barker. He would have had a right to retain it under the statutes of set-off.] In the case referred to it would have been a breach of duty in the party as broker, to retain the money. Here the only question is whether Churchill had a claim against Barker equal to or greater than the amount of the claim by Barker against Greenwood, in either of which cases he **[418]** would have a right to retain. There are several authorities for the defendant: Paley, Prin. and Agent, 287: *Drinkwater* v. *Goodwin* (Cowp. 251), *Hudson* v. *Granger* (5 B. & Ald. 27).

Mr. Swanston, in reply.

Jan. 18th, 1837.—ALDERSON, B. This was a bill filed by the plaintiff, claiming an account of certain monies paid by the defendant as the purchaser of an estate, sold by the late Rev. Mr. Barker to him, through the agency of a Mr. Churchill, a solicitor. The bill prays a declaration that there is a lien on the estate for the purchase-money remaining unpaid. There is no doubt that if the purchase-money remains unpaid, the plaintiff is entitled to the declaration and lien. There is no doubt, also, as to the

payment of all the purchase-money except the sum of 7675l. 19s. 8d. As to that, the facts are these: a distinct authority was given to Churchill, with the assent of the plaintiff, to receive the purchase-money from the defendant. Now this sum of money was not actually paid; but was, on the 19th October, 1822, set off in an account between Churchill and the defendant, Churchill being indebted to the defendant to that amount at the time.

I think it is satisfactorily made out by the correspondence that Mr. Barker was indebted to Mr. Churchill in some amount, and intended that Mr. Churchill's debt should be paid, and only the balance of the monies received by Churchill from the defendant paid over to himself.

I must also assume for the present, which, however, as far as the facts are before me, is very questionable, that the amount of this debt, on the 19th October 1822, was more than 7675l. 19s. 8d., the sum set off in account between Churchill and the defendant; and then the question is this—If a man, being indebted to his own agent, **[419]** authorize that agent to receive money due to him from his debtor, intending that he should thereout pay himself his own debt, does he authorize that agent impliedly, to the extent at least of that debt, to receive payment in any way he may think fit? I think he does. An agent, with a general authority like this, is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. If, therefore, the agent be not a creditor of his principal, he must receive the whole in cash; for, otherwise, he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over. Such were the cases of *Todd* v. *Reid* (4 B. & Ald. 210), *Russell* v. *Bangley* (4 B. & Ald. 395), *Bartlett* v. *Pentland* (10 B. & C. 760), and *Scott* v. *Irving* (1 B. & Ad. 605). For in those cases the assured was entitled, as between himself and the broker, to the whole amount which the latter might have received in cash from the underwriter. But if the agent be himself a creditor of the principal, and the principal intends, when he makes him his agent to receive, that he shall retain his own debt out of the sum received, his only duty is to pay over to the principal the balance, after deducting his own debt. If he therefore takes care to receive in cash that balance, he, as it seems to me, puts himself into a situation as completely to discharge his duty as if he had received the whole in cash. For what possible difference can it make to the principal whether his agent receives the whole and retains part, or only receives that balance which he himself is entitled to receive from the agent? A person **[420]** however who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If, therefore, he pays by a settlement in account, he takes upon himself, in such a case as this, the risk of being able to shew the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money. Here these circumstances are made out, but still he must shew that there was a debt due to Churchill from Mr. Barker, equal at least to the sum set off in account between himself and Churchill.

I propose therefore to refer this question to the Master, namely, whether, on the 19th of October, 1822, Barker the testator was indebted to Churchill in any and what amount. If the defendant can shew to the Master's satisfaction that there was such a debt then due, and that it exceeded or equalled the sum set off in account between him and Churchill, this bill will be dismissed; but certainly without costs, because the bill was most properly filed to compel such proof being given, and its necessity arose from the unusual mode of settlement adopted by the defendant. If, however, the defendant cannot satisfy the Master of this, the plaintiff will be entitled to a declaration that he is to have a lien for the whole, if there be no debt—for the balance, if the debt due to Churchill at the time in question (for the subsequent accounts between Barker and Churchill are wholly immaterial) was less than the sum set off in account between Churchill and the defendant, and will have a decree with costs to that effect.

[421] THE REV. HENRY THORPE, *Plaintiff;* and THOMAS MATTINGLEY, WILLIAM BUDD, GEORGE BLISS, CHARLES COWPER, AND EDMUND PLOWDEN, *Defendants.* Feb. 8th, 15th, 1837.—To a rector's bill against occupiers of lands for an account of tithes, the defendants, by their answer, set up an ancient agreement between a former rector of the rectory and the then owner of the lands occupied by the defendants, and who was also the patron of the living; by which agreement certain lands enjoyed by the present rector were allotted to the rector in exchange for his glebe lands, which were then dispersed in the common fields, and a rent-charge of 40l. a year was granted to the rector; in consideration of which exchange and annuity, the lands occupied by the defendants were discharged from tithes. The defendants proved that the agreement was not only approved by the then bishop of the diocese, but had been established by a decree of the Court of Chancery, and had been acted upon for upwards of a century; and that the arrangement was not only beneficial to the rector at the time when it was entered into, but that it was made with reference to the probable future increase in the value of the tithes, and that it was advantageous to the plaintiff at the time of the filing of the bill: Held, however, that the agreement was absolutely void under the disabling statutes; and that, being void, the decree of the Court of Chancery could not give it validity; and an account of the tithes was decreed. —Where a bill for tithes was filed against occupiers of lands within the time prescribed by the statute 2 & 3 Will. 4, c. 100, and the bill was subsequently, and after the period limited by the act, amended, by making the owner of the lands a party: Held that the original and the amended bill formed but one record, and that the suit was therefore instituted against the owner within the time prescribed by the statute.

[S. C. 8 L. J. Ex. Eq. 9. Varied, nomine *Plowden* v. *Mattingley*, 1840, 7 Cl. & F. 137; West. 42. As to stay of proceedings see 3 Y. & C. 254, also 4 Y. & C. Ex. 577.]

The bill was filed by the plaintiff as rector of the rectory and parish church of Aston-le-Walls, in the county of Northampton, against the several defendants (except Edmund Plowden, who was made a defendant by amendment), for an account of the titheable matters had and taken by them on their respective farms and lands in the parish of Aston since the year 1831, the time of the institution and induction of the plaintiff into the rectory, and for an account and satisfaction of the tithes.

The defendants to the original bill (the defendants the occupiers) by their answer stated that at the time of the making of the agreement thereinafter set forth, W. Plowden, of Aston, in the county of Northampton, was seised in fee of the manor of Aston, and of the rectory of Aston-le-Walls, which was appendant to the said manor, and that the said manor comprised the lands and tenements thereinafter mentioned to be then in the occupation of the defendants, and also the lands which were holden by the plaintiff as rector of Aston-le-Walls aforesaid, by virtue of the exchange thereinafter set forth.

[422] That by an agreement, bearing date the 1st day of March, 1711, duly made and signed between the said W. Plowden, as lord of the manor of Aston, and patron of the rectory of Aston-in-the-Walls, of the one part, and the Rev. J. Wilson, the then incumbent of the rectory, of the other part; after reciting that the said W. Plowden was lord of the manor of Aston, and patron of the said church of Aston-in-the-Walls, and was also seised of divers parcels of land lying dispersed in the common fields of Aston aforesaid; and that the said J. Wilson was the then rector and incumbent of and in the said church of Aston, and in right thereof was seised of divers other parcels of land lying also dispersed in the said common fields, and also of a parcel of ground lying in a close called Aston Close, in Appletree, in the said parish of Aston, being the glebe-lands belonging to the said rectory, and also in right of his said church was entitled to the tithes of all sorts, arising as well out of the common fields as out of the demesne lands of the said W. Plowden in Aston; and further reciting that the lands in the common fields thereinbefore mentioned were of little value, lying so dispersed, and that it was apprehended that it would be a great improvement, as well to the said church as to the said W. Plowden's estate in Aston aforesaid, if the said common fields were inclosed and certain exchanges were made; but that the said W. Plowden being desirous that the rights and profits of the said

church might be preserved and ascertained, and that the said J. Wilson and his successors might have and enjoy in right of his said church an advantage by a just proportion of the improvement expected from such inclosure, it was by the now stating instrument agreed that all the several pieces or parcels of the common fields of Aston aforesaid, therein, and in the answer also respectively, described and set forth, should, together with the church-yard, parsonage-house and close, gardens, orchards, and walls dividing a garden and orchard from the estate of the said W. Plowden, and all yards, out-**[423]**-houses, and buildings, and all grounds belonging thereto, for ever thereafter be deemed and taken as the glebe land of and belonging to the church of Aston-in-the-Walls aforesaid; and, as such, should be for ever enjoyed by the said J. Wilson and his successors, rectors of the said church; and also that the sum of 40*l.* per annum, payable half-yearly, free from all taxes or payments whatsoever, unless for taxes charged by act of Parliament on the said annuity itself, should be issuing out of and chargeable upon the said W. Plowden's said manor, messuages, lands, tenements, and hereditaments, situate, lying, and being in Aston-in-the-Walls aforesaid, and be secured and made payable to, and be for ever for the use and benefit of the said J. Wilson and his successors, rectors of the said church of Aston aforesaid, with power of distress for the said J. Wilson and his successors, in case of nonpayment thereof. And it was by the said articles further agreed that the said J. Wilson and his successors, rectors of the said church, should at all times thereafter, as often as occasion should require, have privilege to dig, take, and carry away from every the usual and open pits within the said W. Plowden's said manor, such stone, gravel, or mortar as should from time to time be needful for the repairing and supporting all buildings, walls, and highways, and other ways and passages belonging to the said rectory; and that neither the said J. Wilson, nor his successors, rectors of the said church, should be chargeable with any other or any part of any other highways except that which was part of the glebe land, and leading from Aston towards Appletree, and four-score yards of the lane by the parsonage meadow downwards, from the place called the Hay Gap, as the same was measured, set out, and known. And it was also thereby further agreed that the said J. Wilson or his successors should not, by reason of removal of cattle from any part of Aston aforesaid not within such agreement, unto and upon any part of the said W. Plow-**[424]**-den's estate, by that means be prevented of his tithes, but in case of such removal the said W. Plowden, his heirs and assigns, should and would take effectual care to prevent such loss to the rector for the time being. And further also, that the said J. Wilson and his successors should at all times have liberty from time to time, as occasion should require, of coming upon the grounds adjoining to their houses and walls for building and repairing the same, and that they should for ever be freed from the payment of one-fourth per annum for weeding the meadow in Aston aforesaid; and that the watercourse which formerly ran through Carret Close in Aston aforesaid, and then stopped, to the detriment of the said J. Wilson and his successors, should forthwith be cleared and kept open. And in consideration of the premises and privileges agreed to be for ever made over and secured to the said J. Wilson and his successors, rectors of Aston aforesaid, the said J. Wilson did by the said articles agree to and with the said W. Plowden, his heirs and assigns, that all those parcels and pieces of land formerly reputed and taken as the glebe land of or belonging to the church of Aston aforesaid, and lying in the said common fields of Aston aforesaid, and which were theretofore in the possession of the said J. Wilson or his tenants, and the said parcel of ground thereinbefore mentioned to lie in the said close called Aston Close in Appletree aforesaid, except such parts as did lie and were in the said parcels of ground and meadow thereby allotted and appointed for glebe lands, and which were to be secured and made over to the said J. Wilson and his successors as aforesaid, should from thenceforth be enjoyed by the said W. Plowden and his heirs, as his and their own proper estate for ever. And also that all lands, tenements, and hereditaments whereof the said W. Plowden was possessed as owner in Aston aforesaid, and every of them, should for ever thereafter be freed and discharged from the payment of all manner of tenths, tithes, **[425]** oblations, obventions, moduses, and all other dues theretofore due and payable out of the said W. Plowden's estate in Aston aforesaid (except and other as aforesaid), and also except such tithes and dues as were properly personal, and did not purely arise of said W. Plowden's estate, and such as were the Easter roll, and fees due for marriages, christenings, and mortuaries and other surplice fees. And by the said articles it was further agreed that the four lands, with the bulks and stades

thereto belonging in Aston aforesaid, known by the name of the town lands, should be enjoyed by the said W. Plowden, his heirs and assigns, as his own free estate, and in lieu and satisfaction thereof, one acre and a half excepted, which did lie in the furlong called Great Church-Way, should be given in exchange for the same for the purposes in the said articles mentioned.

That upon or shortly after the signing of this agreement, the said W. Plowden, with the approbation of the said J. Wilson, enclosed the whole of the said common fields of the said manor of Aston-in-the-Walls, and duly set out the several parcels of land in the said agreement mentioned to be given to the said J. Wilson and his successors, rectors of the said church of Aston: and that the said J. Wilson shortly after the date of the said agreement entered upon, and that he, his successors, incumbents of the said rectory, had ever since been, and that the said plaintiff, as the present incumbent of the said church, was then in the possession and enjoyment of the last-mentioned pieces of land: and that the said W. Plowden, pursuant to the said agreement and the decree thereinafter stated, also annexed to his own estate the several pieces of common lands mentioned in the said agreement, and which were thereby agreed to be given to him in exchange as aforesaid; and the said W. Plowden and his heirs and assigns had ever since been and then were seized and possessed of such last-mentioned lands and hereditaments.

[426] That the said pieces of land taken in exchange by the said W. Plowden under the said agreement were small pieces of land lying dispersedly in certain common fields within the said rectory, and which, as appeared by certain terriers and other ancient records, constituted the glebe lands of the said rectory.

That in or as of Michaelmas Term, 1714, the said W. Plowden filed his original bill of complaint in the High Court of Chancery, at Westminster, against the said J. Wilson, and also against the Right Reverend Father in God, Richard, then Lord Bishop of Peterborough, within which diocese the said rectory of Aston aforesaid was and is situate, and thereby, after stating the said agreement, and further stating, as the fact was, that the said W. Plowden and J. Wilson, to shew the justice of their design in the said exchange and inclosure, and that the rights of the said church were not prejudiced, but meliorated thereby, did, in the month of April, 1714, join in a petition to the said Bishop of Peterborough to inquire by commission into the nature of the aforesaid inclosure and exchange; and that the said bishop, by an instrument under his hand and episcopal seal, dated the 17th day of May, 1714, had certified the same to be for the benefit of the said church, so that the said W. Plowden did hope to enjoy the lands so exchanged as aforesaid; but although the said W. Plowden and J. Wilson were the only persons interested, and were satisfied as to the quality of the exchange, and were desirous to have the said agreement and inclosure perfected and established, yet the same could not be of force to bar the successors of the said J. Wilson, rectors of the said rectory, unless established by decree of the Court of Chancery: and that the said W. Plowden was apprehensive, in case he should at any time improve the ground inclosed and exchanged as aforesaid, it would encourage the said J. Wilson's successors to take the same, on pretence that the exchange was not of equal value at the time of the making thereof; and the said bill prayed that the said in-**[427]**-closure, exchange, and articles of agreement might be established and directed to be carried into effect by the decree of the said High Court of Chancery, and that he might have the aid and assistance of the said Court.

That the said Bishop of Peterborough duly put in his answer to the said bill, and thereby admitted that on the petition of the said W. Plowden and J. Wilson, to him the said Bishop of Peterborough, a commission did issue to inquire into the nature of such exchange and inclosure, and whether the same were for the benefit of the said church or not; and that it was thereupon found to be much for the interest of the said church, and not only beneficial to the said J. Wilson, but also would be so to his successors, rectors of the said church, and therefore that he, the said defendant, was willing that the same should in all respects be ratified and confirmed by the decree of the said Court. And the said J. Wilson also duly appeared to and answered the said bill, and by his answer stated that he and the said W. Plowden had taken all precautions that the said exchanges and inclosures might be reasonable and just, and no party prejudiced thereby, and that he the said J. Wilson was ready and willing to ratify and confirm the same, and desirous also that the same should be confirmed and established by the decree of the Court.

That the said cause came on for hearing on the 25th day of July, 1715, before Sir John Trevor, the then Master of the Rolls, who did order and decree that the said articles of agreement entered into between the said W. Plowden and the said J. Wilson should be performed, and that the said exchange of lands should be confirmed and made perpetual, and that the said parties should hold and enjoy the said premises according to the said exchange, and that conveyances should be made pursuant thereto.

That some short time afterwards the said W. Plowden sold and conveyed the advowson of the said rectory to **[428]** the President and Scholars of Saint John's College, in the University of Oxford, who, as the defendants believed, purchased the same with full knowledge of the said agreement, and had ever since been the patrons of the said church, but had not at any time theretofore questioned or impugned the said agreement, or any part thereof, but had acquiesced in and assented to the same.

That since the time when the said agreement was entered into and established by the decree of the Court of Chancery in manner aforesaid, the whole of the said manor of Aston-in-the-Walls (except the said several pieces of land, parts thereof, which in and by the said agreement were given to the rectory of Aston) had been tithe-free, and that no payment of any tithe in respect of the said manor, or any part thereof, except as aforesaid, had ever been made to or claimed by the rectors or incumbents of the parish of Aston, but such rectors of Aston had always held, possessed, and enjoyed, and the said plaintiff, as such rector, did then hold, possess, and enjoy the several pieces of land by the said agreement given or annexed to the said rectory of Aston, and the several privileges secured to the rectors of the said church by the same agreement; and the said annuity of 40l. had always been duly paid by the said W. Plowden and his heirs to such rectors, and had been duly paid to and received by the said plaintiff as such rector ever since he became the incumbent of the said rectory up to Michaelmas, 1832; and the said plaintiff had during his incumbency holden and enjoyed the said lands, and received and taken the said annual sum of 40l., with full knowledge of the said exchange and agreement, and in affirmance thereof, and in lieu and satisfaction of all tithes of the said manor, and had thereby, as the defendants submitted and insisted, assented to and confirmed the said agreement, and was bound thereby.

That the said plaintiff was presented, instituted, and inducted into the rectory and parish church of Aston-le-**[429]**-Walls some time in or about the month of December, 1831, and that the said plaintiff was duly and regularly presented, instituted, and inducted to the said rectory, and had ever since been and was then the lawful rector of the said parish and parish church, and had, ever since his said induction up to Michaelmas in the said year 1832, duly and regularly received the said annuity of 40l. as and by way of satisfaction of all tithes issuing out of the lands occupied by the said defendants as thereinafter stated, and had also been and then was in the possession and enjoyment of the several pieces of land given to the rectory of the said parish church under the said exchange.

That, for the reasons aforesaid, they denied that, as such rector as in the said bill alleged, the plaintiff had ever since his said presentation, institution, and induction been, or that he then was, entitled to have, receive, and take all the tithes, both great and small, yearly arising, growing, renewing, and increasing within the said parish and rectory, and the titheable places thereof. The defendants admitted that they, in and previously to the year 1831, respectively held and occupied, and that they had ever since held and occupied, and did then hold and occupy the several farms and lands described in their answer, and that they had the severable titheable matters stated in their answer. They admitted that, for the reasons therein stated, they had not set out or rendered the tithes of such titheable matters or things, or made any recompence or satisfaction for the same, inasmuch as the plaintiff had duly and regularly been paid the aforesaid annuity of 40l. up to Michaelmas in the year 1832, since which time he had refused to receive it, in lieu and composition of all such tithes, according to the said articles of agreement; and the plaintiff had never given any notice to the defendants, and never made any application to the said defendants to set out their tithes, previously to the month of June then last.

[430] They had heard that tithes in kind were paid for or in respect of the lands then occupied by them before the said agreement and exchange.

They believed that the said composition and exchange were very advantageous to the church and rectory of the parish of Aston, and were entered into with a due

regard to the probable future increased value of the tithes of the manor of Aston, inasmuch as the value of such tithes, at the date of the said articles of agreement, was much below the sum of 40l. per annum, and that the said tithes had been shortly before let on lease at a rent of 24l. per annum.

They submitted and insisted that the aforesaid agreement was entire, and that the composition for tithes, and the exchange thereby made, was one contract and transaction, and that the said W. Plowden, party thereto, would not have given in exchange the lands which were then so given by him to the rectors of the said parish but for such contract and engagement to accept the said annuity in lieu and perpetual satisfaction of the said tithes; and therefore, in case the Court should be of opinion that the composition was no longer subsisting, then the defendants submitted that the exchange of the glebe lands of the said parish of Aston for other parts of the common fields of the said parish comprised in the said articles, was void, and that the plaintiff, as such rector, ought to give up and reconvey the several pieces of land then in his occupation and enjoyment, and which were so exchanged for the glebe lands of the said parish under the said agreement; and they submitted that Edmund Plowden, who was then the lord of the said manor of Aston, ought to be made a party to the suit, and that the Court could make no decree in his absence.

The plaintiff amended his bill, by making the defendant, Edmund Plowden, a party thereto.

The defendant Plowden put in a plea to the plaintiff's **[431]** bill, by which he pleaded in bar the agreement, and the decree in Chancery establishing it, stated in the answer of the other defendants, and also the statute the 2 & 3 Will. 4, c. 100, for shortening the time required in claims of modus decimandi, or exemption from or discharge of tithes.(*a*)

(*a*) By the 1st section of this statute it is enacted, "That all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our Lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained, and be deemed good and valid in law, upon evidence shewing, in cases of claim of a modus decimandi, the payment or render of such modus, and in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money, or other thing differing in amount, quality, or quantity from the modus claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money, or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such case the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of modus made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of modus made or enjoyment had (as the case may be) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of

[432] This plea, on argument before the Lord Chief Baron, was overruled, and the defendant Plowden thereupon put in an answer, stating the agreement, the decree in Chancery, and other circumstances stated in the answers of the other defendants, and which had previously been stated by him in his plea, and insisting on the validity of the agreement, and claiming the benefit of the statute 2 & 3 Will. 4, c. 100. The defendant also stated that, since the making of the said agreement and before the filing of the said bill, there had been more than three lawful rectors of the said parish, and more than sixty years had elapsed; and he submitted that on that ground also he was entitled to the benefit of the statute, and the said defendant claimed to be allowed the benefit thereof in like manner, as if he had pleaded the **[433]** same in bar to bar the bill. That, if the Court should be of opinion that the said lands were not, under the circumstances aforesaid, discharged of tithes, and that the said plaintiff was not bound by the said agreement, then the said defendant submitted that the agreement was one entire agreement, and must and ought to be altogether avoided and set aside, and that the lands and other privileges given to the rector of the said parish in exchange as aforesaid, and which were then held and enjoyed by the plaintiff, must be restored to the defendant, who, in that case, would be entitled to all the estate and interest which the said W. Plowden had therein previously to the exchange; and he insisted that the said plaintiff could not have any decree for an account of tithes against the other defendants to the said bill until he should have restored to him (the defendant Plowden) the lands and other privileges which were then held and enjoyed by the plaintiff as aforesaid, and had taken back the ancient glebe of the said rectory, which the defendant Plowden was willing and thereby submitted to give up, in case the said agreement was avoided, upon having the said lands and other privileges, then enjoyed by the said plaintiff as aforesaid, restored to him.

Both parties entered into evidence.

The plaintiff proved his presentation, institution, and induction — that all the inhabitants of the parish, except the defendants in the present suit, compounded for their tithes with the plaintiff as rector; and he also proved several ancient terriers.

The defendants proved by several old witnesses their knowledge of the farms occupied by the defendants, and that they were the lands of the defendant Edmund Plowden, and formerly of his ancestor W. Plowden. That tithes had not, within their memory, been paid or received in respect of such farms and lands, and that the same were reputed to be free from tithes in consequence of an allot-**[434]**-ment of 140 acres of land to the rector, and an annuity of 40l. a year, and that the value of the 140 acres of land was 280l. a year. The defendants also proved various receipts for the annuity, one of them given by the plaintiff. The defendants likewise gave in evidence the decree of the Court of Chancery referred to in the answer, and a copy of the agreement of the 1st March, 1811; which latter document was proved to come out of the custody of the plaintiff, and the deeds securing the annuity of 40l. Various title-deeds of the Plowden family were given in evidence, and terriers and other documents were produced from the Bishop's registry. As the general effect of the

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sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing."

By section 2 it is enacted, "That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act."

And by the 3rd section it is enacted, "That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced."

evidence was not disputed, and corresponded with the case made by the answers, it is unnecessary to state it in detail.

Mr. Swanston and Mr. Griffith Richards, for the plaintiff. The arrangement set up by the defendants in this case is not merely voidable, but actually void, under the statute 13 Eliz. c. 10, s. 3.(*a*) And this point has **[435]** been decided in *The Attorney-General* v. *Cholmondeley* (2 Ed. 304; 6 Bro. P. C. 332; Amb. 510; 3 Barn. El. 7 edit. 439; Gwill. 914; 2 Eagle & Younge, 203). In that case an agreement had been made between the rector and inhabitants, by which certain lands were allotted to the rector in lieu of the glebe, together with a pecuniary stipend or compensation in lieu of tithes; and after a decree establishing the arrangement, and an acquiescence of eighty years, the arrangement was set aside at the instance of a succeeding incumbent. The great and principal objection to such an arrangement is that no sufficient provision can be made for the increasing value of the tithes. In the present case the plaintiff, who was no party to the arrangement, is sought to be deprived of his legal right to tithes, and this is endeavoured to be effected by occupiers who are not proved to have any interest in the lands in question. If this transaction were supported, the effect would be wholly to defeat the disabling statutes. The present case cannot in principle be distinguished from *The Attorney-General* v. *Cholmondeley*.

Mr. Boteler and Mr. Bethell, for the defendants. The plaintiff, by filing his bill for an account of tithes, necessarily seeks to open the agreement. He ought not however to be permitted thus indirectly to open the agreement partially. He ought, as in *The Attorney-General* v. *Cholmondeley*, to have applied to open the whole agreement, and to have an account taken of the tithes merely as incidental to the opening of the agreement. In *The Attorney-General* v. *Cholmondeley* the plaintiff offered to give up the lands allotted to the rector in lieu of the glebe. In the present case no such offer is made by the plaintiff. The defendants contend that the agreement is one entire agreement, and that no partial relief can be given—that **[436]** the agreement must be altogether avoided, or not at all—and that, in this question, the plaintiff is not alone concerned, but that the patron and the ordinary are likewise interested. The defendants undertake to prove that the arrangement not only was at the time when it was entered into, but is now, a beneficial arrangement for the rector. If it were not, the plaintiff is precluded, by the late statute, from setting it aside. He is now too late to file a bill for that purpose against the ordinary. In *Atterbury* v. *Turner* and *Lord Nottingham* v. *Atterbury* (1 Eagle & Younge, 543) an agreement for an exchange of glebe lands between a former rector and lord of the manor was established, on the ground that it would be mischievous and of dangerous consequence to question such ancient exchanges, and throw open such ancient enclosures after so long an enjoyment on all sides, although it might not appear that the consent of the ordinary was at first had thereto; and a perpetual injunction was issued to the rector to stay all suits brought or to be brought touching any matter settled by the decree. In that case, therefore, the rector not only did not obtain a decree, but he was decreed to be bound by the arrangement. The defendants insist that so long as the rector

(*a*) "And that for long and unreasonable leases made by colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions, be the chief causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents in the same, be it enacted, by the authority aforesaid, that from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other, having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or anywise appertaining or belonging to the same or any of them, to any person or persons, bodies politic or corporate, other than for the term of one-and-twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary in anywise notwithstanding."

thinks fit to take the benefit of one part of the arrangement, he ought not to be permitted to repudiate the remainder of it. A strong distinction between this case and *The Attorney-General* v. *Cholmondeley* is that in the latter case the incumbent sought to undo the whole arrangement, and offered to give up the land allotted in exchange for the glebe. The attention of the plaintiff was distinctly called to this point by the answers in the present suit, but the plaintiff has thought fit to proceed to a hearing without amending his bill. It may be collected from the case of *The Attorney-*[437]-*General* v. *Cholmondeley*, as reported in Ambler, that the court below held that the agreement was not an entire agreement, and also that no compensation was allowed for the increasing value of the lands; for Lord Northington in his judgment states: "I have no reason to think that the lands allotted to the parson were for more than his glebe and tithes. It is the quality of the land and not the quantity which must determine the extent of the composition. In all the acts of Parliament which are made upon compositions with parsons, they are allowed a compensation for tithes upon improvements in futuro. Had a sum been paid by the defendants originally, by way of increase of tithes, they had stood on a different footing; for then they would have been purchasers for a valuable consideration by allowing for the future improvements. It would have suspended the equity of this Court by setting up equity against equity, and the parties would have been left to their remedy at law" (Ambl. 511). As no reasons are given for the judgment in the House of Lords, it is not unfair to presume that the judgment proceeded on similar grounds with these stated in the judgment of the Court below. There were distinct allotments in that case also in respect of the tithes and in respect of the glebe. In the present case the exchange is entire, and we have distinct evidence that the exchange is even now beneficial to the rector. The land allotted to him on the exchange has gone on progressively improving to the same extent as the glebe land, and it is inequitable that he should retain both. [Alderson, B. Why is the landlord a necessary party to the suit?] He is interested, because the agreement which is thus indirectly sought to be set aside is one entire agreement. [Alderson, B. Can the agreement be supported under Lord Tenterden's Act?] We contend that it is protected by the statute. It is true the plaintiff filed his bill against the defendants, the occupiers, before the ex-[438]-piration of the time limited by the act, but he did not make the defendant Plowden a party until after the expiration of that period. The defendant Plowden has taken the same objection by his answer which he raised by his plea, that he is not a defendant to any suit instituted within the time prescribed by the act; and that the agreement, so far as he is concerned, is therefore good and valid. If good and valid as to him it must be so as to the ordinary, who is not even now a party. Lord Abinger disposed of this question, on the argument of the plea, by holding that the tithes were the subject of the suit, and that proceedings had been instituted in sufficient time with reference to the subject of the suit. [Alderson, B. There is only one suit, and it must be good as to all or none. The defendant Plowden is clearly a party to a suit instituted within the time limited by the act.] The suit would have been incomplete without him. [Alderson, B. What degree can I possibly make against Mr. Plowden in this suit? He is not an occupier. How can I make any decree for tithes against him?] The rector having accepted the provision made for him under the arrangement, cannot have any relief in this suit. The rector is in possession of the land allotted to him, and has accepted the annuity with full knowledge of the facts, for the agreement is proved to have come out of his custody. By these acts he has, in effect, become a party to the arrangement, and is prevented from complaining of the transaction during his incumbency. He has elected to take under the agreement, and is debarred from setting it aside. The great object of the Court is to do complete equity, and to avoid multiplicity of suits. Where there would be cross actions at law, and one party comes into equity, the Court always imposes terms. Where a party seeks relief in respect of usury, that relief is only granted to him upon the terms of repaying the money actually [439] borrowed, and interest. So in *Kneble* v. *White* (2 Younge & Collyer, 15) it was held that a bill for an account of the rents and profits received by the grantee of an annuity in possession of the premises charged with the annuity, should contain an offer by the plaintiff either to redeem the annuity according to the provisions of the deed, or to repurchase it upon equitable terms to be settled by the Court. The Court is bound to give complete relief. The Legislature, in passing the statute 2 & 3 Will. 4, never contemplated or intended that a party should evade the

question of the validity or invalidity of an agreement like the present by filing a bill simply for tithes. The virtually setting aside of the agreement by decreeing an account of the tithes would be most inequitable in its operation, for the defendant would have no means of getting back the lands allotted to the rector in exchange, and the annuity or stipend, being secured by deeds, would still be payable. This is not such a suit as the statute intended to protect. The former decisions ought not, under the circumstances, to bind the Court in this case; but if bound by those decisions, still the Court will only assist the plaintiff on condition of his doing complete equity.

Mr. Swanston, in reply. Any observations which might otherwise arise on the effect of Lord Tenterden's Act are wholly removed by the remark that transactions of the present description were clearly void before the passing of that statute, and are not, therefore, in any manner protected by the provisions contained in it. [Alderson, B. The only real point is the question raised on the equity of the case.] The demand of the plaintiff is a legal demand, and a suit in equity is only necessary to assert the legal right, and the account is ancillary. No legal bar has been shewn to the legal right asserted by the plaintiff. Tithes **[440]** may, of course, be the subject of equitable jurisdiction; but a mere suit for tithes is the assertion of a legal right only. The legal right of the plaintiff in this case to tithes is not disputed. The only question in the suit is whether the rector's legal right to tithes is barred, not whether there is any defence to his right. The equity asserted by the defendants is not an equity qualifying the rector's legal right, but a distinct equity opposed to his legal right. No case of election arises in the present case. Election necessarily implies an option. There is no evidence of any option having been given to the plaintiff. A portion of the evidence put in by the defendants consisted of receipts given by the plaintiff to Plowden for the annuity. These receipts are confined to only one year; and the plaintiff, during the first year, was ignorant of his rights. There could be no election without a full knowledge on his part of his rights as rector. *The Attorney-General* v. *Cholmondeley* was an equitable suit, and not a mere suit for tithes, asserting only a legal right. It seems to have been the practice at one time to establish agreements of this description by decrees, which were perfectly useless, the agreements being absolutely void and incapable of confirmation. [Alderson, B. The practice seems to have originated with *Edgerley* v. *Price* (Finch, 18).] *Edgerley* v. *Price* is reported in a book of very questionable authority; but it is proper to say that in examining several of the cases in that book with Lord Nottingham's manuscripts, I have found it generally correct. *Edgerley* v. *Price* is not in Lord Nottingham's manuscripts. In *The Attorney-General* v. *Cholmondeley* there was no offer on the part of the plaintiff, as was supposed in the argument for the defendants in this case, to give up the land; and the bill, in that case, was not a bill for tithes, but a bill to rescind the agreement, and the suit was therefore an application to the **[441]** equity of the Court, and not the assertion in a court of equity of a legal right.

At the close of the argument, Alderson, B., said that he should take time to consider the case, expressing a desire, if possible, to support an agreement which had been acted upon for so many years.

Wednesday, Feb. 15th.—ALDERSON, B. The bill in this case was filed for an account of tithes. The defence set up by the answer, in substance, is an arrangement entered into by all proper parties after the disabling statutes, by which certain lands were assigned over by the owner to the rector, and certain privileges were given to him, together with an annuity of 40l. a year; and in consideration of this the rector agreed, on behalf of himself and his successors, to exchange certain lands then forming the glebe of the rectory, and also to give up the tithes of the lands which the present plaintiff now claims. It does not very distinctly appear from the agreement whether the 40l. a year was assigned for the tithes and privileges, or for either of them, or for which in particular. In the view, however, which I take of the case, the point is not very material. The agreement appears to have been examined with great care by the then bishop, and he appears to have taken great pains to ascertain whether it was fair and reasonable. He certified that the arrangement was advantageous to the church, and at that time it probably was so. The bishop being thus satisfied, the agreement was subsequently confirmed by a decree of the Court of Chancery. The question now, therefore, to be considered is whether this agreement, so confirmed by the Court of Chancery, forms a sufficient defence to the demand in this suit.

There is no question that such an agreement would now be valid under Lord Tenterden's Act, the provisions in which clearly apply to the present case.

[442] The real question is whether this agreement, though confirmed by the decree of the Court of Chancery, was not absolutely void, and it appears to me that the case of *The Attorney-General* v. *Cholmondeley* decided this question. It seems impossible to understand how the Court of Chancery ever assumed to exercise jurisdiction to confirm such agreements, unless it did so upon what may be considered a metaphor rather than a rule, viz. that the church being considered as a minor, all those rules which applied to a minor also applied to the church; and therefore that the Court had equal authority to give to the church the same protection which was afforded to a minor. The jurisdiction appears to me to have originated in some such notion as this, and it shews the danger of courts of justice acting on such grounds, for there are no disabling statutes applicable to minors. The case of *The Attorney-General* v. *Cholmondeley* brought back the rule to what seem to be proper and reasonable grounds. If agreements are made void by an act of Parliament, on the ground of public policy, it is for this reason—that, although some may be fair and honest, yet, as the majority of such agreements are notoriously unfair and dishonest, public policy requires that no such transactions should be allowed to stand. A small good must be sacrificed to prevent a great evil, which would necessarily arise but for such a provision, and the same public policy requires that the statute should be fully acted upon. I cannot understand how any court of justice could set itself up against the legislature and say that that which the legislature had declared to be void, on the ground of public policy, the Court would confirm by its decree. *Atterbury* v. *Turner* appears to me to be a most singular decision; for though the precise point arose in that case, yet the Court, in the whole course of its judgment, never seems to have noticed the fact that the agreement had been made after the disabling statutes, but merely states that, under the circumstances, the Court would infer that **[443]** the agreement to exchange the glebe-lands had received the assent of the ordinary. In that point I entirely concur. There were quite sufficient circumstances from which the Court might reasonably infer, for the sake of supporting a long-established usage, that the consent of the ordinary and all other proper parties had been given. But the question is, would such consent have made the agreement valid? It seems to me that, though the Court gave extremely good reasons on the former part of the case, yet that the facts did not warrant the conclusion at which the Court ultimately arrived. I have been much pressed with an expression which is stated to have fallen from Lord Northington in the case of *The Attorney-General* v. *Cholmondeley*, in which he seems to have said that if provision had been made for the prospective increase in the value of the land, corresponding with the increasing value of the tithes, he should not have been inclined to interfere. This expression, if used by Lord Northington, does not seem to be quite consistent with the former part of his judgment, in which he observed that the agreement was unequal, but that if it had been equal, it would have been void under the disabling statute. It appears to me that the latter part of his judgment is quite irreconcilable with the previous part, unless, indeed, it proceeded on the ground that the suit there was an application to the equitable jurisdiction of the Court, not only to decree an account of the tithes, but to set aside the agreement. And if Lord Northington had referred to this in the early part of his judgment, it would have removed the seeming inconsistency; for undoubtedly in that case it might reasonably have been said that a Court of Equity would not interfere to set aside the agreement, though it would interfere to the extent of decreeing an account of the tithes. Whether this will explain the difference between the first part and the latter part of Lord Northington's judgment **[444]** I do not know. Certainly, though he considers the agreement in that case an unequal one, yet he does not decree that it shall be set aside, but simply directs that an account of the tithes shall be taken. That is what I shall do here.

This is not any application to the equitable judgment of the Court, except so far as an account is prayed of the tithes. The plaintiff rests his claim on his legal right. All that he claims from a court of equity is that which arises out of his strict legal right—an account of the tithes, the legal right being established: and this account is for the purpose of preventing multiplicity of legal suits. Now, in this case, suppose I were to decide that I was not satisfied on the subject, the plaintiff would be entitled to an issue; and if he is entitled to an issue upon his legal right, what am I to do

if the jury to whom I refer the issue find that the legal right is in the plaintiff? In that case I must decree an account. If that be so—and if I am now satisfied that he has made out his legal right, does it not follow as of course that I must decree an account of the tithes to be taken? It is said the plaintiff ought to have given up the lands he holds; but how can he do this when he does not know whether the other party would give up the land conveyed to his predecessor? How is he to ascertain how much of this land was given for the tithes, and how much is to be referred to the exchanged lands? This is, besides, a suit against the tenants, and though the landlord is a party, I think he is not properly made a party to this record. It appears to me that the agreement is absolutely void; and that the plaintiff is therefore entitled to an account of the tithes as prayed, with costs. With respect to the defendant, the landlord, I see no ground upon which any decree can be made against him, and the bill must therefore be dismissed as against him. If he had been made a defendant originally, I should have ordered the bill to **[445]** be dismissed as against him with costs; but as he has been made a defendant by amendment, on the suggestion of the other defendants, who are his tenants, and therefore probably by his own desire, I think the bill ought to be dismissed against him without costs.

Decree accordingly.

GUDE *v.* MUMFORD. Jan. 12th, 1837.—The master having reported certain passages in the depositions taken for the defendants to be scandalous and impertinent, but having made no report as to the frame of the interrogatories: Held, that the defendants were not liable to the costs of the reference, &c.—The attorney for the defendants having been examined as their witness, and having made certain scandalous and impertinent statements in his deposition in reply to the last interrogatory, was compelled to pay the costs of expunging such scandalous and impertinent matter.—Semble, that the examiner is not liable for the costs of expunging scandalous and impertinent matter from depositions made in answer to specific interrogatories, nor from depositions made in answer to the last interrogatory, where the deposing witness is an attorney in the cause.—Testator devised to J. M. for his life "one annuity or clear yearly sum of 100l.," and charged his estates at C. with the payment of the annuity. He then devised the estates at C. to trustees, in trust to levy and raise the annuity and pay the same to J. M.; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee: Held, that J. M. was entitled to the annuity clear of all deductions for legacy duty.—The question whether a legatee is to take his legacy free from legacy duty depends upon the intention of the testator as manifested upon the face of the will. Therefore, the words "without deduction," "clear of all deductions," &c., may be sufficient to free the legacy from duty, although there be, from the nature of the property on which it is charged, other outgoings to which those words may be applied.

[S. C. 1 Jur. 577. Followed, *Baily* v. *Boult*, 1851, 14 Beav. 595. Referred to, *Pridie* v. *Field*, 1854, 19 Beav. 497.]

An order having been made in this cause, referring it to the master to look into the interrogatories exhibited and the depositions made on the part of the defendants, and to report to the court whether the depositions contained any scandalous and impertinent matter, the master reported in the affirmative, specifying the passages which he considered scandalous and impertinent. These passages occurred in the evidence of the defendants' attorney, who was examined as one of their witnesses, in reply to the last interrogatory.

Mr. Blenman now moved that the master's report might be confirmed, and that it might be referred back to him to expunge the scandalous and impertinent matter, and to tax the plaintiff's costs of the reference, and of this application, &c.

Mr. Teed, for the defendants, said that as there was no complaint of the frame of the interrogatories, but only of the depositions, the defendants ought not to be made to pay the costs now asked for. The defendants could not control the conduct either of the examiner or of the witness, who were the only parties to blame. In *Cocks* v. *Worthington* (2 Atk. 235) and *Anon.* (2 P. W. 405) no costs were given.

[446] Mr. Blenman, in reply, contended that as the scandal was the production of the defendants' own attorney, it was reasonable that the defendants should pay these costs.

THE LORD CHIEF BARON. If the master had reported both the interrogatories and the depositions to be scandalous and impertinent, I should have allowed you the costs you ask for. But as the report extends only to the depositions, I am of opinion that you are not entitled to these costs. If you had made your motion specifically against the attorney, it might have been a good reason for making him pay the costs.

Order as prayed, except as to costs.

Feb. 22nd.—The scandalous and impertinent matter contained in the depositions before mentioned having been expunged, a motion was now made that the costs mentioned on the former occasion, together with the additional costs incurred by the plaintiff relative to the same matter, might be paid by Mr. Fox, the solicitor for the defendants, or by A. B., Esq., the examiner who examined Mr. Fox.

Mr. Blenman, for the motion, cited *Ex parte Simpson* (15 Ves. 476) and *Ex parte Wake* (3 D. & Chit. 246), to shew that the court would, in its discretion, fix the solicitor with these costs; but, supposing there were any doubt upon that point, he contended that the examiner was liable, on the authority of *Anon.* (2 P. W. 405). There, as here, the witness was examined to the last interrogatory, and yet the commissioner was held to be in fault for allowing an irrelevant answer.

[447] Mr. Teed, for the solicitor. If the solicitor is to be fixed with costs, he ought to have been a party to the inquiry as to the scandal. [The Lord Chief Baron. He was employed as solicitor at the reference.] The correctness of the report is questionable. The solicitor had no opportunity of excepting to the report. In order to except, he ought to have been distinctly and separately before the court. In this court a report of scandal and impertinence must be confirmed. If upon the motion to confirm the report, and to expunge, an application had been to visit these parties with costs, they might have taken the opinion of the court as to the scandal. [The Lord Chief Baron. You think the admission of the scandal by the client does not bind the solicitor?] Unquestionably not. If the witness had not been the defendants' solicitor, these proceedings could not have been taken in his absence, and his situation as solicitor can make no difference. The plaintiffs have put the record in such a state that they cannot now be heard. [The Lord Chief Baron. I agree with you to this extent—that if this person had not been a solicitor, and was not a party to the suit, he would have had a right to resist the payment of these costs, unless he had had an opportunity of shewing that he ought not to be made liable. I never doubted that; but whether a solicitor in the cause is not so much a party to the proceedings as to be identified with his client, I have doubted from the first.]

Mr. G. Richards, for the examiner, contended that this client had no control over the manner in which the interrogatories were framed, and consequently was not responsible for the answers which might be given to them. [The Lord Chief Baron. The commissioner has no control over interrogatories prepared by counsel. He has nothing to do with their being impertinent; his sole duty being to put them to the witness. The only doubt is whether he **[448]** is to be supposed to be so far acquainted with the facts in the cause as to be responsible for evidence received in answer to the last interrogatory. I think he ought not in a case where the evidence is given by an attorney in the cause.]

Mr. Blenman, in reply, observed that the attorney was an officer of the court, and in that light, independently of being identified with a party in the cause, might be visited with these costs.

THE LORD CHIEF BARON. I think that the costs of the reference, and of expunging the irrelevant matter, should be paid by Fox, but that the examiner ought to have his costs of appearing, and that these costs should be paid by the plaintiff. It must be an extreme case, indeed, which should induce the court to visit the examiner with costs; but in the case of an attorney in the cause, the court will not shew so much indulgence.

Order accordingly.

Feb. 10th, 13th.—Henry John Attfield by his will, after directing that all his just debts, funeral and testamentary expenses should be paid and satisfied by his

trustees and executors thereinafter named, out of the rents and profits of his real estates thereinafter devised to, or in trust for, his friend and relation, Richard Gude the elder, for his life, with remainder to his son, Richard Gude, in fee; and after giving several small pecuniary legacies, all which legacies he directed **[449]** should be paid and satisfied by his said trustees and executors out of the rents and profits of his real estates as before mentioned, gave, devised, and bequeathed in the words following; that is to say, "I give and bequeath all and singular my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, unto my friend, James Metherell, his executors, administrators, and assigns, for his absolute use and benefit. I give and devise unto the said James Metherell and his heirs, all that messuage or tenement wherein I now dwell, with the garden and pleasure ground thereto belonging, situate in the said parish of Chobham, to hold the same with the appurtenances unto and to the use of the said James Metherell, his heirs and assigns for ever. I also give and devise unto the said James Metherell one annuity or clear yearly sum of 100l. for and during the term of his natural life, such annuity to be paid by equal half-yearly payments, the first half-yearly payment thereof to commence and be made at the end of six calendar months from the time of my decease; and I do hereby charge all the residue of my freehold messuages, lands, tenements, and hereditaments, situate in the said parish of Chobham, with the payment of the said annuity or yearly sum of 100l.; and subject thereto, and charged and chargeable with the payment of my said debts, funeral and testamentary expenses, and the several legacies hereinbefore by me given and bequeathed, I give and devise all the rest, residue, and remainder of my messuages, lands, tenements, and hereditaments, situate in the said parish of Chobham, and all other my real estates whatsoever and wheresoever, with their and every of their appurtenances not hereinbefore devised, unto and to the use of Samuel Mumford the younger and William Soan, their heirs and assigns, in trust by such ways and means as they or the survivor of them, his heirs or assigns, shall think fit, to levy and raise the said annuity hereinbefore given to the said James **[450]** Metherell, and to pay the said annuity when so raised unto the said James Metherell, according to the trusts of this my will; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for my said friend and relation, Richard Gude the elder, of New Bridge Street, in the city of London, gentleman, and his assigns, for and during the term of his natural life; and from and immediately after his decease, then in trust for Richard Gude the younger (the second son of the said Richard Gude the elder), his heirs and assigns for ever. And lastly I hereby nominate, constitute, and appoint the said Samuel Mumford and William Soan executors of this my will."

The testator by a codicil directed that all his debts, legacies, and funeral expenses by his said will directed to be charged on his real estate devised in trust for the plaintiff, Richard Gude the elder, for his life, should be charged thereon exclusively, and in exoneration of his personal estate. And he directed that if James Metherell should die on any other day than one of the half-yearly days of payment of the annuity, a proportionate part thereof should be paid to his executors, administrators, or assigns, up to the day of his death.

The testator died in August, 1829, and soon afterwards the plaintiff, Richard Gude the elder, entered into possession of the devised estates. He regularly paid the annuity, treating it as an annuity the duty upon which was to be paid by the annuitant, until the year 1832, when Metherell claimed to have the legacy duty paid out of the estate on which it was charged. In consequence of this claim the plaintiff for some time paid the duty under protest, but now brought his bill, praying that it might be declared that the legacy duty payable in respect of the annuity was not charged upon the devised estates; that if necessary an account might be taken of what was due in respect of the annuity, and that the plaintiff might have **[451]** credit in such account for the sums which he had paid for legacy duty.

Mr. Simpkinson and Mr. Blenman, for the plaintiff. The testator gives to Metherell "one annuity or clear yearly sum of 100l.," for the term of his life. The words "annuity" and "clear yearly sum" are used here as synonymous; and to shew more clearly that that was the testator's meaning, he subsequently omits the word "clear," and calls the annuity a "yearly sum." He charges all the residue of his lands in Chobham with the payment of the said annuity or yearly sum; and subject thereto, that is, to the annuity or yearly sum, he gives the residue of his real estates,

in trust for the plaintiffs. So far there is clearly nothing to lead to the conclusion that the legacy duty for this annuity was chargeable on these premises; but then the trustees are to take the premises in trust to levy and raise the annuity, and to pay the annuity when so raised to Metherell; "and subject thereto, and all costs, charges, and expenses attending the raising and paying the same," in trust for the plaintiff. Now, is it possible to contend that these words, merely affecting the devise to Gude, and referring exclusively to the costs to be paid in raising and paying the annuity, are to be applied so as to indicate an intention that the legacy duty should be paid out of these premises? The cases in which a construction has been put upon the words "without deduction" differ materially from the present case. *Barksdale* v. *Gilliat* (1 Swanst. 562) was the case of a legacy merely payable out of personal estate; and Lord Eldon doubted whether a qualified construction could not be put upon the words "without deduction," so as still to charge the legatee with the duty. [Alderson, B. It is remarkable that Lord Eldon should have doubted; because the words of **[452]** the Legacy Act are that the executor shall deduct.] In *Courtoy* v. *Vincent* (Turn. & Russ. 433) the words which were held to exonerate the legatees from payment of the legacy duty were much stronger than any words contained in this will. The testator there directed that the legacies and annuities should be paid "clear of the property tax and all expenses attending the same." The present case must be governed by that of *Hales* v. *Freeman* (1 Brod. & Bing. 391). There an annuity charged upon real estate was given clear of all deductions. The trustees paid the legacy duty and afterwards the annuitant assigned the annuity. The trustees then brought their action against the annuitant to recover the amount of the legacy duty; and the Court held that the action lay, and there was judgment for the plaintiff. It is remarkable that in that case no observation was made upon the construction of the will, which shews that the point as to the legacy duty was considered untenable. [Alderson, B. That case is at variance with the case before Lord Eldon. No distinction can be made between the words "clear of all deduction," and "without deduction."] The case of *Hales* v. *Freeman* is not inconsistent with the principle on which Lord Eldon's judgment proceeded. In *Smith* v. *Anderson* (4 Russ. 354) Sir John Leach in speaking of that judgment said, that Lord Eldon considered that a direction to pay annuities without deduction would not extend to exempt the annuitant from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The case of *Dawkins* v. *Tatham* (2 Sim. 492) was decided on that principle, for there could be no deduction in that case except for legacy duty; the annuity being payable out of dividends of stock. In *Gosden* v. *Dotterill* (1 M. & K. 56) the legacy was to be paid out of the per-**[453]**-sonal estate free from all expense; and the Court held that legacy duty was the only expense to which those words could apply. In *Louch* v. *Peters* (1 M. & K. 489) and *Snow* v. *Davenport* (5 B. & Ad. 359) the decisions depended on the words "free of all taxes and other outgoings," which are much stronger than any words contained in this will.

The cases, therefore, upon the whole, proceed upon the principle that where there are no outgoings, or deductions, or charges to which the legacy or the annuity could be subject to, except the legacy duty, and the testator gives either a legacy or an annuity clear of all deductions, he must mean the only thing to which it was subject; but if there are other charges which would satisfy the words of the will, the legatee will be liable to duty. Here there are other charges which will satisfy the words of the will; but independently of that it is clear that the testator only meant the expenses of raising the annuity. The trustees are to pay the annuity to Metherell for his life, and then the property is given subject to the annuity, and all costs, charges, and expenses attending the raising and paying the same. That means the costs, strictly, and not the legacy duty; which has nothing to do with the costs, which is a tax imposed by law, and which the annuitant is liable to pay unless there is a clear contrary intention on the face of the will. Even in cases where the rational inference is the other way, it has been held that unless there is a clear declaration to the contrary, the legacy must be charged against the legatee: *Foster* v. *Ley* (2 Bing. N. C. 269; 2 Scott, 438). [Alderson, B. In that case the legacy duty was never present to the mind of the testatrix.]

Mr. Swanston and Mr. Teed, for the defendant Metherell. The only case which has been cited in which it was adjudged that the legatee was to pay the duty is the

[454] case before the Court of Common Pleas, where the point now in issue did not distinctly arise, and was not adjudicated upon. In *Barksdale* v. *Gilliat* the words were, "without any deduction," and then follows a passage on which the argument chiefly turned, namely, "A list of all my property at this time is left with this will, &c.;" which referred to a document enclosed in the will shewing that the testator could not have intended the duty to be paid out of the residue. Lord Eldon's doubt does not arise from thinking the expression in the will insufficient to exempt the legatee, but because there was a suspicion in his mind that the testator did not intend that the legatee should be exempted. Sir John Leach, in commenting on the case of *Barksdale* v. *Gilliat*, gave his judgment upon a total misapprehension of it. What he stated to be the result of Lord Eldon's judgment had, in truth, nothing to do with it. Lord Eldon's decision did not proceed on the ground that the word deduction might be referred to other charges, but that it was absurd to say that a legatee should take subject to deduction, the testator expressly saying that he should not. Upon that view of *Barksdale* v. *Gilliat*, if the case rested in this instance on the first words of the will creating the annuity, the annuitant would be entitled to take it clear of duty. But then it is said that by the words "clear yearly sum," the testator meant annuity. Doubtful words in a will are to be constructed by words not susceptible of doubt. If the word "annuity" were out of the question, the defendants' case would be governed by that of *Barksdale* v. *Gilliat*. Is he to be without the benefit of the word "clear" because the testator combines with it another word not importing so much?

But the case does not rest there, because the testator in a subsequent part of his will charges "all costs, charges, and expenses attending the raising and paying the annuity" upon the real estate upon which the annuity is charged. Now, the plaintiff must say either that the **[455]** legacy duty is not a charge, or that because there are some other charges the annuitant is not exempt from this. But here there is an express direction, that all costs, charges, and expenses are to be paid out of the estate. How then is this case distinguishable from *Courtoy* v. *Vincent*, where the "expenses" were precisely the same as in the present case? That case was, in truth, less favourable to the legatee than the present, because there the word "expenses" was alone held sufficient to comprehend legacy duty. Here the word "charges" would at all events include the legacy duty.

Mr. G. Richards and Mr. J. Russell, for the trustees.

Mr. Simpkinson, in reply.

Feb. 13th.—ALDERSON, B. It is clear that the principles upon which questions as to the payment of legacy duty proceed are those which govern the construction of wills. In order to arrive at the decision that a legacy is to be paid free of duty, the Court must be satisfied that the intention of the testator in that respect has been clearly made out. Primâ facie the law must take its ordinary course, and the legacy must be left in the circumstances in which the law places it; nevertheless it is competent for the testator, by words, to direct otherwise. The case in the Common Pleas (*a*) was a case of disposition by a testatrix, in which no direction of that sort was contained in the will. There the testatrix, by her will, directed that her husband's debts should be paid. She probably had no notion that she was leaving legacies to the amount of those debts. The law, however, says that bequests so made shall be subject to legacy duty, and her will being silent upon that point, it was held that the creditors took these legacies **[456]** subject to the duty. This construction probably violated the intention of the testatrix, but the Court considered itself bound by the terms of the will.

But from the other cases, particularly that of *Barksdale* v. *Gilliat*, it is clear that if you can collect from any direction contained in the will that the testatrix's intention was that the legacy duty should be paid by the executor, the Court will carry that direction into effect. In *Barksdale* v. *Gilliat* the direction was that the legacy should be paid "without any deduction." Lord Eldon, in his judgment, does not follow the words of the will, but takes them as if they were "without deduction" only. That circumstance alone shews that the view taken of Lord Eldon's judgment by Sir John Leach was not correct. If it had been correct, the word omitted would have been material, and Lord Eldon's language would have been altogether different; but in the view which he took of the case it was not material. Lord Eldon evidently

(*a*) *Foster* v. *Ley*, 2 Bing. N. C. 269.

considered that the words "without deduction" in their ordinary sense mean "clear of all deduction." He then went on to examine whether, in the four corners of the will, he could find the same words used in another sense, or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and, upon the whole, he arrived at the conclusion that the words must be used in their ordinary sense without qualification. That appears to me to be the right construction of Lord Eldon's judgment, and I am confirmed in that opinion by the observations of Lord Brougham in *Louch* v. *Peters* (1 M. & K. 499).

With the exception of Sir John Leach's dictum, the authorities upon this subject are all one way. That being so, the question in this case is whether I can find words in this will shewing that the testator used the ex-**[457]**-pression, which he has used, in a limited sense. The words of the will are "one annuity or clear yearly sum," and the argument is that the word "annuity" is equivalent to "clear yearly sum;" but if it be so, which is to govern? Is it the word "annuity?" It appears to me that any ambiguity that there is in this expression is to be explained by the word "clear," and that the words "one annuity or clear yearly sum" are equivalent to the words "one clear annuity;" the word "clear" meaning "clear of all deductions." It is true that, in another part of the will, the testator uses the expression "the said annuity or yearly sum," without using the word "clear"; but that expression is coupled with words of reference, the testator evidently referring to the annuity which he had already bequeathed. The latter part of the will puts the question out of doubt. The trustees who hold the land out of which the annuity is to be raised are to deduct the costs, charges, and expences attending the raising and paying it, out of the profits of the land. The legacy duty is a charge of expence attending the raising and paying this annuity.

Upon the whole it appears to me that, upon the point in issue, there is only one conclusion to be drawn from this will, namely, that the residuary estate is chargeable with the duty payable for this annuity.

Decree accordingly.

PAYNE *v.* COMPTON. COMPTON *v.* PAYNE. Jan. 27th, 1837.—The bill alleged that the plaintiff A. had sold Blackacre to B., upon an agreement that B. should execute to him a mortgage both of Blackacre and Whiteacre; that the mortgage was accordingly made, and that B. afterwards mortgaged Blackacre to C. The bill then, after alleging that B. had conveyed Whiteacre to a purchaser for valuable consideration without notice of the mortgage, prayed a foreclosure of Blackacre: Held, that the purchaser of Whiteacre was a necessary party to the suit.—Semble, that purchase for a valuable consideration without notice is available as a defence against a plaintiff who relies on a legal title.

It appeared from the statements in the bill and cross bill, that in the month of April, 1820, Payne, being seised **[458]** in fee simple of an estate at Warminster, entered into an agreement with a person of the name of Tring to sell him that property. The arrangement was that, Tring should not pay any money, but, upon that estate being conveyed to him, should execute a mortgage of it, and also of another estate to which he was entitled, called the Courton estate, to Payne. In June, 1820, Payne executed deeds of lease, release, and feoffment, by which he conveyed the Warminster property to Tring and at the same time Payne placed in the hands of Tring all those deeds. Afterwards, upon the execution of the mortgage to Payne, Tring delivered over to Payne the indentures of lease and release of the Warminster estates, but kept in his possession the indenture of feoffment. Tring afterwards applied to Compton for a loan of money on the Warminster estate, and upon that occasion produced to Compton the indenture of feoffment. Compton, accordingly, under the belief that Tring was the real owner of the property without incumbrance, advanced the money.

The original bill, which was filed against the assignees under the bankruptcy of Tring, and against Compton, prayed for a foreclosure of the Warminster estate; alleging, with respect to the Courton estate, that Tring had conveyed it to a purchaser for a valuable consideration without notice of the mortgage created upon it.

The cross bill was filed by Compton for the purpose of establishing his priority over Payne.

Mr. Simpkinson having opened the case for the plaintiff in the original suit,

Mr. G. Richards and Mr. J. Parker, for the defendant Compton, objected that the alleged purchaser of the Courton estate ought to have been made a party to the bill. And they contended that, Payne having executed a double conveyance of the Warminster estate, and placed the **[459]** indenture of feoffment in the hands of Tring, thereby enabling him to commit a fraud, Compton's mortgage on the Warminster estate had the priority to Payne's, and that, as against Compton, Payne was not entitled to a foreclosure. That being so, Compton would have a right to redeem Payne, not only as to the Warminster estate, but the Courton estate. He would have a right, under the circumstances, to stand precisely in the same situation as to both estates as the first mortgagee. If so, it is necessary to have the alleged purchaser of the Courton estate before the court, in order that he may see that the account is duly taken between Payne and Compton : *Palk* v. *Lord Clinton* (12 Ves. 48), *Stokes* v. *Clendon* (3 Swanst. 150). If he were not a party, Compton might be put to the necessity of filing a bill against him to foreclose the Courton estate. It is stated in the bill that the Courton property was sold for a valuable consideration without notice. The answer to that is that whether the purchaser had notice or not is wholly immaterial. If, as appears by the bill, the legal estate in that property was conveyed to Payne, of course Tring had no longer power to deal with it, and the question of notice can never arise unless the purchaser has the legal estate. Tring had no property in it whatever, except the equity of redemption ; it is, therefore, perfectly clear that the purchaser, or alleged purchaser of the Courton estate took it liable to the mortgage of Payne. Besides, if he were a purchaser for a valuable consideration without notice, the mere allegation of that fact is not sufficient : it must be proved.

Mr. Simpkinson and Mr. Stinton, for the plaintiff. Compton, in his answer, makes a totally different defence from that made at the bar. The case made by the answer is, not that he is entitled to redeem in the manner stated, **[460]** or that the purchaser of the Courton estate is a necessary party, but only that he, Compton, under the circumstances stated in the answer, is entitled to priority over Payne. That is his whole case. The objection for want of parties is not attempted to be made : nor is it made in the cross-bill which Compton filed against Payne. By that bill he insists that he is entitled to priority over Payne, and in case the court shall be of opinion that he is not entitled to priority, then he prays to be at liberty to redeem ; and singularly enough, in that suit he has not made the owner of the Courton estate a party. It is for the court to say, upon a record so constituted, whether the objection, if good under other circumstances, can possibly prevail in this case. It is stated that Tring fraudulently represented himself to be the owner of the fee of the Courton estate, and sold it to a purchaser for valuable consideration without notice of the mortgage : if so, a court of equity cannot under such circumstances interfere against the purchaser. It has been contended that the owner of the Courton estate is a necessary party to the suit, because he is interested in the account to be taken between Payne and Compton ; the latter being entitled to stand in the place of Payne as against both estates. Without denying the truth of that proposition as a general proposition, does it follow that the person who purchased the Courton estate in the manner stated in the pleadings is a necessary party to the suit? What relief can be asked against him? He purchased the fee, and it must be assumed that he had a conveyance for a valuable consideration without notice. Is it so clear that any relief can be had against a purchaser under such circumstances? It is true that in *Collins* v. *Archer* (1 Russ. & Myln. 284) Sir John Leach held that a purchaser for a valuable consideration without notice had no defence against a plaintiff relying upon a **[461]** legal title. But Sir Edward Sugden does not appear to consider that case as a decisive authority (Sug. V. & P. chap. xviii.). He says that title of a purchaser for a valuable consideration without notice is a shield to defend possession, and not a sword to attack the possession of others ; that it is clear that it protects possession from an equitable title, but whether it avails against a legal title was perhaps doubtful, though in the last decision upon the subject, that of *Collins* v. *Archer*, the Master of the Rolls, Sir J. Leach, followed the precedent in *Williams* v. *Lambe* (3 Bro. C. C. 246).

THE LORD CHIEF BARON. I cannot but think that the alleged purchaser of the Courton estate is a necessary party to this suit. If he were a purchaser for a valuable

consideration without notice that would protect him against any claim by the owner of the legal estate. But Compton, if he redeemed Payne's mortgage, was not bound to take Payne's statement in the bill as to the Courton estate being purchased for a valuable consideration without notice. That fact is not admitted in the answer, and therefore I cannot take it as a fact conceded. That fact must some way or other be established before Compton can be considered as precluded from calling on that person to be a party to this suit. I must look at it in the same way as if a party had a mortgage upon two estates, which became separated in different hands. The plaintiff has filed a bill to foreclose on one estate only. It would be very hard if the purchaser of that one estate were compelled to pay the whole mortgage: the party must go to the purchaser of the other estate, and make him pay a portion, or give him the title to the whole. It appears to me that the objection for want of parties is one without getting rid of which I cannot make make a final end of the controversy. The case must therefore stand over, with liberty for the parties in both causes to amend.

[462] MEMORANDA.

In February, 1837, Thomas Coltman, Esq., one of His Majesty's counsel, was called to the degree of the coif, and gave rings with the motto "Jus suumcuique," and was thereupon appointed one of the judges of the Court of Common Pleas in the room of Mr. Justice Gaselee, who had resigned that office, and shortly afterwards received the honour of Knighthood.

About the same time, the following gentlemen were appointed His Majesty's counsel learned in the law, namely, Francis Newman Rogers, of the Inner Temple, Esq., Biggs Andrews, of the Middle Temple, Esq.; George Chilton and John Evans, of the Inner Temple, Esqs., and Richard Budden Crowder, of Lincoln's Inn, Esq.

DOWBIGGEN *v.* BOURNE. Feb. 8th, 15th, 1837.—A., and B., as his surety, having given a joint and several promissory note to C., the latter brought separate actions against A. and B. upon the note, and recovered judgment in both actions; C. afterwards issued execution upon the judgment obtained against B., whereby B. was compelled to pay the whole debt and costs. Upon a bill filed by the administratrix of B., for the purpose of obtaining an assignment of the judgment which had been recovered against A., the principal debtor: Held, that such judgment not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment, as sought by the bill.

[S. C. 6 L. J. Ex. Eq. 82; 1 Jur. 102. See 4 Y. & C. Ex. 577.]

This cause now came on for hearing upon the answers and evidence. The facts, as stated in the bill, and as reported in 1 Younge, 111, were not disputed; but the point of law which on the former occasion was raised by demurrer, was now re-argued.

Mr. James Russell, for the plaintiff. The point reserved for argument on the present occasion was virtually decided in the plaintiff's favour by Lord Chief Baron Alexander, when he overruled the demurrer. The question is whether the plaintiff, who is the personal representative of John Dowbiggen, has an equity to have the judgment obtained against Cawthorne assigned to her. **[463]** The law upon that point is settled by some ancient and many modern decisions. The case of *Parsons* v. *Priddock* (2 Vern. 608), which is an old authority, has been recognised and approved of by modern Judges, though going much farther than the present case. In that case there was no privity between the sureties and the bail; but an action having been brought against the principal debtor, and bail being given, and in that action judgment having been obtained against the bail, but not enforced to execution, the creditor availed himself of the bond given by the sureties, and the Court gave the sureties the benefit of the judgment against the bail, saying that the bail should be considered as the principal, and that having paid the creditor they should have the judgment assigned to them. And yet it is clear that if the creditor had obtained payment, and had endeavoured to enforce payment again, the proceedings would have been stayed. The general principle is laid down in *Wright* v. *Morley* (11 Ves. 22), where Sir William Grant says that as the creditor is entitled to the benefit of all the

securities which the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor. The decision of Lord Eldon in *Copis* v. *Middleton* (Turn. & Russ. 224) is not inconsistent with this principle, though his Lordship qualified the right of the surety in certain cases. It was there held that if A. as principal, and B. as surety, are jointly bound in a bond, and B. pays the bond, the instrument is extinguished by that payment; and the surety, though he has a claim against the principal debtor for the money paid, has nevertheless no claim as a specialty creditor. In *Hodgson* v. *Shaw* (3 M. & K. 183), Sir John Leach likewise decided that the surety in a bond who had paid off the debt could not stand in the situation of a specialty creditor of the **[464]** principal debtor. But upon appeal Lord Brougham reversed Sir John Leach's decision upon a distinction which was not taken before his Honor, but which is quite consistent with former decisions. In that case one Whaley was surety in a bond given by Shaw for securing a sum of money and interest due from Shaw under a former bond. Whaley, and after his decease his executors, made various payments on account of what was due under the second bond, till the whole was discharged. The executors then procured an assignment of the original bond in trust for their benefit, and claimed to be specialty creditors against the estate of Shaw; and Lord Brougham held that the executors were entitled to all the existing securities which the creditor had against the principal debtor; that though the second bond was satisfied and gone, there still remained a bond in which Shaw was the sole obligor, and that by virtue of that bond they were entitled to stand as specialty creditors against his estate. His Lordship's judgment proceeded on the rule of equity as stated by Sir S. Romilly—namely, that "a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment." The case of *Hudson* v. *Stalwood* (Ca. Temp. Hardw. 153) is an authority to shew that this rule is regarded even at law. [Alderson, B. I do not understand the doctrine of that case, notwithstanding the high authority of Lord Hardwicke.] Here the judgment against the principal debtor remains unsatisfied, and the plaintiff claims to have the security assigned to her to make it available against the estate of Cawthorne. [Alderson, B. Suppose there had been only one action and judgment—you could have had no equity; so that the equity you claim depends on the form of the proceedings at law, there being two actions.] If there had been only one action, there would cer-**[465]**-tainly have been nothing for equity to operate upon; but there being two actions and judgment in one of them remaining unsatisfied, I have a right to the benefit of that judgment. Suppose I brought scire facias on that judgment; Cawthorne could not defend himself except under the statute of Anne (stat. 4 Ann. c. 16). What equitable foundation would there be in such a case for any court to interpose against my right to sue? The unsatisfied judgment being made available for the surety, would be no reason for a Court of equity to stop my legal right, but on the contrary it would be a ground for allowing the surety the full benefit of the judgment. If A. grants an annuity, and enters into a bond as a security for the payment of the annuity, and B. enters into a separate bond as surety, it is unquestionable that the principal creditor, being paid the amount of one bond, cannot sue on the other, and the surety has a right to the unsatisfied bond. Suppose, instead of two bonds, two warrants of attorney are given in the same manner; what becomes of the doctrine of principal and surety if, when by means of the judgment entered up against me, the creditor has obtained payment of his whole demand, I cannot have the benefit of the judgment which he may have entered up on the other warrant of attorney? He then referred to *Butcher* v. *Churchill* (14 Ves. 567) and *Sharpe* v. *Earl of Scarborough* (3 Ves. 557).

Mr. Simpkinson and Mr. G. Richards, for the defendant, Mrs. Cawthorne, the personal representative of Cawthorne. The questions are first, whether, under the particular circumstances of the case, the plaintiff is entitled to the assignment of this judgment; and secondly, if so entitled, whether it can be made available at law. It has been stated that the point was adjudicated by Lord Chief Baron Alexander. There are indeed, several propositions in **[466]** his lordship's judgment which may be deemed questionable, but he took great pains to say that he would not decide the point now before the Court. Why he did not decide it, it is difficult to say. The defendant admitted, as he does now, all the facts, but disputed the law. His lordship, however, for some reason which does not appear, considered that he could not decide the point of law. The question is, not whether the plaintiff is a creditor of Cawthorne,

for that is admitted: but whether, under the circumstances, she is entitled to the assignment of the judgment against him. The two judgments were obtained at different times. That against the principal having failed by reason of his insolvency, another judgment was obtained against the surety, under which execution issued, and the debt was satisfied. But it has been expressly decided that if collateral securities are given for a debt at a different time from that when the debt was contracted, the surety paying the debt is not entitled to avail himself of the collateral securities: *Wade* v. *Coope* (2 Sim. 155). So, in the case before Lord Eldon, he treats the collateral securities as given at the same time; and hence it would follow from these authorities that even if this judgment were available at law, the plaintiff would not be entitled to an assignment of it for her benefit.

But supposing the plaintiff entitled to the assignment, could it be made available at law? Would not a court of law hold it to be satisfied, and would not a court of equity, therefore stultify itself in ordering an assignment? In *Gammon* v. *Stone* (1 Ves. sen. 339) the surety of a bond went to the obligee, and offered to pay the money if the obligee would assign; but the obligee refusing so to do, the Court would not compel an assignment. In *Woffington* v. *Sparks* (2 Ves. sen. 569), a case of a similar nature, Sir Thomas Clark, in com-**[467]**-menting upon the case of *Gammon* v. *Stone*, said that the Lord Chancellor in that case held that the assignment was not to be insisted upon, because it was a useless thing; the bond when once satisfied being functus officio. The case of *Copis* v. *Middleton* (Turn. & Russ. 224) is a strong authority for the defendant. That was not the case of a bill filed for the purpose of obtaining an assignment, but of a surety insisting that, having paid the bond, he was entitled to rank as a specialty creditor. It is clear that, if he could have enforced an assignment of the bond, he would have been a specialty creditor, but Lord Eldon held that he was only a simple-contract creditor. The case of *Copis* v. *Middleton* has been acted upon ever since, though some learned judges have doubted whether it was not carried too far. In *Onge* v. *Truelock* (2 Molloy, 31, 42) the surety in a bond had paid the whole debt with interest. Upon a bill filed by him against his co-sureties for contribution, one question was whether the plaintiff was entitled to any interest as against his co-obligors. Lord Plunkett held that, though entitled to contribution on the sum actually paid, he was not entitled to interest in the absence of express contract. Now it is clear that he would have been entitled to interest if he were entitled to have an assignment of the bond. In *Jones* v. *Davids* (4 Russ. 277) a person joined a testator as surety in a bond which he paid after the death of the testator, taking an assignment of the bond: it was held that he was only a simple-contract creditor of the testator. The case of *Hodgson* v. *Shaw* (3 M. & K. 183) was decided by Lord Brougham on its own peculiar circumstances. His lordship, however, did not question the decision in *Copis* v. *Middleton*, or any of the other cases, except the case in Vernon, which he considered inconsistent with later decisions.

[468] Supposing the Court were to direct the assignment of the judgment, the assignee must sue in the name of the party who obtained it. He must also revive his judgment by applying to the Court in which it was obtained. The judgment is more than ten years' standing, and the party dead. If liberty were given to recover it, we might plead satisfaction to the scire facias. [Alderson, B. I think that a party applying to revive a judgment of more than ten years' standing must make an affidavit that the judgment is unsatisfied.] That may almost be inferred from the 79th General Rule, Hil. Term, 1832 (see 3 B. & Ad. 385). How could the Bournes, the plaintiffs at law, make such an affidavit? But suppose the affidavit were made and the judgment revived; if it could be shewn that the plaintiffs at law had been satisfied aliunde, would not that be a bar to the scire facias? The case put by Mr. Serjeant Williams (2 Wm. Saund. 148, n. (1)) is precisely in point: "When an obligee sues one of two obligors in a joint and several bond in the Common Pleas, and recovers, and afterwards sues the other in the King's Bench, and recovers, if one of them makes satisfaction, the other shall have an audita querela to avoid execution against him, for the plaintiff can only have one satisfaction." Upon these authorities it is evident that the judgment now sought to be assigned could not be made available at law, and, consequently, a decree to compel the assignment of it would be totally useless. It is submitted, therefore, that this bill should be dismissed with costs.

Mr. Spence and Mr. Duckworth, for the defendants, the Bournes.

Mr. Russell, in reply. It has been said that the surety is not entitled to any other securities than those that are **[469]** given at the time he becomes surety. There is no authority for that proposition. In *Wade* v. *Coope* (2 Sim. 155) the security of which the surety sought to avail himself had been given, it is true, at a different time; but it was given for a distinct debt, or, what is the same thing, a distinct part of the original debt: and the decision of the Court went entirely upon that ground. The time when the securities are given is of no importance. If I am a surety, and the creditor avails himself of my liability, I have a right to put in force all the securities for that debt which I can obtain: *Ex parte Rushworth* (10 Ves. 409). In *Wright* v. *Morley* the surety was held entitled to the benefit of a security to which he was not a party; and in *Hodgson* v. *Shaw* the securities were given at different times. The principle on which the plaintiff's claim depends is that a surety is entitled to the benefit of all securities which can be made available for his indemnity. But it is said that the judgment against Cawthorne cannot be enforced at law. Is that judgment wholly satisfied by the subsequent judgment against Dowbiggen? The former was for the whole 1481l. 10s.; the latter for 1277l. 4s. 8d. only. It is admitted that Dowbiggen paid the whole debt. Supposing then the second judgment to be a satisfaction of the first to the extent of 1277l. 4s. 8d., why is the surety not entitled to the first security to the extent of the residue of 200l. and upwards? [Alderson, B. Would not that be an inequitable judgment as against Cawthorne on the part of Bourne, if 1277l. 4s. 8d. was all that was due to him? How do you make out that you could in any way make that judgment available against Cawthorne?] At all events, the payments made by the sureties anterior to the judgment against Cawthorne could not be in satisfaction of that judgment. [Alderson, B. Supposing the Bournes alone concerned, and it appeared by their affidavit, on ap-**[470]**-plication to recover the judgment, that the debt had been paid by the surety, would a court of law allow execution on the judgment against Cawthorne?] If the plaintiff applied for a scire facias, the debtor could make no defence: Bac. Abr. Scire Facias, E.; Auditâ Querelâ, B. [Alderson, B. A court of law only looks to the parties before the Court. Now, taking the Bournes to be the only parties interested, the Court would not allow them to issue execution against Cawthorne for a debt already satisfied.]

ALDERSON, B. It seems to me that, if the plaintiff is entitled to any relief at law, she is entitled to the assignment of this judgment; but that, if that judgment cannot be made available at law, I ought not to make an order which would be entirely useless. The authorities are clear that I ought not to make such an order. The point which I shall take time to consider is whether, if the judgment were assigned, it could be made available at law.

Feb. 15th.—ALDERSON, B. I expressed my opinion on the hearing of this case, that the plaintiff could not derive any benefit from the assignment of the judgment against Cawthorne; and that, supposing that to be the case, there was not any ground for the interference of a court of equity to decree that assignment. The question I desired an opportunity to consider was whether under the circumstances there would be any remedy at law, supposing an assignment of the judgment were actually executed to the executors of Mr. Dowbiggen. It is quite clear from the authorities that a surety who pays the debt of the principal debtor is entitled to the benefit of all those securities which the creditor himself could render available against the principal debtor. That point was in effect determined by Chief Baron Alexander, on the argument of the demurrer in this case: and I cannot help regretting that he did not then dispose of the question of law which is now raised, **[471]** and which was as ripe for discussion seven years ago as it is at the present time.

In this case the assignee, if he obtain an assignment of the judgment, must necessarily proceed in the name of the assignor, to enforce that judgment. Now, what are the facts of the case? A joint and several promissory note was entered into by Cawthorne and Dowbiggen as his surety. The note when due was not paid, and the payee of the promissory note brought an action, and obtained judgment for the full amount of the note and interest against Cawthorne, the principal debtor, for I think it is fully established that Cawthorne was the principal debtor. The holder of the note, having obtained this judgment against Cawthorne, finding that it was not likely to be made available, brought another action, as he was entitled to do, against Dowbiggen the surety, and recovered judgment against Dowbiggen for the amount

of the note and interest. Dowbiggen paid the amount of the principal money and interest due on the note, and the costs of the action against him, and the holder of the note, having been thus satisfied the whole of the principal money and interest, had no further claim, except perhaps in respect of the costs of the action against Cawthorne; and if he had afterwards ventured to proceed on the judgment against Cawthorne, the Court of King's Bench, in which the judgment was recovered, would have interfered in a summary manner to stay proceedings on the judgment, except for these costs. The whole effect, therefore, of assigning the judgment to the plaintiff would be to give her that which would be wholly useless, except for the purpose of recovering the costs of the action against Cawthorne, and to which, as administratrix of Dowbiggen, she could not possibly have any right. And that it had been felt that she had no such right was evident from the tender to the defendants, the Bournes, of those costs. The case in substance is not distinguishable from the case (Turn. & Russ. 231) before Lord **[472]** Eldon, in which he says that if a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety paying the bond has a right to stand in the place of the mortgagee; but that if there is nothing but the bond, the surety, after discharging it, cannot set it up against the principal debtor.

It appears to me that any assignment of the judgment would be entirely useless; and, therefore, under the whole of the circumstances, I think the bill must be dismissed; but as the Bournes might, I think, readily have given to Mrs. Dowbiggen what she required, though it was perfectly useless, I think the bill must be dismissed against them without costs. There is no ground or pretext for making the surety pay the costs of the principal: the bill must, therefore, also be dismissed without costs against the defendant Cawthorne.(*a*)

LOVELL *v.* HICKS. Feb. 13, 15th, 1837.—The general rule is that no other evidence can be given at a rehearing than might have been given at the hearing. Therefore, where a document is not included in the order of course to prove exhibits vivâ voce at the hearing, or when the plaintiff has obtained no such order, he cannot obtain an order to prove an exhibit vivâ voce at a rehearing without a special application.—Exhibit not proved at the hearing, upon special application allowed to be proved vivâ voce at the rehearing.—Joint owners of a patent for a particular process used in carrying on a trade, are answerable in solido for the losses occasioned in relation to the patent by the frauds of their co-adventurers.

[S. C. 6 L. J. Ex. 85. See 1 Y. & C. 230, and p. 46, ante.]

The plaintiff in this cause presented his petition of rehearing, for the purpose of having that part of the judgment reversed which directed an inquiry as to what proportions of the sum of 3000l., paid by the plaintiff, had been received by the defendants, Hicks, Watson, and Todd, and which decreed that those defendants should repay the same, and that the bill should be dismissed against the defendant Smith (see ante, p. 58). The object of the petition was to make the defendant Smith equally liable with the other defendants, Hicks being insolvent and abroad, Todd being in poor circumstances, and Watson being dead, and his representative not admitting assets.

The plaintiff, by his petition, stated that it appeared, from the terms of the articles of agreement of the 3rd March, 1832, and the receipt indorsed thereon, as well as **[473]** from the answers of the defendants, and from other matters in evidence, that the defendants Hicks, Smith, Todd, and Watson, were jointly interested in the profits of the patent, and that the agreement in question was entered into by the petitioner with the defendants jointly; that the said sum of 3000l. was in fact paid by the petitioner to the defendants jointly, or on their joint account; that the petitioner had in his possession a bill of exchange for 1000l., which he had given to the defendants in part payment of the 3000l.; that this bill, dated 17th March, 1832, was drawn by the plaintiff upon and accepted by Messieurs Carr Glynn and Company, and was made payable two months after date to Messrs. Hicks, Smith, Todd, and Company, or order; and that it was indorsed in the following words:—"Pay to

(*a*) See *Reed* v. *Norris*, 2 Myl. & C. 136.

O. H. Smith, Esq., or order, per procuration of Hicks, Smith & Co.; William Todd; O. H. Smith;" which signatures were in the handwriting of Todd and Smith respectively. Under these circumstances, the plaintiff submitted that the defendants ought to be declared jointly and severally liable to make good the whole of the 3000l., with interest at 5l. per cent., together with the costs of the suit; and he prayed that the cause might be reheard for that purpose, and that upon such rehearing he might be at liberty to give in evidence the bill of exchange.

The plaintiff did not originally obtain any order for proving exhibits vivâ voce at the hearing, but, after filing this petition, he obtained an order of course to prove the bill of exchange vivâ voce at the rehearing, whereupon it was now moved, on the part of the defendants Smith and Todd, that such the order so obtained might be discharged for irregularity, with costs.

Mr. Wigram, Mr. Lynch, and Mr. Heathfield, for the motion. The only evidence which a party is entitled, as of course, to read at a rehearing, is the evidence which he **[474]** had collected before the hearing: *Williams* v. *Goodchild* (2 Russ. 91). If it can be proved that a party was in a situation to produce certain evidence at the hearing, but that he had omitted to do so, he would be entitled as a matter of course to use that evidence at the rehearing; but he can read no other evidence without a special application. Here there was no order to prove exhibits vivâ voce at the hearing; there must, therefore, be a special case to entitle the plaintiff to that proof at the rehearing: *Wylde* v. *Ward* (2 Y. & J. 381), *Cutten* v. *Sanger* (3 Y. & J. 374). In *Bingham* v. *Dawson* (Jac. 243) Lord Eldon refused to allow a supplemental bill to be filed for the purpose of introducing new evidence, where the proper means for searching for it had not been used previously to the decree. Here the plaintiff cannot say that he did not know of this bill of exchange before the hearing. He is altogether silent upon that point. He ought, however, upon the authority of *Partridge* v. *Usborne* (5 Russ. 195), to have shewn, first, that he had used due diligence in proving the document originally; and, secondly, that it is material to the issue. The Court of Chancery has unquestionably, in some cases, admitted documentary evidence upon an appeal which was not used at the hearing. That was done in *Dashwood* v. *Lord Bulkeley* (10 Ves. 230) and *Buckmaster* v. *Harrop* (13 Ves. 456), though under what special circumstances does not appear. It is clear, however, that it could not be done of course: *Higgins* v. *Mills* (5 Russ. 287). Even upon the original hearing, the Court of Chancery is extremely jealous of allowing an interrogatory to be exhibited for the purpose of introducing new evidence after the cause has come to a hearing: *Cox* v. *Allingham* (Jac. 337), *Wood* v. *Lindsay* (4 Sim. 3, n.). This Court is undoubtedly less **[475]** strict in matters of this nature than the Court of Chancery; but though it will permit the proof of documents at a rehearing which were not used at the original hearing, it will be guided in its discretion by affidavits stating special circumstances.

The defendants rely on the strict rule of practice in this case, because it is obvious, from the statement in the petition, that the plaintiff is seeking, by means of this document, to establish a partnership between these defendants—a point which is not charged in the bill, and is, therefore, not in issue. If it were in issue, it would be sufficient to say that *Dickenson* v. *Valpy* (10 B. & C. 128) distinguishes this kind of part-ownership from ordinary partnerships. That question, however, has not been raised by the pleadings: and on that ground alone your Lordship will refuse to allow the proof of this document. [Alderson, B. If the document is immaterial, it will be rejected when tendered. Your proper point is that it could not have been used in evidence originally, and therefore cannot now.]

Mr. Knight, Mr. Spence, and Mr. Blunt, contrà. The question is not now what evidence your Lordship will receive on the rehearing; and it is quite consistent with the failure of this motion, that the document in question should not be allowed to be read. The order is that the plaintiff be at liberty to read the exhibit at the rehearing, saving all just exceptions which shall be taken to the reading thereof. You cannot discuss the admissibility of the evidence on a motion of this sort. The mere proof of the handwriting of the party will not make the document evidence, and, therefore, the materiality or admissibility of it as evidence is entirely out of the question.

If this order had been obtained before the original hearing, the present motion would not have been sus-**[476]**-tained for a moment; and the only question is

whether the order thus obtained before a rehearing will not equally avail the plaintiff. In a court of equity a rehearing is a matter of right. It is not like an application for a new trial at law, which must be founded on special circumstances. In Chancery, if a decree is not inrolled, you may rehear after twenty years. In this Court the time for rehearing is very limited, but the right to a rehearing is indisputable. That being so, it is clear that a party may introduce at the rehearing any documentary evidence that he pleases, without any special order. Upon a rehearing the question is not, as it is upon an appeal in the House of Lords, whether the Judge below has decided right or wrong; and, consequently, there is no necessity to be bound by the evidence used in the Court below. That was very apparent in the case of *Lambert* v. *Fisher* (not reported on this point), where the Vice Chancellor, having decided in favour of the plaintiffs, who were lessees of Trinity College, Cambridge, the cause was reheard before Lord Brougham, upon documentary evidence which was then produced for the college, but which had not been produced at the original hearing; and his Lordship decided the case the other way, and made the college pay the costs for not using the documents in question at the original hearing. [Alderson, B. The difficulty here is that if this order had been obtained in the first instance, it would only have applied to documents which were then in the party's possession. Documents, however, may be subsequently discovered; and the question is whether it is the practice to allow the production of those documents as a matter of course.] Whatever is true of an original hearing is true of a rehearing. You cannot add to the interrogatories after publication passed, either on the hearing or the rehearing; but you may apply in either case to prove an exhibit vivâ **[477]** voce: Gilb. For. Rom. 183, ed. 1758; *Walker* v. *Symonds* (1 Mer. 35, n.). The authorities cited on the other side are not inconsistent with this statement of the practice. In *Wylde* v. *Ward* the Lord Chief Baron admitted that the lease of 1804, though from neglect it was not proved at the hearing, might be proved vivâ voce at the rehearing. In *Williams* v. *Goodchild* other evidence besides documentary evidence was required. The cause was reheard after the trial of an issue, and it was sought to introduce at the hearing evidence, beyond that of documents, which had been brought forward at the trial. *Higgins* v. *Mills* decides nothing but that a party may, if he pleases, have an order to prove exhibits, upon notice; but he must pay his adversary's costs, if he brings him into Court. The other cases only shew generally that you cannot add to evidence upon interrogatory without a special case. They are such as would have equally applied before the original hearing and after publication passed. Where a special case is required, it is equally necessary after publication and before hearing, as after the hearing.

Mr. Wigram, in reply. If in the Court of Chancery the hearing and rehearing of a cause are considered as the same thing in regard to the proof of written documents, the reason is that in Chancery the order to prove exhibits vivâ voce is obtained without specifying the exhibits; so that it is not known what documents are in the plaintiff's possession at the hearing. In this Court the practice is to specify the exhibits; therefore, if they are not included in the order before the hearing, they cannot be proved after the hearing without a special application. Even in the Court of Chancery the proper course is to make a special application, and that seems to have been done in *Walker* v. *Symonds*, where, as appears from the **[478]** registrar's book, Sir Samuel Romilly appeared for the defendants.(*a*)

(*a*) L. C. Saturday, 4th Aug. 1810. *Walker* v. *Symonds*. Upon motion this day made into this Court by Mr. Roupel, of counsel for the plaintiffs, it was prayed that the plaintiffs might be at liberty at the hearing of this cause on the petition of appeal presented by them to examine one or more person or persons vivâ voce to prove the handwriting of Thomas Griffiths deceased, in the pleadings of this cause named, and a letter from him to the plaintiff Loveday Walker, dated the 12th day of January, 1796; also the handwriting of George Tickner Hardy deceased, to two several letters from him to the plaintiff, Loveday Walker, dated respectively the 27th day of April and 24th day of May, 1797; and a letter from the said George Tickner Hardy to ——— Ryder, Esq., New-square, Lincoln's-inn, dated the 2nd day of June, 1801, which, upon hearing Sir Samuel Romilly, of counsel for the defendants, is ordered accordingly, saving all just exceptions; and hereof notice is to be given forthwith.

ALDERSON, B. Unless the practice is settled in regard to the point now at issue, it seems to me most reasonable and most consistent with justice, that what a party is not in a condition to prove at the hearing should be treated as new evidence on a rehearing; and that to take into consideration the causes of a party's omitting to produce the documents at the hearing would be to introduce too nice distinctions. I shall leave the point to be settled according to the practice of the Court of Chancery. If that is not settled, I am of opinion that there ought to have been a special application to prove this exhibit, and that the present motion must be granted.

Feb. 15th.—ALDERSON, B. In this case I took time to consider whether or not I should agree to the motion for setting aside for irregularity an order which had been obtained to prove a document vivâ voce. It was pressed very much upon me, in the course of the argument, that it was the settled practice in the Court of Chancery to admit those **[479]** orders ex parte, as a matter of course. It appears to me, upon the whole of the argument, that the principle of the thing lies altogether the other way.

At a rehearing the general rule is this—distinguishing it from an appeal—that all evidence which was capable of being given at the time of the hearing, though it was not given, may be given at the rehearing; but that on an appeal the evidence only which was actually given at the hearing is capable of being given at the time when the appeal is heard—and for the very best of all reasons—an appeal is from a judgment of the judge to another tribunal; and it is, therefore, only justice to the Court below to act on the same grounds on which the Court below acted; but a rehearing, being before the same Court, is merely an application to that Court, upon fuller investigation, to determine the question which it has before decided upon less information.

An appeal in the Court of Chancery has, no doubt, the nature of a rehearing. It partakes of the double character of both the one and the other. It is a rehearing, but before a different judge. I have sent to the Court of Chancery, and I cannot find, on the best investigation, that there is any settled practice at all on the subject. Out of three registrars that have been consulted, two are of opinion that it is not an ex parte application, and one that it is an ex parte application: and we find in an old manuscript book of Mr. Deaves, who was a registrar or secretary to seven successive Masters of the Rolls, a note to this effect: "That, on a rehearing, further evidence and further documents may on some occasions be produced"—the effect of which would rather be to shew that it was not an ex parte application; for, as he expresses it, the production will be allowed "on some occasions," not on all. Now, that being the state of the practice in the Court of Chancery, and there being no settled practice in this Court on the subject, it comes to be con-**[480]**-sidered what is the principle which ought to govern it: and the best way is to settle the practice as much as one can consistently with right reason and principle. That being so, it appears to me that it would be drawing too nice distinctions if I did not hold it as a general rule that that evidence which might have been given at the time of the hearing, and no other, may be given at the rehearing. In this court it is the settled practice to specify the documents, which are to be proved vivâ voce, in the order for proving them. If, therefore, a party had obtained any order to prove particular documents vivâ voce at the time of the hearing, of course he may put in under that order such of those documents as he may be advised at the rehearing; but if the new documents were not included in that order, I think the production of those new documents at the rehearing is new evidence; and that I ought to hold that new evidence cannot be produced at the rehearing without a special order. The result of this opinion is that the order in question must be set aside; but, as the point is new, without costs.

I ought to add that it appears from the note of *Walker* v. *Symonds*, as cited from the registrar's book, that the application in that case was not ex parte, but that, on the contrary, Sir Samuel Romilly was heard for the defendants. That case, therefore, is an authority for granting the present motion.

Order accordingly.

May 10th.—In consequence of the foregoing decision the plaintiff moved specially to prove the exhibit vivâ voce. The motion was opposed, on the ground that the plaintiff had the document in his possession at the time of the hearing, and might then have proved it; that the defendants ought not to suffer from the plaintiff's

neglect in that respect; that a court of equity will not allow a party to bring forward his case by piece-meal; and that, according to all the authorities, the neglect of a party to prove his docu-**[481]**-ments at the hearing was a sufficient reason for refusing a motion of this nature.

ALDERSON, B. My own opinion is that parties ought not to be allowed to produce new evidence upon a rehearing; but it has been done over and over again, and I must take the practice as I find it. It is certainly very objectionable; and, where the rehearing is before another judge, it is a crying evil: but it being the practice, I must allow the documents to be proved.

The case was then reheard on the merits. The principal documents which were relied upon on either side, and which were in evidence at the hearing, were the agreements of the 3rd March, 1832, and the 16th November, 1831. By the former of these documents, which was made between the defendant Hicks of the first part; the defendants Smith, Watson, and Todd of the second part; and the plaintiff of the third part; reciting the grant of the patent to Hicks; and that Smith, Watson, and Todd were jointly interested with Hicks in the patent, and the profits thereof; and that Hicks and the others had contracted with the plaintiff to grant to him a licence to make use of the invention within the town of Birmingham, and a certain specified district around it: It was witnessed that, in consideration of the sum of 1000*l.* paid to Hicks, Smith, Watson, and Todd by the plaintiff, the receipt whereof they all thereby acknowledged, and therefrom did each and every of them acquit, release, and discharge the plaintiff; and for the other valuable considerations therein mentioned, Hicks, with the consent and approbation of Smith, Watson, and Todd, testified, &c., and also Smith, Watson, and Todd, according to their respective shares and interest in the premises, did thereby, for themselves, their executors, &c., severally and respectively give and grant to the plaintiff, his executors, &c., the licence and consent of Hicks, and also of Smith, Watson, and Todd, that the plaintiff, his executors, &c., should and might, **[482]** during the term therein mentioned, exercise and make use of the said invention within the district round Birmingham before mentioned.

By the agreement, dated the 16th November, 1831, the defendant Smith assigned to Hicks all his interest in the sale of licences in the town and neighbourhood of Birmingham, and other places mentioned in the agreement.

There was contradictory evidence as to whether the plaintiff had notice of the situation of Smith when he contracted with the defendants. It was proved that the plaintiff attended by appointment at Sir George Duckett's banking-house, about the 18th of March, 1832, at which time and place all the defendants were present, and that the plaintiff then offered to pay the sum of 1000*l.*, part of the entire consideration, by means of the bill of exchange now produced; and according to the plaintiff's statement in his affidavit, made in support of the foregoing motion, the bill was seen and not objected to by the defendant Smith, and nothing was said as to his limited interest in the concern. The defendants, Smith and Todd, however, by their counter-affidavits, swore that it was distinctly stated to the plaintiff at the meeting that Smith had parted with all his interest in the patent, so far as affected the plaintiff's right. With respect to the bill of exchange, the defendant Smith swore that it was drawn by the plaintiff without his, the defendant's, sanction or privity, but that it was afterwards indorsed to him specially by the other defendants, as a security for a sum for which they had rendered him liable to Messrs. Duckett, and that he subsequently indorsed it, not as a part of the indorsement for procuration, but solely to acquit the indorsement made to him or his order.

Mr. Knight, Mr. Spence, and Mr. Blunt, for the plaintiff. On the evidence, it is clear that there was a joint interest in the defendants in the patent and all its profits. **[483]** They receive the money jointly, they enter into joint covenants, they bring a joint action, and they put in a joint answer. On the other side there is only the agreement of November, 1831, and a conversation, in which it is stated, but contradicted, that Smith told the plaintiff he had parted with his interest. Supposing the joint interest to be clearly made out, it surely cannot be contended that a joint interest in a patent is not a partnership. To what is the law of partnership to be extended, if not to a joint interest in a patent for baking bread? *Holmes* v. *Higgins* (1 B. & C. 74; 2 D. & R. 196), *Dry* v. *Boswell* (1 Camp. 330), and *Green* v. *Beesley* (2 Scott, 164; 2 Bing. N. C. 108), are authorities to shew that the general law of partnership is not to be confined to buying and selling goods, but to all sorts of speculations. Here the

benefits received were proved to be joint, and the payments proved to be joint; but, suppose even that it was proved that there was no partnership, that the payments were several, that Smith had received nothing, and had ceased to have any interest, and that the only money paid had come to Hicks alone, might not the plaintiff still say that the parties who had led him into this difficulty were several persons, of whom Smith was one, and might he not fairly and reasonably argue that Smith was bound to indemnify him?

Mr. Wigram, Mr. Lynch, and Mr. Heathfield, for the defendants. If, by means of Hicks's fraud, the other defendants had been benefited at the plaintiff's expense, they would have been clearly bound to refund. "But then," as your Lordship observed in your judgment at the hearing, "the other defendants are not affected directly or indirectly with that fraud, and have only received their proportional shares of the money through Hicks." The conclusion which your Lordship drew from these facts **[484]** was that the parties were liable only in proportion to the monies actually received. Your Lordship's judgment as to the separate liabilities was applicable to all the defendants, and did not depend solely upon the circumstances relating to Smith. What then has altered the situation of the parties since the hearing? Not the bill of exchange, because it is evident that the partnership had made Smith liable for monies overdrawn by them, and had given him the bill in payment. Nor can it be said that Smith is inconsistent in any of his statements. It is true that he remained, at law, assignee of the patent, but he had parted with his interest in the licences in particular districts; and the plaintiff knew that fact. Even if he did not know that, he knew that the defendants had each a separate interest in the patent, as tenants in common; and the question is whether, under such circumstances, the fraud affects any but those who received the money. The plaintiff knew that Hicks was the original patentee, and that there had been an assignment of Hicks's sole interest, so as to give a participation to the other three. It is not questioned that the parties had several interests in the patent. Admitting, therefore, that this was a species of partnership, how were they answerable for each other's frauds? In the common case of a partnership, there is a general dealing, and thence there is a general authority on each partner to act for his co-partners. But it is otherwise where the parties, being tenants in common of a particular thing, agree to divide the profits. If the plaintiff could say that every act of Hicks was the act of these defendants, they would of course be liable; but here Hicks was a partner only for particular purposes, and therefore it is impossible to make him an agent for the others to the extent of committing this fraud. If I appoint an agent, whatever he does within the limits of his agency I am bound by. But suppose the agent commit a fraud not within the limits of his agency, I am not liable **[485]** for the misapprehension of a third person that he acted within those limits. When he is out of those limits he cannot affect me. The plaintiff says, a fraud is committed by your agent. I say, he is not my agent; the ground of the suit negatives an agency. I have been as much cheated as you. Payment to him is no payment to me, and you must prove actual receipt by me in order to charge me. [Alderson, B. The question is whether subsequent receipt does not make him an agent.] Upon the supposition that this is an ordinary partnership, it would be so; but here, not only is the interest of the parties several, but it is not even a case of trading. The parties do not work the patent, and the profits which they derive from it are not received in the ordinary manner of profits. In the case of an ordinary partnership, parties deal with the partners on the credit of each, but it is otherwise where they deal with the joint proprietors of a chattel. The joint owners of a licence must join for conformity in receipts, but the money is received severally, and that takes it out of the rule relating to a mixed fund, where each party is liable for the whole. This is like the case of trustees, of whom they only are charged who actually receive. If it were a partnership transaction, payment to Hicks alone, without the knowledge of the others, would render the others liable; it would not be necessary to shew a joint receipt. It is clear, from the acts of the parties, that this was not a transaction of giving credit as to an ordinary partnership, but a mere naked payment. The deed of March, 1832, does indeed recite that the parties were jointly interested; but the grant of the licence is not joint, but according to their respective shares; and in regard to the bill of exchange, if this were a common partnership, where was the necessity for a special indorsement? Upon the whole, it is submitted, that if the plaintiff knew, as he clearly did, that the defendants were interested in this patent severally, in some proportions, though in

what proportions he might be ignorant, that is [486] sufficient to exclude the notion of his dealing with an ordinary partnership; and in that case it will be impossible to follow these monies into the hands of any person, except him who benefits by the fraud.

Mr. Knight, in reply. Cases of ordinary partnership are not confined to actual trade. Horsing a coach is a mere agency; so is an interest in a railway scheme, or in working a vessel. Where a vessel is worked for an adventure, the adventurers are partners as to that. Here the defendants are jointly interested in the profits of this patent, and that constitutes an ordinary partnership. Their interests may be indeed in certain respects qualified, but the general partnership interest remains qualified only as to certain terms. Their own deed provides that the profits shall be divided amongst them, according to their respective interests. It alleges a joint interest, and the covenants to pay are joint. If Smith was a mere partner for conformity, why should he take the covenants to pay? The covenants to pay are with the four, and to pay to the four. The subsequent conversion, if it took place, amounts to nothing. He was bound in the first instance, and cannot be afterwards heard to say that he was not bound.

June 21st.—ALDERSON, B. I have again maturely considered this case. I intimated in the course of the argument, after having fully heard the acute observations of the counsel for the defendants, that I saw no reason to change the opinion I before delivered on the main question in this cause. I was then, and I still am satisfied that the plaintiff has made out a case of fraud entitling him to relief in a court of equity. The extent of that relief was the subject of his petition for a rehearing, and upon that I now propose to give my revised opinion.

It seems to me clearly established, as it did before, that the rest of the defendants had no knowledge of the [487] fraudulent misrepresentations made by Hicks; but the money paid by the plaintiff in consequence of those misrepresentations has been paid to all under a joint contract by all, and they have all signed the receipt. As to Todd and Watson, there is nothing to shew any knowledge by the plaintiff of their particular interests; and even as to Smith, I think that, on the former occasion, I placed too much reliance on the circumstance spoken to by Mr. Todd. On more full consideration, I am satisfied that in this respect my judgment was erroneous; and that what would unquestionably have been the rule at law ought also to be considered the rule in equity. At law, they would all have been equally bound to repay in solido to the plaintiff the money received from him upon a consideration which had failed altogether. This was my own impression when I first heard the cause.

I am now satisfied that the decree must be varied as to the 3000l. paid, by directing that it be repaid by the defendants; and that the plaintiff is entitled generally to the costs of the suit.

Decree accordingly.(*a*)

[488] CUMMING *v.* PRESCOTT. Feb. 22nd, 1837.—A. and B. were directors in the W. M. Waterworks Company, in which no shareholder can act as a director without holding ten shares. A. and B. being intimate friends, the latter advanced to the former several sums of money. The last of these advances was made on

(*a*) With respect to the degree of notice with which it is requisite for the partner to fix the creditor, in order to extinguish the ordinary partnership liability, there is no distinction in principle between general partnerships and partnerships in particular transactions. In either case, the question, whether the creditor had constructive notice of limited liability, will depend on the question whether the transaction which gives occasion to the doubt was within the scope and usual course of the partnership dealings. "All partnerships," says Chancellor Kent, "are more or less limited. There is none that embrace, at the same times, every branch of business, and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise, if the subject-matter of the contract was consistent with the partnership business; and the defendants, in that case, would be bound to shew that the contract was out of the regular course of the partnership dealings." Kent's Commentaries, vol. 3, p. 42, 3rd ed.

the 23rd July, 1829, on which day A. delivered to B. an order upon the Secretary of the company to transfer A.'s ten shares into B.'s name. B. did not at that time make use of the order, and A. continued to act as a director until his death in May, 1832. A.'s affairs being insolvent, and a suit having been instituted for the administration of his assets, B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest: Held, that these circumstances were not sufficient to shew an intention to create a lien on the shares; and, consequently, B.'s claim was rejected.—Mortgagee of shares in a company must give notice of his incumbrance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration without notice. —Where the qualification of a party to act as a director of a company consists in his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of those shares.

[Referred to, *Société Générale de Paris* v. *Tramways Union Company*, 1884, 14 Q. B. D. 457.]

This was a suit instituted by the creditors of the late Charles Elton Prescott, Esq., for the administration of his assets; and the question was whether a person of the name of Stedman was entitled to a lien on ten shares (personal property) in the West Middlesex Water Works Company, standing in the name of Prescott, as a security for a debt of 1033l. 12s. 2d., alleged to be due from Prescott to Stedman. The claim in question had been brought before the Master upon the petition of Stedman, praying to have the benefit of the lien. Stedman likewise tendered an affidavit of the debt, but the Master rejected that evidence. The Master, however, allowed the claim upon the testimony of several witnesses to the following circumstances.

Prescott and Stedman were both directors of the West Middlesex Water Works Company, and were on terms of great intimacy. Divers sums of money had on various occasions been advanced by Stedman to Prescott, and the last of such sums, namely, 400l., was advanced on the 23rd July, 1829, on which day Prescott wrote and delivered to Stedman the following order upon the secretary of the company.

"July 23rd, 1829.

"My dear Sir,—Transfer my ten shares in the West Middlesex Water Works Company into Mr. Stedman's name. "C. E. PRESCOTT.

"To M. K. Knight, Esq., Secretary, &c."

[489] Prescott's qualification as director depended on his holding the above-mentioned ten shares; and notwithstanding the order so given for a transfer of his shares, he continued to act as director until his death in May, 1832. In fact, the order was never acted upon by Stedman until that time. Upon Prescott's death, Stedman sent the following notice to the secretary of the company:—

"Sir,—I beg to inform you that the ten shares which are standing in the books of the company in the name of the late C. E. Prescott, Esq., were by him, in his lifetime, charged with the payment to me of divers sums of money advanced and lent by me to him, amounting altogether to the sum of 1033l. 12s. 2d., with interest thereon; and that the accompanying authority from the late C. E. Prescott to you to transfer such shares into my name was accordingly given by him to me. I therefore hereby give you notice of such my charge, and of my intention to call for a legal transfer of such shares from the representatives of the late C. E. Prescott, Esq., to me, and in the meantime I have to request you will not transfer the shares, nor pay any dividends due or to become due thereon, to any person other than to me or my order. "A. STEDMAN.

"To M. K. Knight, Esq., Secretary, &c."

Upon these facts the Master found that, inasmuch as the last of the several sums lent had been advanced on the same day on which the order for the transfer was given, that order was to be considered as a valid agreement for the transfer of the ten shares, and an available security in the hands of Stedman.

To this report exceptions were taken.

Mr. Twiss and Mr. Teed, for the exceptions. The letter of the 23rd July, 1829,

did not amount to a transfer. [490] If Prescott had put into Stedman's hands the shares and the title-deeds relating to them, it might be a transfer in equity, if consistent with the terms of the act. But it is the gist of Stedman's case that he kept the order for a transfer of the shares in his pocket. One of the objects of the act was to give a shareholder a common interest; for it says, not only that no proprietor, but that no director shall act without having ten shares. Now, if Prescott was not the real owner of these shares, but a trustee only for Stedman, while at the same time he continued in the directorship, that transaction was a fraud upon the act, and the Court will not give effect to it. Admitting, however, that such a transfer as this might be made, there is no sufficient evidence of a valid consideration for it. No consideration appears on the order itself; and the only evidence of the loan having been made is the declaration made by Prescott as to the 400l.

Mr. Lane, for the administratrix of Prescott.

Mr. Simpkinson and Mr. Duckworth, for Stedman. The latter part of the argument on the other side is not warranted by the Master's report. It is a discussion on the evidence which led the Master to find that the sums were advanced and lent by Stedman to Prescott. He finds the advance of divers sums of money at various times, and the giving the note or the direction to transfer, and he finds that such transactions amount to an agreement to transfer. Now, the exceptions admit the finding as to the loans to be a proper finding. They do not impeach the finding of the facts, but only the conclusion which the Master has drawn. It is true that, if the Master had admitted the affidavit of Stedman (which he ought to have done), the case would have been stronger in Stedman's favour; but, upon the whole, the evidence is a sufficient foundation for the Master's report.

[491] With respect to the objection to the mode of transfer, it is clear that the act does not prevent equitable contracts in regard to shares. It might as well be said that there can be no equitable contract in regard to stock. The act of Parliament only prescribes the legal form of the transfer.(*a*) [The Lord Chief Baron.

(*a*) By the 29th section of the stat. 46 Geo. 3, c. cxix., under which the West Middlesex Waterworks Company is constituted, it is enacted that it shall be lawful for the several proprietors of that undertaking, his, her, or their respective executors, administrators, and assigns, to sell and dispose of any share or shares to which he, she, or they may be entitled therein, subject to the rules and conditions in the act mentioned. The act then prescribes a form of conveyance of the shares, and provides that on every sale the deed of conveyance, being duly executed, shall be kept by the purchaser or purchasers, after the clerk of the company shall have entered in the books a memorial of such transfer and sale, for the use of the company, and have testified or endorsed the entry of such memorial on the said deed of sale or transfer; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share of the profits of the said undertaking, nor any interest for such share or shares paid to him, her, or them, nor any vote in respect thereof as a proprietor or proprietors of the said undertaking.

The 33rd section, reciting that where the original subscriber of one or more share or shares in the undertaking shall die, become insolvent or bankrupt, or go out of the kingdom, or shall transfer his right and interest to some other person, and no register shall have been made of the transfer thereof with the said clerk, as directed by the act, it may not be in the power of the company to know who is the proprietor of such share or shares, in order to bring any action or actions against him, her, or them, for the calls on such shares, or for the purpose of safely paying him, her, or them the interest or dividends to which he, she, or they may be entitled by virtue thereof, enacts that in all such cases where the right and property in one or more share or shares in the said undertaking shall pass from the original proprietor thereof to any other person or persons by any other legal means than by a transfer or conveyance thereof as herein directed, an affidavit shall be made and sworn to by two credible persons before one of his Majesty's justices of the peace, stating the manner in which such share or shares hath or have passed to such other person or persons; and such affidavit shall be transmitted to the clerk of the company, to the intent that he may enter and register the name or names of every such new proprietor or proprietors in the register book, or list of proprietors in the said undertaking, to be kept in the office of the said clerk.

Suppose Prescott had **[492]** given Stedman a power of attorney to transfer the shares, and the latter had kept it in his possession till Prescott's death.] The power would have expired, but a court of equity would give it effect. [The Lord Chief Baron. If Prescott had said, I give you the power of attorney, but I rely upon your not using it till you see occasion; if you see me likely to fail, or from any other cause you suspect me, then use it, but not else, would not that agreement have been limited to the life of the parties? As against the individual who gave the option, the creditor might have enforced it; but when the jus tertii intervenes, he cannot. The moment a man dies, his creditors become interested in his assets.] The Master has found that this is an existing agreement. Suppose I agree to make a mortgage, but the agreement is not enforced in my lifetime, can it be said that it will not be an equitable mortgage after my decease? This is an equitable agreement to transfer, and it is as binding as if he had said, "I hereby agree to transfer." [The Lord Chief Baron. If Stedman had delivered this order to Knight, the case would have been clear; but he keeps it in his pocket. Suppose a man desires his attorney to prepare a mortgage to A. B., and A. B. lends the money, but keeps the draft of the mortgage in his pocket until his death, is that sufficient evidence of an agreement to mortgage? If he died next day, it would be evidence. But suppose he kept it four or five years, would that be the same thing?] We **[493]** submit that it would be so; the only question being whether the delay would amount to sufficient evidence of abandonment. [The Lord Chief Baron. Or to sufficient evidence that it was not an unqualified agreement, —that it was qualified by circumstances which we ought now to know.] Taking the case in both points of view, we submit, first, that the delay is no evidence of the agreement having been qualified. Whatever the delay, it can be no evidence that the security was intended for life only, any more than for any other period. It is not likely that so fragile a security should be for life only. Nor, by parity of reasoning, can the delay be evidence of any other qualification. Besides, the Master has found that money has been paid under the agreement. Upon the other point, that of abandonment, the circumstances stated by the Master are sufficient to rebut any such presumption arising from length of time; for he expressly finds that the parties were very intimate, and that if the shares had been assigned in a formal manner, Prescott would have been deprived of his directorship. It is said that the arrangement in that respect was a fraud upon the public; but, if it were, it is not such a fraud as this Court can notice. It is not against public policy.

Mr. Twiss, in reply. With respect to the nature of this security, no observation can be more just than that it was in the nature of a power of attorney. At law it ceased on the death of the party. In equity, it might be enforced notwithstanding the death of the party, if it could be shewn that it was meant to be made available against his representatives. But it lies on them who seek this equity to shew the facts. They are not entitled to rely on presumptions, but must produce solid proof by means of positive testimony. There are many cases in which Stedman might have been entitled to maintain this claim, but his proofs are wanting. This paper, which **[494]** never came into the hands of Knight, must be considered void by the operation of lapse of time. It was never meant to be ambulatory for so long a period. It may be that there was an option to Stedman either to consider himself as a purchaser in full of the shares, or not to call for a transfer of the shares, but to retain a general right of calling on Prescott to pay the debt. But, whatever the right was, it should, after such a lapse of time, be made manifest. Stedman's case is much weaker than that put by your Lordship of an intended mortgage, and the title-deeds placed in the hands of the attorney; for here the paper was not put in the hands of the person who was the proper party to hold it.

THE LORD CHIEF BARON. I must deal with this case as if Stedman had filed a bill against the representatives of Prescott, calling upon them to transfer these shares to him in compliance with a specific contract to that effect. The difficulty which I feel is to separate from my judgment the impressions received from

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The 32nd section enacts that the names of the proprietors, and the number of their shares, shall be entered in a book, and sealed certificates, specifying the share or shares to which they may be entitled; such certificate to be the evidence of the title of each proprietor, but the want thereof not to hinder or prevent him from selling or disposing thereof.

Stedman's affidavit; but I am bound to do so and to treat that affidavit in no other way than the bill, which I could not read or look at as evidence, though it might be used for the purpose of drawing any inference or argument from it which could be reasonably suggested.

When a man comes into a court of equity for relief, he must make out his case by the proof of such circumstances as require no further explanation by means of mere conjecture. If there had been clearly some contract in this case, which, though purporting to be for an equitable lien, was attended with circumstances raising some doubt as to its full extent or meaning, the party might possibly have been allowed to introduce evidence to remove the ambiguity; but in this case one is at liberty to conceive many reasons why, if there was any agreement at all, it was not intended to be an equitable lien. I do not say it **[495]** was not so, or that it was not a just conclusion of the Master, that the order to Knight to transfer the shares had some connexion with the loan of the 400*l.*; but whether or not there was a specific contract that the transfer should be a security for this loan is the question. Taken by itself, the direction to transfer contains no contract at all. Had it not been the fact that the 400*l.* was lent upon the day on which the note containing the direction is dated, what inference could be drawn from that paper in favour of the alleged equitable lien? I can collect nothing from the transaction, but some uncertain understanding which had not been acted upon by the parties for three years. Though I may presume that this order had some connexion with the loan, am I bound to presume, on behalf of a gentleman coming into a court of equity, that there was an agreement to execute at all events a transfer of these shares? If I could imagine any cause, or rather if I could account with any certainty for the delay in putting this paper into the hands of Knight, the difficulty might be removed; but if any one conjecture upon the subject is equally probable with any other, is there any rule in equity (not to say in common sense) why I should enforce this claim? In the case of an equitable mortgage, the title-deeds are in the hands of the party who claims the lien. Here, in order to enforce the claim of a party not using due diligence, I am called upon to presume a contract of a specific character, which he could immediately enforce. There are many circumstances under which the contract may have been made so as to be only available conditionally. The parties being intimate friends, I can easily conceive that one might say to the other, I don't desire to part with these shares, but here is an order for their transfer, and if I don't pay interest half-yearly for the sums I owe you, then enforce it. Could he enforce that contract in a court of equity? As long as interest was paid he could not. Again, let me suppose **[496]** this case: One party might very well say to the other, I don't like to part with the directorship, but I give you this order, upon the understanding that you may enforce it in case I part with some other property, and thereby lead you to suspect that I may be in difficult circumstances. I am proprietor of certain East India shares; if I am compelled to sell them, enforce this security; if not, keep it. The party giving the security then dies, and the shares are not sold: the condition for enforcing the security does not take place, and the liability under it is at an end.

These are some of the difficulties in the way of decreeing this to be an equitable contract; but there is another, which is by no means unimportant. If Prescott had intended this to be a security by way of equitable lien, nothing would have been more easy than for him to have given notice to Mr. Knight, the secretary, not to transfer the shares without Stedman's consent. If he had so done, and Knight had transferred them without such consent, he would have been a very unfaithful secretary. Prescott would have remained proprietor of the shares till he had actually passed them out of his hands, and the notice to Knight would not have deprived him of his directorship. As the case now stands, it appears that Prescott might have sold these shares at any time, and nothing but a notice to Knight could have prevented it.(*a*) Under such circumstances, the difficulty is in proving that there was a special contract that these shares should be a security for this money; and I do not think that this is a consideration which can be left out of the case. It would be more consistent with the honour of the parties to conjecture that Prescott was to hold the shares till something was to take place to give Stedman a right to them. That would certainly be more to the honour of the parties, especially as both were directors.

(*a*) See *Dearle* v. *Hall*, 3 Russ. 1.

[497] No court of equity will, in the absence of all presumption consistent with a contract, interfere to conjecture a contract to be of such a nature that the parties intended that one of them should retain the possession and apparent ownership of property, and by-and-bye, when he is insolvent, the other should come forward to the prejudice of creditors, and claim a specific security on that property by way of equitable mortgage. Yet that is Stedman's case. If I were on a jury, I should not of necessity make such a conjecture in such a case; and therefore, sitting here both as judge and jury, though the question comes before me in a different shape, I must treat it in the same manner. I must say I differ from the Master.

Exceptions allowed.(*a*)

[498] JONES *v.* THOMAS. Feb. 13th, 14th, 1837.—Agreements entered into between an attorney and his client for the purchase by the attorney, at an under price, of estates to which the client had good title, but of which he was not in possession, set aside for fraud and maintenance.—Where an account is decreed to be taken of the dealings and transactions between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable, for want of witnesses, to prove fraud in the attorney, the Court, upon decreeing an account between the parties, directed an inquiry as to whether the attorney could by any, and what, affirmative evidence, prove the consideration for the note.

[See further, 3 Y. & C. Ex. 227.]

The defendant, James Thomas, of Llandilo, in the county of Carnarvon, for some years previous to the year 1826 acted as the plaintiff's attorney, and in that character acquired and exercised great influence over the plaintiff, who was a Welsh clergyman, totally ignorant of law, and a relation of the defendant, being his first cousin once removed.

In 1820 Thomas being in want of money borrowed of the plaintiff the sum of 116l. 2s., for which he gave his promissory note dated the 16th May, 1820, and payable to the plaintiff on demand. A memorandum was endorsed on the note to the effect that the money should not be called in without three months' notice to Thomas.

In the year 1823, Thomas being instructed by the plaintiff to recover a small debt for him, commenced an action against the debtor. That action was subsequently discontinued at the instance of the plaintiff, and the costs of the defendant in the action, amounting to 32l. 7s. 6d., were paid by Thomas on the plaintiff's account. Thomas immediately afterwards applied to the plaintiff to pay these costs, which the plaintiff not being prepared to do, was persuaded by Thomas to give his promissory note at two months for the amount. This took place on the 25th September, 1823, on which day the note was dated. According to the plaintiff's statement, the note was given merely as a security for costs, and under an express understanding that it should not be negotiated. That, however, was denied by Thomas in his answer; and at all events he negotiated and received value for the note. It was afterwards presented to the plaintiff for payment, but he was unable to pay it.

[499] In consequence of the dishonour of this note, Thomas went to Brecon, about six miles from the plaintiff's, whence he sent the plaintiff the following note:—

"Castle Inn, Brecon, Dec. 2, 1823.

"Dear Sir,—I shall remain here until half-past two, when I intend to return by the mail. I have sent this letter to you by a purpose messenger, to request that you

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(*a*) That courts of equity will, upon evidence of an intention to create a specific trust of personal property, give effect to imperfect instruments relating to such property, as declarations of trust, where a valuable consideration was given, and will even struggle to do the same thing where the instrument was only voluntary, appears from *Colman* v. *Sarel*, 3 Bro. C. C. 12; *Ellison* v. *Ellison*, 6 Ves. 662; *Cotteen* v. *Missing*, 1 Madd. 176; *Bayley* v. *Boulcott*, 4 Russ. 347.

will come over immediately, as I particularly wish to see you. Your draft is returned, and must be renewed so as to prevent law expenses, but don't be in the least alarmed, for there is no danger.— I am, dear Sir, &c. &c. "JAMES THOMAS."

The plaintiff, in answer to this note, sent a note to Thomas, in which (according to his own statement) he directed Thomas to pay the 32l. 7s. 6d., and set it off against the note for 116l. 2s. Thomas, on the other hand, swore to his belief that the purport of that note only was that it was inconvenient to the plaintiff to leave home at that time. In answer to that note, Thomas wrote as follows:—

"Dear Sir,—In consequence of your not meeting me here this evening, I am under the necessity of sending this note by a purpose messenger, to request that you will come over with the bearer, as I am under the necessity of waiting here till you arrive.
"Castle Inn, Brecon, Dec. 2, 1823. "JAMES THOMAS."

The plaintiff, being thus pressed by Thomas, went to Brecon the same evening and had an interview with Thomas.

At this interview Thomas wrote a promissory note, not for 32l. 7s. 6d., but for 300l., which was dated the 2nd December, 1823, and made payable two months after date at Sir John Lubbock's, at whose banking-house, ac-[500]-cording to Thomas's own admission, he had no belief or knowledge that the plaintiff had any effects. The plaintiff's statement of what took place at the interview was that after Thomas had mentioned the dishonour of the note for 32l. 7s. 6d., he handed to the plaintiff for his signature a note stamp in blank, which the plaintiff signed and handed back to Thomas, who informed him that it was necessary to renew the note for 32l. 7s. 6d.; that Thomas thereupon filled up the note-stamp in his own handwriting for the sum of 300l., without the knowledge or consent of the plaintiff, and without having paid the plaintiff any consideration for it, and without reading it over to the plaintiff, the latter supposing it to be merely a renewed note for 32l. 7s. 6d. On the other hand, Thomas by his answer swore that he wrote out the note for 300l. before he handed it to the plaintiff for his signature, and that the plaintiff himself read the note, though he, Thomas, did not, and that before or immediately after the plaintiff signed the note, he, Thomas, paid to the plaintiff the full sum of 300l. in notes of different Welsh bankers, as the consideration for the note; that this note for 300l. was not intended as a substitution for or a renewal of the note for 32l. 7s. 6d., but was a totally distinct transaction; and that although Thomas proposed to deduct the 32l. 7s. 6d. from the 300l., the plaintiff would not accede to such proposal. It appeared that no witness was present at this interview.

In February, 1824, this note for 300l. was dishonoured. It was afterwards taken up by Thomas, who also paid the incidental expenses attending the presentment, &c. The plaintiff's statement was that he was at that time entirely ignorant of the note for 300l., and received no notice of its dishonour; and that although, as it subsequently appeared, a letter had been written to him on the subject by the bankers, that letter had been retained by Thomas, to whom it had been sent in the first instance, to be for-[501]-warded to the plaintiff. On the other hand, Thomas swore that the plaintiff had received the bankers' letter, and placed it in his, Thomas's, custody, for the purpose of taking it to the bankers', in order to ask them for time to pay it.

On 26th April, 1824, Thomas sent a letter to the plaintiff, in which, without referring to the note for 300l., or any of the circumstances relating to it, he stated that he was in great want of money, and expressed his hope that the plaintiff would remit part of the money, which he alleged that the plaintiff owed him. To this letter the plaintiff, on the 7th May, wrote in reply that it was not in his power to comply with the request, that he was himself in want of money, and hoped that Thomas would excuse him.

Nothing material took place afterwards between the parties till November 1824. At that time the defendant, James Thomas, having obtained information that the plaintiff was entitled to two freehold estates, called Llwyncelyn Issa and Cwmodu, various communications took place between him and the plaintiff as to the means of recovering those estates, and the terms upon which Thomas should be employed to recover them. The result of these communications was the following agreement, which was signed by both parties, and duly attested:—

"Agreement made this 16th of December, 1824, between the Rev. Thomas Jones, of &c., and Mr. James Thomas, attorney, of &c. The said Thomas Jones, in consideration of the natural love and affection which he hath and beareth towards the said James Thomas, and also in consideration of 5s. &c., doth hereby agree and engage, upon being required by the said James Thomas, to convey, assign, and assure to the said James Thomas, by a proper conveyance or conveyances, all that messuage, tenement, and lands, with the appurtenances, commonly **[502]** called and known by the name of Llwyncelyn Issa, and also all those four pieces or parcels of land, called Cwmodu, situated in the several parishes of, &c., in the county of Carmarthen; to hold to the said James Thomas, and his heirs and assigns, to such uses, trusts, intents, and purposes as he shall by any deed, will, or writing direct or appoint; and in default of such direction or appointment, to the use of the said James Thomas, his heirs and assigns for ever: and it is hereby agreed that the said James Thomas shall pay to the said Thomas Jones, within twelve months after the said James Thomas shall have the peaceable possession of all the said premises, the sum of 200l., as a further consideration to the said Thomas Jones, for conveying to the said James Thomas the same hereditaments and premises: the said James Thomas doth further agree to indemnify the said Thomas Jones against the costs and charges of the recovering possession of the said premises, and of the recovery of the rents due from John Williams, the tenant thereof. As witness," &c.

In pursuance of this agreement, the defendant, James Thomas, in May, 1825, commenced an action of ejectment, on behalf of the plaintiff, against the tenant in possession of the Cwmodu estate. The action was tried in August, and the plaintiff obtained a verdict, subject to a special case reserved. About a month before the trial, Thomas, notwithstanding the stipulation in the agreement to the contrary, applied to the plaintiff for money to defray the expenses of the action. The plaintiff being unable and unwilling to advance the money, Thomas urged him to give him his note to the amount of 100l., by way of accommodation; and at the same time promised to provide for it when it should become due. Upon these assurances the plaintiff gave his note at two months, dated the 15th July, for the required sum. It was immediately negotiated by Thomas for value.

[503] After the agreement of the 16th December, 1824, had been executed, the plaintiff was induced to think that the sum of 200l., which Thomas had agreed to pay him for the purchase of the estates, was very much below their real value. The plaintiff therefore, immediately after the verdict had been obtained in the action of ejectment, applied to Thomas to resell to him the estates at the price of 600l. This offer was at that time refused by Thomas, on the ground that the price was inadequate, but on the "spontaneous assurance," to use the words of Thomas's answer, "that he, the said complainant, would give such estates to this defendant by his will, this defendant was at last induced to sell the said estates to the said complainant, with that understanding, for 500l." Accordingly, on the 1st September, 1825, the plaintiff, accompanied by the defendant, David Thomas, the brother of James, went to James Thomas's office, and signed the agreement for repurchase. This instrument was drawn up and witnessed by William Rees, a shopkeeper of Llandilo, since deceased, in order, as Thomas stated by his answer, to avoid any imputation that might be cast upon him by the relatives of the plaintiff, if one of his, Thomas's, own clerks drew it up. The purport of this agreement, which bore date the 1st September, 1825, was that James Thomas thereby agreed to give up all his right and interest in the said estates called Llwyncelyn Issa and Cwmodu, in consideration of 500l., for which the plaintiff had that day given his promissory note; and also in consideration of the plaintiff's paying to Thomas all rent and arrears of rent he might be able to recover from the said estates, or either of them, to the 25th September then instant. At the same time a promissory note was drawn up by William Rees, bearing the same date as the agreement, which the plaintiff signed; and by which he promised to pay to James Thomas, or order, "on the 29th day of November next," the sum of 500l., with interest, &c. The agreement and note, when signed, were delivered to David **[504]** Thomas, to hold in trust for the plaintiff and the other defendant.

Shortly after this transaction the plaintiff applied to James Thomas for a settlement or their mutual accounts, when the plaintiff mentioned the sum of 200l. as coming to him under the agreement of the 15th December, 1824. Upon this Thomas denied his liability to pay any part of the sum of 200l., on the ground that it was not payable

until a year after he had had peaceable enjoyment of the premises, and also that the agreement of the 1st September, 1825, operated as a forfeiture of the plaintiff's claim to the purchase-money under the agreement of the 16th December, 1824; and that the plaintiff was bound to pay him the whole of the 500l., without deduction. Thomas at the same time (according to the plaintiff's statement, not denied by the answer) pressed for payment of part of the 500l.; and upon the plaintiff's saying that, from the state of his circumstances, he could not do so at that time, proposed to borrow the money for the plaintiff, which the latter refused.

On the 9th September, 1825, James Thomas wrote and sent the following letter to the plaintiff:—

"Dear Sir,—I have succeeded in getting you the loan of 500l. upon the note you gave me, and your depositing the mortgage deeds of Craigybrock; and the person who will advance you the money will give you an acknowledgment of the deeds, and an undertaking to deliver them back to you on payment of the money. This is all you required, and I am glad that I succeeded for you, as I want the money immediately. I shall be at the Castle Inn, Brecon, at about two o'clock to-morrow, to meet you to make the necessary arrangements; and I request that you will be there as near that time as you can, and that you will bring with you all the deeds relating to Craigybrock.—I am, dear Sir, yours faithfully, "JAMES THOMAS."

[505] In answer to this letter, the plaintiff sent a note to Thomas, stating that the 500l. was not due till the 29th November, by which time he expected to have funds to discharge it, and therefore he declined to raise money at present for that purpose, or to make any mortgage or deposit of the title deeds of Craigybrock.

In consequence of this refusal, James Thomas reminded the plaintiff that the promissory note of the 15th July for 100l. would soon become due, which note, as Thomas swore by his answer, the plaintiff, on the 1st September, 1825, verbally agreed to pay in part discharge of the 500l. It did not appear that the plaintiff ever had notice that Thomas had negotiated this note, and according to the plaintiff's own statement he had not. However that might be, an action was soon afterwards brought against the plaintiff by the holder of the note, Thomas acting as the attorney for the party bringing the action; whereupon the plaintiff, from stress of circumstances, consented to the payment of that note by Thomas, and also to give a fresh note to Thomas for 110l., to cover the amount of the former note, and the costs of the action.

In consequence, as the plaintiff alleged, of the pressing demands of James Thomas for payment of the 500l., and of the importunities of David Thomas to purchase the estates at a price which he represented to be advantageous to the plaintiff (which demands and importunities were however denied by the defendants), the plaintiff, on the 13th of September, 1825, wrote to David Thomas a letter, requesting him to walk over and value the estates, and also to consider of some means of procuring for the plaintiff a sum of money to pay off the 500l. It appeared by David Thomas's answer that he took no notice of this letter as regarded the valuing the estates, but that he applied to one David Williams for a sum of money for the plaintiff, and obtained from him the promise of a loan of **[506]** 400l. On the 21st November the plaintiff received the following letter from James Thomas:—

"21st November.

"Dear Sir,—I have succeeded in getting you the greatest part of the money you wanted upon your bond, but the person who is to advance it must have my brother David to join you as security. The person alluded to will be here to-morrow, at twelve o'clock, by which time you and my brother are requested to meet him without fail.—I am, dear Sir, yours respectfully, "JAMES THOMAS."

In consequence of this letter, the plaintiff, on the 22nd November, attended at the office of James Thomas, where he met James Thomas and David Williams. The plaintiff was then informed that David Williams could advance only 360l.; and the plaintiff accordingly executed a bond to Williams for that sum only; in which bond David Thomas was named as a surety. The 360l. was then handed over by Williams to James Thomas, who indorsed a receipt for that amount on the 500l. note; and likewise gave an acknowledgment of the receipt of the 360l. to the plaintiff. David Thomas executed the bond a few days afterwards

No sooner had the transaction of the 22nd November been concluded than the plaintiff received notice from James Thomas that he should require immediate payment of the remainder of the 500l.; and although it was arranged that the note for 110l. should go in part satisfaction of what was due, yet there remained unpaid the sum of 30l., which the plaintiff could not command. That sum, in consequence of an arrangement between the plaintiff and David Thomas, was paid by the latter on the 28th November, when the note for 500l. was delivered over to him by James Thomas.

[507] The plaintiff's statement of the transaction between him and David Thomas relative to the 30l., and of the circumstances which followed that transaction, was this; namely, that upon a specific application being made by the plaintiff to David Thomas for the loan of 30l., for the purpose above stated, David Thomas refused to make any advance, unless the plaintiff would enter into an agreement to sell him the estates for 600l., deducting the 30l. from the purchase-money; and accordingly that the plaintiff, through fear of further legal proceedings by James Thomas, and being in great pecuniary distress, was induced to consent to this arrangement. On the other hand, David Thomas denied by his answer any such specific application or refusal; swearing positively that the plaintiff had continually importuned him to purchase the estates, and that he, David Thomas, ultimately, and with great reluctance, consented to purchase them at 600l., and that after such consent was given, and not before, he agreed to discharge for the plaintiff the sum of 30l. remaining due on the 500l. note, and to deduct the same from the purchase-money for the estates.

Under whatever circumstances this arrangement was made, the plaintiff on the day following met David Thomas at his house, and himself (though, as he alleged, by the dictation of David Thomas), wrote out an agreement, and counterpart thereto, in the following terms:—

"Agreement made this 29th day of November, 1825, between the Rev. Thomas Jones, of &c., and Mr. David Thomas of Twerdyrhwy, farmer, &c." [The former part of the agreement purported to convey the estates to David Thomas in fee, in the same terms, mutatis mutandis, as were used in the agreement of Dec. 16th, 1824.] "And it is hereby agreed that the said David Thomas shall pay to the said Thomas Jones the sum of 600l., with lawful interest, from the first day the said David Thomas takes possession of the said premises to the day the 600l. is paid to the said **[508]** Thomas Jones: the said money is to be paid six months after possession. The said David Thomas doth further agree to indemnify the said Thomas Jones against the costs and law expenses and charges of the recovering possession of the said premises. As witness, &c."

In March, 1826, the special case before referred to having been abandoned, the defendant, James Thomas, was let into possession of the rents and profits of the Cwmodu estates, as the attorney of the plaintiff.

Some time in 1826, the plaintiff being advised that he had been grossly imposed upon by the defendants, refused to make any conveyance of the estates to David Thomas, in pursuance of the agreement of 1825, insisting that that agreement was fraudulent and void. The consequence of this refusal was that David Thomas (although indebted to the plaintiff in 200l. on mortgage) brought an action against the plaintiff to recover the 30l. That action was settled by the plaintiff paying the 30l. and costs, and the note for 500l. was thereupon delivered up to the plaintiff.

In April, 1826, James Thomas brought an action against the plaintiff on the 300l. note, and to recover 146l. 10s. 11d. for business done; but on the cause coming on for trial, he submitted to a nonsuit. The reason given by Thomas for the nonsuit was that one of his witnesses, through ignorance of the English language, gave wrong evidence as to the circumstances under which the sum of 360l. was paid to him by David Williams.

The plaintiff now brought his bill against the defendants James and David Thomas, charging that the note for 330l. had been obtained under the fraudulent circumstances before mentioned, and while there was due from James Thomas to the plaintiff the sum of 116l. 2s. on his promissory note; that the plaintiff had frequently applied to James Thomas to have the 116l. 2s. set off against what the plaintiff might owe the said James Thomas, but **[509]** that his requests had been refused, and that James Thomas had also likewise refused to account with the plaintiff; that these transactions took place while James Thomas acted as the attorney of the plaintiff; that he also took advantage of that situation to obtain from the plaintiff the agreement of the

16th of December, 1824, whereby he purchased the estates at an undervalue; that upon the plaintiff's discovering this fraud, and seeking to repurchase the estates, the two defendants entered into a conspiracy for committing further frauds upon the plaintiff by purchasing his estates at a very inadequate price; that as evidence of such conspiracy, the defendant, David Thomas, after the other defendant had refused to allow the plaintiff to repurchase the estates at 600l., called upon the plaintiff, and stated that if he would place himself under his, David Thomas's, guidance, there was little doubt that James Thomas might be prevailed upon to resell the estates at 500l., provided the plaintiff would leave them to James Thomas by his will; that under such inducement, as well as under the pressure of circumstances, the plaintiff entered into the agreement of the 1st of September, 1825; and that, ultimately, through the oppression of both defendants, and particularly in consequence of the repeated importunities of David Thomas, the plaintiff entered into the agreement of the 29th of November, 1825. The bill likewise charged that the defendant, James Thomas, had delivered an improper and exorbitant bill of costs, in which he had included charges for business done in the alleged fraudulent transactions.

The bill prayed that the several agreements might be declared fraudulent and void against the plaintiff, and delivered up to be cancelled; that the note of the 1st of September, 1825, for 500l., might be declared to have been obtained from the plaintiff without legal consideration, and the amount thereof, with interest, allowed in account; that the defendant, James Thomas, might be **[510]** restrained from bringing actions on the note for 300l. or for his bill of costs, and that that note might be delivered up to be cancelled; and that an account might be taken of what was due from the defendant, James Thomas, for principal and interest in respect of these several transactions, and that he might be decreed to pay the balance, &c.

The defendant, James Thomas, by his answer denied all the charges of fraud and conspiracy contained in the bill, and insisted on the validity of the several agreements. He also denied that, except on one occasion, the plaintiff had ever applied to set off the note for 116l. 2s.; and he insisted that, as that note was not to be paid without three months' notice, it would not be the subject of set-off as between him and the plaintiff. He stated the circumstances attending the plaintiff's giving the 300l. note in the manner already mentioned. He admitted that he had refused to allow the plaintiff the sum of 200l. under the first agreement; insisting that such agreement was in that respect annulled by the subsequent agreement of the 1st of September, 1825. He denied that the plaintiff had previously to 1826 uniformly employed him as his attorney, for that on one occasion, in 1825, the plaintiff had employed a Mr. Williams in that capacity.

The defendant David Thomas likewise denied, by his answer, all the charges of fraud and conspiracy contained in the bill. He also positively denied the plaintiff's statement, as to the representations alleged to have been made by him to the plaintiff previously to the transaction of the 1st September, 1825. He positively denied having made any application to the plaintiff for the purchase of his estates, and with respect to the agreement of the 29th November, 1825, he stated as follows:—that he, David Thomas, having heard of the uncertain and wavering disposition of the plaintiff, did, in order to avoid any dispute on the subject, desire the plaintiff, after he had drawn **[511]** or written the said agreement and counterpart, and after the execution of both, to consider well what he was doing before he delivered the same to him, David Thomas; as he, David Thomas, cared nothing about the bargain, and would not enter into any agreement with plaintiff unless the plaintiff meant to perform it. Upon which the plaintiff left the house, and took the agreement and counterpart with him for the purpose, as he, David Thomas, believed, of consulting his friends on the subject. That the plaintiff, two or three days after, called again with the agreement and counterpart, and urged him, David Thomas, very strongly to accept the same, which he at last consented to do, and accordingly the counterpart was delivered to him by the plaintiff.

The plaintiff had no witnesses to prove the fraudulent circumstances under which he stated the 300l. note to have been given, nor could he give parol evidence of any of the alleged frauds, but he entered into evidence of the value of the estates. James Howard, a maltster and farmer, who had occasionally for the last eleven years valued property in the neighbourhood of the two estates, valued them in December, 1834, at 1110l. John Bowen, a land surveyor of thirty-five years' experience, and who had

occasionally for the last thirty years valued lands in the neighbourhood of these estates, valued them in January, 1836, at 11311.

The defendants entered into no very material evidence, except to prove the respectability of William Rees, through whose medium the agreement of September 1835 was effected; and also to prove that the plaintiff had on some occasions expressed his satisfaction at the arrangements between him and the defendant, James Thomas, and had talked of making him his heir.

Mr. Simpkinson and Mr. Roupell, for the plaintiff. Enough is admitted on the face of these answers to enable the Court to direct an account; but what the plaintiff is **[512]** most desirous of obtaining is an inquiry into the circumstances relating to the 300l. note. Independently of all considerations drawn from the relation of attorney and client, there would, it is submitted, be sufficient ground of suspicion to induce the Court to direct a special inquiry as to whether any, and, if any, what consideration was paid for this note. But when the situation of the parties is regarded, no doubt can exist on the subject. Here a person under the control of his attorney signs a note for 300l., at a meeting proposed suddenly and for a different purpose, at a time when the attorney was indebted to him in the sum of 116l., which, even taking the attorney's statement to be true, ought to have been made the subject of set-off. The answer of James Thomas on this subject is incredible. Considering the relative situation of the parties, the plaintiff has a right to clear and specific proof, independently of proof of the note itself, that the money was paid to him, and of the circumstances under which it was paid. The general principles on this subject are laid down in *Lewes* v. *Morgan* (5 Price, 83), decided in the House of Lords. There Lord Redesdale, in giving his judgment, said that the Master should consider how far the acceptances and bonds executed from time to time by Sir Watkin Lewes to Mr. C. Morgan were conclusive evidence of the fact that the several sums of money alleged to have been comprised in the several bonds, constituting 2400l., and for which the bond to that amount was given, were actually advanced; and his lordship added that when an account has been directed of dealings and transactions of this description, a person standing in the situation of solicitor, agent, general manager and director, and having the whole concerns of the other party under his control, and having made such other party execute instruments of this sort, which are therefore liable to suspicion, is not entitled to rely merely on proof of the instruments themselves, **[513]** but must shew that the advances were actually made. These principles were recognised and acted upon by Lord Chief Baron Alexander, in another stage of the same cause (3 Y. & J. 248); and although his decision was subsequently reversed in the House of Lords (8 Bligh, N. S. 811), upon the circumstances of the case, yet the general proposition was fully assented to and adopted by Lord Brougham in his judgment on that occasion. It is clear, therefore, that if that proposition be true, the plaintiff has a right to this inquiry; the onus probandi lying on the attorney to shew that consideration was given for the security.

There is no imaginable ground on which any of the alleged purchases can stand. The first agreement, that of December 1824, was made between the attorney and his client, without the intervention of any third party. A court of equity looks at all transactions of this nature between an attorney and his client with suspicion. In order to support such a transaction, the attorney must shew that the contract was carried on with perfect fairness, that a full price was given, and that he had, quoad the purchase, discarded the character of attorney. Is that the case here? Besides, this agreement is liable to the objection that the client was out of possession. The stipulation was that an action should be brought to recover the estates and that the purchaser should indemnify the seller against the costs of the action. This agreement, therefore, is void for maintenance: *Wood* v. *Downes* (18 Ves. 120), *Harrington* v. *Long* (2 M. & K. 590), *Prosser* v. *Edmonds* (1 Y. & C. 481); and the other agreements, which are founded upon them, must be void also. It is impossible to go through this case without seeing fraud in every part of it. The evidence for the plaintiff is explicit as to the real value of the property, and that evidence stands uncontradicted. All **[514]** that is attempted to be said to the contrary is that it was valued some years ago by another person who, he believes, thought it not worth more than 900l. The original agreement was for the purchase of these estates at five times less than their real value. Assuming the construction put by James Thomas on the second agreement to be right—namely, that it put an end to the first,

still the question is whether, under such circumstances, the second agreement can stand. According to his own construction of it, James Thomas was to resell the estates at a profit of 500l. and be paid the costs of the action besides. Then as to the agreement with David Thomas, independently of the objection of its being void for maintenance, there is no mutuality in it. Suppose a bill had been filed by the plaintiff against David Thomas, what decree could have been made? There is no time fixed for taking possession or paying the purchase-money. Specific performance could not be decreed, as David Thomas might refuse to take possession, and the purchase-money would not become payable till he did. Under these circumstances, we submit that the plaintiff is entitled to have this agreement, which is a blot on his title, delivered up to be cancelled. The connection between the defendants is evident from many circumstances; but amongst others, from that of James acting as solicitor for David, and attempting to take possession of the estates on his behalf. Upon the whole, these securities, if good at all, can only be good to the extent of the monies actually due. The rest of the monies cannot be considered in the light of gratuities, for the Court will not allow an attorney to take a gratuity from the client, whilst this relation subsists (see ante, p. 183, 195). [Alderson, B. You do not advert to the relationship of the parties.] That relationship would not contravene the general rule. At all events, it is admitted that the plaintiff was totally ignorant of law.

[515] Mr. Metcalfe (*a*) and Mr. James Russell, for the defendants. The note for 116l. 2s. was given for good consideration, and bore a special indorsement that it was not to be negotiated till three months' notice had been served on James Thomas for that purpose. So that all the argument as to set-off, there being no legal obligation to pay it till notice, falls to the ground. Again, the argument drawn from the assumption that the note for 300l. was given to Thomas without consideration, and while he was the plaintiff's attorney, falls to the ground. This was a specific loan to the plaintiff of 300l. in notes; not an allowance in account in the course of mutual dealings between the parties as attorney and client. It is an insulated transaction. There is no evidence whatever to connect the loan of 300l. with any transactions between the parties as solicitor and client. In this respect, therefore, it is clear that the plaintiff is not entitled to any relief. [Alderson, B. He only asks for inquiry.] The inquiry must be founded on evidence of fraud, and in a matter of account between an attorney and his client. But fraud is not necessarily to be inferred even where large gratuities have been made to an attorney. A gift to an attorney after the transaction is concluded, though exorbitant, will not be set aside in equity: *Oldham* v. *Hand* (2 Ves. sen. 259; see ante, p. 170). Then is a bill of costs to be the subject of an account in this court? There is nothing in the dealings between these parties which may not be investigated at law. Upon the subject of the agreements and the alleged inadequacy of consideration for them, the Court must consider the relationship between the parties. There is strong evidence to shew that the plaintiff intended to make James Thomas his heir, in consideration of his relationship, and his having done much to recover the estate. **[516]** The plaintiff was himself present at the trial of the ejectment, and expressed himself satisfied with the verdict, and talked of remunerating James Thomas for the result. It is in evidence that James Thomas was not present when the plaintiff said this. With all this evidence in favour of the defendants, what is the nature of the plaintiff's case? He brings the foulest charges of fraud and conspiracy against the defendants without any evidence to support his allegations. He states a variety of transactions which have no connection with each other even as regards James Thomas; and those transactions, unconnected as they are, he endeavours to combine with matters relating to the other defendant. The relief sought against the two defendants is totally distinct. Unless there had been charges of collusion between them, the bill would have been multifarious, but there is no evidence of any connection between them as agent and employer. The name of David Thomas does not appear in the transactions until September, 1825. [Alderson, B. The first question is whether there is not ground for relief, as against the defendant, James Thomas. What do you say to the note for 300l.? Supposing there is a proper ground for an account, the question is whether or not there should be an inquiry as to this specific item.] There is no ground for an account in this case. There must be mutual demands to authorize a decree for an account in equity;

(*a*) Owing to accidental circumstances, Metcalfe had precedence.

and matter relating merely to business done or bills of exchange is not considered matter of account. [Alderson, B. Suppose the second agreement is set aside, and the 500l. directed to be considered merely as a payment in a series of transactions; how can that be settled except in equity?] An account grounded on such directions must be confined to the particular transaction to which the directions apply. Even if the plaintiff succeed in setting aside that agreement, he will only be entitled to an account in reference to that particular trans-**[517]**-action; not to a general account of all dealings and transactions. These transactions, however, are not such as a court of equity will set aside. It may be conceded that the arrangements were voluntary, and therefore that the defendants could not enforce the specific performance of them in a court of equity; but there was a near relationship subsisting between the parties, and one of the agreements was drawn up and attested by a person of great respectability, and it is no valid objection to say that the plaintiff entered into a hard bargain. In *Willis* v. *Jernigan* (2 Atk. 251) Lord Hardwicke says that it is not sufficient to set aside an agreement in this Court to suggest weakness and indiscretion in one of the parties who was engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him on this footing only, but he must shew fraud in the other party. In *Montesquieu* v. *Sandys* (18 Ves. 302), where the consideration stated was money, but the true consideration was a bill of costs, not equal in amount to the purchase-money, the agreement was nevertheless supported.

Mr. Simpkinson, in reply. The question is whether the facts disclosed by the answers are not sufficient in themselves to prove the fraud. It is enough to say that this man was solicitor to the plaintiff; that while he was so, the plaintiff agreed for the sale to him of these estates for 200l. and the costs of the ejectment; that a few months afterwards he was driven to get back the premises from his attorney under circumstances which no court of justice will warrant; that he was compelled to pay for the privilege of repurchasing them, and even obliged to borrow the odd 30l. to make up the consideration money. [Alderson, B. There is no doubt as to that part of the case; **[518]** the questions as to the account and the situation of David Thomas are more material.] Upon the question of account, it is impossible to say that a bill will not lie in equity to have an agreement obtained from a party under these circumstances declared null and void, and to have the money paid under the agreement replaced. Now, if such a bill were filed against the defendant in respect of one of these agreements, he might say in his defence—Be the case what it may under the agreement, yet there are other transactions in which the plaintiff is indebted to me, and I must have credit in account with him. If it be clear that such would be the result upon a bill so framed, it follows that the present bill, which is for a general account, is maintainable. Courts of equity will not administer justice by halves. They would say, in a case like the present—these dealings, taken per se, clearly authorize a decree for an account in each case; therefore let all the accounts of all the dealings be gone into.

With respect to David Thomas, he unquestionably stands in a different situation from his brother, but he is so mixed up in the transactions that he is a necessary party to this suit. In the first place he admits, by his answer, that the agreement of the 1st of September, 1825, is in his possession, and he holds it in trust for his brother, and refuses to deliver it up to the plaintiff. He is, therefore, a necessary party to a bill which seeks the delivery up and cancelment of that agreement. He has likewise so conducted himself in these matters as to bring himself, to a degree, within the principles which regulate the dealings between attorney and client; for it appears by the evidence of the defendants, who defend together, that the application to Williams for the loan of 360l. was made by David Thomas, and although he was not personally present at the meeting in September, 1825, yet that meeting took place a few days only after the procuring this loan.

[519] It has been said that this bill is multifarious; but objections for multifariousness cannot be taken at the hearing: *Wynne* v. *Callendar* (1 Russ. 293).

ALDERSON, B. The only questions in this case which have presented any doubt to my mind are those which have been raised with respect to the account and to the relief prayed against the defendant David Thomas.

It appears to me that I ought, upon the whole, to make a decree for an account as prayed, upon the ground that these transactions having taken place between

attorney and client cannot be supported in equity, and therefore that a general account must follow from the nature of those transactions. I agree with the proposition that not every transaction in the nature of a purchase, which takes place between an attorney and his client, is void, by reason of the relation which subsists between the one party and the other. If the transaction be entirely unconnected with the duty of the attorney, and the attorney act with fairness, no doubt such a transaction may be supported. That was the case of *Montesquieu* v. *Sandys*. The decision in that case proceeded on the ground that the party against whom the contract was sought to be annulled, although he was the attorney of the plaintiff, had not acted as such attorney in hâc re. But in *Wells* v. *Middleton*, which is cited by Lord Eldon in the case of *Wood* v. *Downes* (18 Ves. 127), the transaction was set aside, although it would have been unobjectionable but for the relation in which the parties stood to each other as attorney and client. "It was overturned," said Lord Eldon, "on this great principle—the danger from the influence of attornies or counsel over clients, while having the care of their property; and, whatever mischief may arise in particular cases, the law, with the view of preventing public mischief, **[520]** says they shall take no benefit derived under such circumstances." It appears, therefore, that even a fair transaction of this nature, between an attorney and his client, in a matter entrusted to the attorney in his character of attorney, may be set aside, in order to prevent the public inconvenience that would arise, if professional men, though not, individually speaking, intending to act unfairly, were to be allowed to avail themselves of their peculiar situation to enter into such transactions.

The question, therefore, in cases like the present is whether the party was, as Lord Eldon expresses it, the attorney in hâc re. Now, what are the circumstances of this case? The defendant, James Thomas, is employed by the plaintiff as his attorney to recover the possession of these estates; and while he was so employed, a bargain is entered into between him and his client, that he shall have possession of the estates delivered to him upon his giving an indemnity to the client from the costs of recovering the possession, and that the contract shall be completed upon his paying to the client 200l., at a certain time after the delivery of possession. What is that but a bargain between an attorney and his client in hâc re—a bargain which cannot stand in a court of equity, and is contrary to public policy?

I own I think that the case goes a great deal further, upon the mere statements of the answer, and that the client has abundant reason to say that he has been deceived in these transactions, and that the attorney is not prepared to clear up these charges of deceit, either as regards the transaction of 1824 or as regards that of 1825. The latter is infinitely more fraudulent than the other, and may be set aside on other principles. How stands the case with reference to that agreement? The attorney having obtained from his client an illegal agreement for the purchase of these estates, the client brings his action of ejectment for the recovery of those **[521]** estates, and obtains a verdict. The client, then, suspecting that he has been deceived, is induced to seek for a modification of that agreement; upon which, what does the attorney do? He enters into a fresh bargain with his client; he refuses to give up the former agreement, but makes the client pay for nothing, in order to put an end to the illegality of that agreement. This second agreement, therefore, must also be set aside, and the account which is asked for follows as a matter of course.

I say nothing here relative to the note for 300l., because that will be the subject of an inquiry before the Master. In taking the account the Master will inquire under what circumstances that note was given. If it appear to have been given in a fair transaction the attorney ought to have the benefit of it; but he ought not to have the privilege of recovering that as an item in the account in equity. With respect to the note for 500l., as the agreement for which it was given is declared to be null and void, it appears to me that the amount of that note, together with interest, must be repaid by the defendant, James Thomas.

The only remaining question is what is to be the nature of the decree in reference to the defendant, David Thomas. Upon the whole, I think that the circumstances shew that a considerable connexion existed between him and his brother in these transactions, and that I shall do right if I decree that he also deliver up the agreement of the 29th of November, 1825, for the purpose of being cancelled.

Declare all the agreements fraudulent and void, and let the same be delivered up to the plaintiff to be cancelled. Refer it to the Master to take an account of the

dealings and transactions between the defendant James Thomas and the plaintiff, and in **[522]** taking such account, let the Master charge the defendant James Thomas with the amount of his note for 500l., with interest from the time of payment. Let the Master inquire whether anything, and what, is due to the defendant James Thomas, on the note for 300l., dated the 3rd December, 1823, and let the Master state whether the defendant James Thomas can prove by any and what affirmative evidence, beyond the production of the note itself, the payment of any and what consideration to the plaintiff for that note. The Master to tax the bill of costs of the defendant James Thomas. Liberty to state special circumstances. Reserve further directions and costs.

EX PARTE TRAFFORD. IN THE MATTER OF THE LIVERPOOL AND MANCHESTER RAILWAY ACT. 1837.—Where, under the provisions of a railway act, lands are purchased by the company of corporations, tenants for life, &c., the costs of an application to the Court to have the purchase money applied in the discharge of incumbrances, will be directed to be paid by the company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.

[Followed, *In re Bethlem Hospital*, 1875, L. R. 19 Eq. 460. Referred to, *In re Gaselee*, [1901] 1 Ch. 929.]

The petitioner Thomas Joseph Trafford was, by virtue of his marriage settlement, tenant for life of considerable estates in the parish of Trafford and elsewhere, in the county of Lancaster, subject to a term of five hundred years, for securing portions for his brother and sisters. The trustees of that term, having borrowed several sums amounting to 6666l. 13s. 4d., for the purposes of the settlement, mortgaged the premises comprised in the term to secure the repayment of that sum.

By the statute 7 Geo. 4, c. xlix. s. 39,(*a*) the Manchester and Liverpool Railway Company are empowered to purchase lands, tenements, and hereditaments for the pur-**[523]**-poses of that undertaking, of corporations, tenants in life, tenants in tail, &c.

Under the 61st section of the act, the money to be paid for the purchase of any lands, &c. of any corporation, tenant for life, &c. shall, if it exceed 200l., be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, according to the provisions of the statute 1 Geo. 4, c. 35, there to remain until the same shall, by the order of the Court of Exchequer, made upon the petition of the party who would have been entitled to the rents and profits of the lands to be purchased, be applied either in the purchase or redemption of the land tax, or in the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled to the same uses; or until the same shall by a like order be laid out in the purchase of other lands to be settled to the like uses, as the lands which shall be so purchased stood settled or limited; and in the meantime the money may by like order of the Court be invested in the 3l. per cent. Reduced Annuities, &c.

The 66th section enacts, that where, by reason of any disability or incapacity of any party entitled to the lands &c. to be taken by the company, the purchase-money shall be required to be paid into the Bank of England, to be applied in the purchase of other lands, to be settled to the like uses, it shall be lawful for the Court to order the expenses of such purchases, together with the necessary costs and charges of obtaining such order, to be paid by the company out of the monies to be received by virtue of the act.

The petitioner having sold some part of the settled lands to the company under the provisions of this act, the company paid the purchase-money, amounting to 2166l., into the Bank of England, where the same **[524]** was now standing in the name of the Accountant-General.

The mortgagee of the term for five hundred years having consented to receive the above-mentioned sum of 2166l. in part discharge of his mortgage debt of 6666l. 13s. 4d., the prayer of the petition was that the Accountant-General might be directed to pay over to him that sum, and that the company might be ordered to

(*a*) This act is amended and enlarged by stat. 10 Geo. 4, c. xxxv.

pay the expenses of this petition, together with the necessary costs and charges of obtaining the order to be made on this petition, and of the other parties appearing.

Mr. Stinton, for the petition, said that although the express words of the 66th section, relative to costs, were confined to cases where the money was to be laid out in lands to be settled to the like uses, yet it was clearly within the scope and meaning of that section that the same costs should be given in cases where the money was to be applied in the discharge of incumbrances: and he cited *Ex parte Northwick* (1 Y. & C. 166).

Mr. R. Atkinson, for the mortgagee.

Mr. Spence, for the company.

THE LORD CHIEF BARON said that, however desirous he might be to order the costs prayed for, he doubted whether, under the words of the act of Parliament, he had authority to do so. He fully agreed with Lord Lyndhurst, that cases of this nature came within the spirit of the act; but he thought that that consideration alone, without stronger expressions on the part of the Legislature, would hardly authorize him to make such an order. He would, however, reserve the question of costs, **[525]** and would, in the mean time, mention the subject to Lord Lyndhurst.

On a subsequent day, Mr. Stinton applied for the judgment of the Court upon the point reserved, when the Lord Chief Baron stated that he had consulted Lord Lyndhurst on the subject, and that he should follow the decision in *Ex parte Northwick*. His Lordship therefore ordered that the costs, as prayed by the petition, and likewise the costs of this application, should be paid by the company.

THOMAS *v.* THE ATTORNEY-GENERAL. Feb. 9th, 1837.—Testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience: Held, that the legatees were not entitled to interest on their legacies before the expiration of the three years.—Where lands are charged by will with the payment of debts and legacies, and the executor has power to raise money for that purpose by the sale or mortgage of all or any of the testator's real estates, this is not a discretion which can be exercised arbitrarily or capriciously by the executor.

[Distinguished, *Olive* v. *Westerman*, 1884, 53 L. J. Ch. 525; 50 L. T. 355; 32 W. R. 608.]

Jane Lawrence, by her will, after reciting certain powers of appointment which she possessed by virtue of her marriage settlement and other indentures, directed, limited, and appointed all her real and personal estate, whatsoever and wheresoever, to the only use and behoof of her husband, Henry Lawrence, for life, subject to the payment of her debts, which she directed to be paid by her husband, whom she appointed her executor. She then gave annuities to certain charitable societies; the interest of 100*l.* to her nephew, T. Morgan, for his life; and legacies to various persons—"The legacies to be paid by my husband as soon after my death as convenient, or within three years, if it suit the convenience of my said beloved husband." The testatrix then charged all her real estate with the payment of her debts and legacies; and gave her husband power, by sale or mortgage of any part of her property, to raise and levy the requisite sums for that purpose.

The testatrix died, leaving her husband surviving her, **[526]** who had not paid the legacies before the end of three years after the testatrix's death. The bill was filed by the legatees against the Attorney-General, in respect of the charity legacies, and against the husband and the heir-at-law of the testatrix, praying to have the trusts of the will declared and carried into execution.

Mr. Boteler and Mr. Berkeley, for the plaintiffs. The Court will give interest on these legacies from the usual time, otherwise the legatees will suffer from the neglect of others. As far as T. Morgan's interest is concerned, it is clearly one which ought to commence from the time of the decease of the testatrix. With respect to the other legatees, although they could not compel payment for three years after the death of the testatrix, yet it does not follow that they ought not to have interest from the usual time. In *Churchill* v. *Lady Speake* (1 Vern. 251), a case somewhat

similar to the present, interest was given from the death. The charity legacies, except such as are charged on the personalty, are manifestly void.

Mr. Wray, for the Attorney-General.

Mr. Stevens, for the heir-at-law.

Mr. Simpkinson and Mr. Wilbraham, for the defendant Henry Lawrence. If the husband had paid the legacies before the end of the three years, the interest would also have been payable before the expiration of that time. But he was to pay the legacies at his convenience, and three years is the time limited for his convenience. There is no reason, therefore, why interest should be paid from an earlier period. The rule as to payment of interest from the end of one year, is nothing more than a rule of [527] convenience. As to T. Morgan's interest, it is nothing more than an ordinary legacy, and must be treated accordingly. There is another question in the suit, namely, whether, as the husband has a right to sell or mortgage all or any part of the real estates, he has an arbitrary discretion to say on what part of the estates the charges shall be thrown; but upon that point we offer no argument.

ALDERSON, B. I think that the interest on these legacies should only be calculated from the end of the three years. The testatrix intended to give her husband an extension of that discretion, which courts of equity have limited to one year; and, the discretion having been given to him, it appears that it was not convenient to him to exercise it earlier. As to the bequest to T. Morgan, it is not in the nature of an annuity, but of an ordinary legacy, and therefore payable only at the same time with the other legacies.

I think also that the discretion given to the husband throughout this will is to be taken to be a sound discretion, and not merely the exercise of an arbitrary or capricious choice; therefore, upon the question what part of this property is to be sold for the purpose of the will, I can only say that I think it must be such part as a sound discretion points out for that purpose.

CREASE *v.* PENPRASE. 1837.—Deeds and documents admitted by the answer being very numerous, the usual order for their production may be qualified by a direction that they be inspected, &c. at the office of the defendant's attorney.

Mr. Favell moved for the production of the deeds and documents, admitted by the answer of the defendant to be in his possession.

Mr. Collyer, for the defendant, stated that the deeds [528] and documents were so numerous that it would be impossible without great inconvenience to remove them into the custody of the defendant's clerk in court; and he submitted that under such circumstances the usual order should be qualified by a direction that the plaintiff or his solicitor should be at liberty to attend, at all seasonable hours, at the office of the defendant's solicitor, for the purpose of examining and taking copies of the documents.

The Court, after hearing Mr. Favell in reply, made the qualified order.

MEMORANDUM.

On the 2nd March, 1837, John Jervis, Esq., of the Middle Temple, received a patent of precedence; and soon afterwards, Francis Whitmarsh, of Gray's Inn, Esq., and Charles Purton Cooper, of Lincoln's Inn, Esq., were appointed his Majesty's counsel learned in the law.

EX PARTE ELLISON. IN THE MATTER OF THE TRINITY HOUSE CORPORATION ACT. May 2nd, 1837.—A lease of a light-house and the tolls thereof, by the Corporation of Trinity House, is a chattel real, and therefore a husband may assign his wife's interest in such a lease.—Where an act of parliament authorizes the purchase of lands in which a feme covert is interested, and gives the Court of Exchequer authority to distribute the purchase-money amongst the parties beneficially entitled thereto, the exercise of that authority by the Court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a feme covert, or on the payment of her money out of Court.

[S. C. 7 L. J. Ex. Eq. 49; 1 Jur. 283. See 4 Y. & C. 578.]

By indenture of lease, dated 1st October, 1795, and executed by the master, wardens, and assistants of the Trinity House of the one part, and Henry Smith of the other part, reciting letters patent empowering the Trinity House to give authority to persons to erect light-houses, and reciting the convenience which had been afforded to mariners by the erection of the Longships light-house; and that Smith had erected the same, and had also caused certain poles or trees to be placed on the neighbouring rock, called the Wolf Rock, or Rundle Stone; it was **[529]** witnessed that, in consideration of such erection by Smith, and other considerations in the indenture mentioned, the parties thereto of the first part did demise unto the said Henry Smith, his executors, administrators, and assigns, the said light-house, together with the scite thereof, and also the said poles or trees, and all tolls, dues, and customs payable in respect of the said light-house, to hold, &c., for the term of fifty years, from the 29th September, 1795, at the rent of 100l. per annum. The lease contained clauses that the actions to be brought by the lessee should be in the name of the corporation, and that the lessee should not assign without leave of the corporation.

Henry Smith died intestate on the 24th of October, 1809, leaving a widow and four children. By Smith's intestacy, and the will of the widow, who died some few years afterwards, the four children became entitled to the lease in equal shares.

In July, 1829, Captain Ellison married Betsy Ellen Smith, one of the four children of Henry Smith. No settlement was made upon that marriage. Afterwards Captain Ellison granted an annuity, chargeable on his one-fourth share of this leasehold property, to George Key, who subsequently assigned it to T. Kearsey. Upon the assignment to Kearsey, the latter advanced a further sum, and the whole annuity then amounted to 140l. per annum. This annuity was secured by a deed, dated the 27th of February, 1830, and executed by Captain and Mrs. Ellison, by which the annuity was made payable during the remainder of the term, and made redeemable in the usual manner.

By an indenture dated the 21st of August, 1830, Captain Ellison assigned his interest in the light-house, subject to existing incumbrances, to the petitioners, Mears and Hughes, upon trust, to pay an annuity of 300l. a year during the remainder of the term, to Mrs. Ellison, for her separate use, but without power of anticipation, and to pay the residue to Captain Ellison.

[530] By the statute 6 & 7 Will. 4, c. 79, which vests the property in all light-houses in England in the Trinity House, and which recites, amongst other things, that the Longships light-house is held by Henry Pascoe Smith, Esq. (the administrator of Henry Smith, the intestate), by virtue of a lease from the Trinity House, that corporation (see sect. 3) is empowered to purchase several light-houses, amongst which is the Longships, and the tolls belonging to them, of the owners or persons interested in those light-houses.

The 23rd section directs that the purchase-money paid for any light-house to be purchased of corporations, femes covert, infants, &c., shall, if it exceed 200l., be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account there "Ex parte the Corporation of the Trinity House," &c.; to be applied under the direction of the Court, and upon the petition of the party who would have been interested in the rents, in the purchase of hereditaments to be conveyed to the like uses to which the light-house stood limited, and in the meantime to be invested in the 3l. per cent. Reduced Annuities.

The 26th section enacts that in case any person to whom any purchase-money shall be awarded for a light-house shall refuse to accept the same, or shall not be able to make a good title to such light-house, to the satisfaction of the master, wardens, and assistants of the Trinity House, they may order the sum assessed and awarded to be paid into the Bank of England, in the name of the Accountant-General of the Court of Exchequer, to the credit of the master, wardens, and assistants of the Trinity House, and the parties interested, subject to the order of the Court; and the Court, upon the application of the parties interested, may, in a summary manner, order the money to be invested in the public funds, and may order distribution thereof or payment of the dividends thereof, according to the respective estates or **[531]** interests of the parties making claim thereto, and may make such other order in the premises as to the said Court shall seem just.

The 27th section enacts that where any question shall arise respecting the title of any party to any money paid into the bank in pursuance of this act, the party who shall have been in possession of the light-house, or in receipt of the tolls, at the time when the purchase-money was awarded, shall be taken to have complete title thereto, according to such possession and enjoyment, till the contrary be shewn to the satisfaction of the Court of Exchequer.

Under the provisions of this act, the corporation of the Trinity House entered into an agreement with Captain Ellison for the purchase of his remaining interest in the property at 6899l. 6s. 7d., the corporation taking upon themselves the responsibility of discharging the several incumbrances. Accordingly, an indenture of assignment was prepared for that purpose, bearing date the 8th of March, 1837, and executed by the proper parties. The corporation, about the same time, undertook to repurchase Kearsey's annuity at the sum of 1540l., and an agreement was executed for that purpose.

A doubt having afterwards been suggested whether Captain Ellison could make a good title to the property, the purchasers paid the purchase-money into Court, under the 26th section of the act. The ground of their objection was that the interest of the parties holding under this lease was not that of a chattel real, but a chose in action, or a mere personal interest vested in Mrs. Ellison during the term, and that it was not assignable by her husband.

A petition was now presented by Captain Ellison and the trustees under the marriage settlement, praying that a sum of 3000l., part of the sum of 6689l. 6s. 7d., might be paid to the trustees, for the purpose of securing Mrs. **[532]** Ellison's annuity during the remainder of the term, and that the residue might be paid to Captain Ellison, and that the Trinity House might be ordered to pay the costs of this application.

Mr. Simpkinson and Mr. Pigott, for the petitioners. If this were a mere personal annuity, it may be admitted that this assignment would not be good against Mrs. Ellison if she survived her husband. But this is a lease of the light-house, of the scite, and of the tolls, for a term of years, which is clearly an interest in land, and is so treated by the act, because the purchase-money is to be re-invested in land. In *Negus* v. *Coulter* (Ambler, 367) the mere right of laying mooring-chains and exacting tolls for them was held to be an interest in land. *Knapp* v. *Williams* (4 Ves. 430), *Howes* v. *Chapman* (4 Ves. 542), *Rex* v. *Bates* (3 Price, 341), and *Rex* v. *Winstanley* (8 Price, 180), are likewise authorities in point. The case of *The Chelsea Water Works Company* (ante, p. 268) went upon this—that though the right of the corporation was an interest in land, yet the individual shares were personal. That case, therefore, is not an authority against the present application. In the cases in which it has been held that the tolls of a light-house are not rateable, the reason has been that the tolls are not collected within the parish where the benefit is received—not that those tolls are not as much connected with the realty as any other tolls: *Rex* v. *Rebowe* (Cowp. 583; Bott, 142, pl. 176), *Rex* v. *Coke* (5 B. & C. 797; 8 D. & R. 666). Supposing this to be a real chattel, it is clear that the assignments of it by Captain Ellison, first to Kearsey, and secondly to the trustees for the benefit of his wife, are valid. In *Donne* v. *Hart*,(*i*) it was held that **[533]** an assignment by the husband of his wife's interest in a chattel real was valid, although the interest was only contingent and reversionary, and although the husband died before the contingency was determined or the reversion fell into possession. But, supposing this were not a chattel real, the money is in Court, and represents the property; and the Court, having the fund in its possession, can give all necessary directions for securing the wife's interest.

Mr. Boteler and Mr. L. Wigram, for the corporation of the Trinity House. It is not the object of the Trinity House to throw obstacles in the way of the petitioners, but only to secure a good title to this property. In the cases which have been cited, the nature of the property was that it should be assignable; the difference here is that the interest originally granted to the Trinity House was not assignable. A confidence was reposed in them not to assign, and the contract between them and Smith amounted to nothing more than a covenant that Smith, in consideration of building the light-house, should enjoy the tolls. The recital in the stat. 13 Eliz. c. 8, shews that peculiar confidence was placed in the Trinity House, on the ground of their

(*i*) 2 Russ. & Myl. 360; see *Moody* v. *Matthews*, 7 Ves. 183.

being "the chiefest and most expert masters and governors of ships." The third section of that statute enacts, "that the corporation shall from time to time keep in repair the beacons, &c. to be by them or their assigns erected." The word "assigns" in this clause, when taken with reference to the entire statute, means nothing more than "agents." And that seems to be the meaning attached to the same word in the charter, by which many of the rights specified are granted to the master, wardens, and assistants of the Trinity House and their successors, "or their substitutes or substitute, deputies or deputy, assigns or assign." That the corporation had a trust or confidence imposed upon them, which they **[534]** could not assign, appears likewise from the opinion of Sir F. Bacon, A. G., and Sir H. Yelverton, both of whom were consulted upon the subject. The lease to Smith also bears out this construction, for it contains a covenant that the actions to be brought on behalf of Smith shall be brought in the name of the corporation. *Rex* v. *Tynemouth* (12 East, 46) favours the position that the tolls are distinct from the light-house. [The Lord Chief Baron. There is a great series of modern cases at variance with that opinion.] Even if the tolls be considered real property under the statute of Elizabeth, it does not follow that they are so for other purposes. They are not annexed to the realty like mooring-chains, but are merely a tax for using the realty. There is no difference in this respect between them and postage. There are many cases in which property has been considered to be real property within the Mortmain Act, though not so for any other purpose. A large and full construction has been given to the Mortmain Act, in order to prevent the mischiefs intended to be provided for. The same observation may apply to the statute of Elizabeth. [The Lord Chief Baron. The question is whether, under the 26th section of 6 & 7 Will. 4, c. 79, this money is not tantamount to money in Court arising from the sale of an interest of a feme covert, and paid on her personal appearance, or by virtue of a deed of acknowledgment.]

Mr. Simpkinson, in reply, contended in favour of the construction put by the Court upon the 26th section of the statute of Will. 4, and also remarked that the Trinity House had themselves considered this property as assignable, because the assignments contained express covenants by the lessee, not to assign without the consent of the corporation.

[535] THE LORD CHIEF BARON. I do not blame the Trinity House for bringing this question before the Court, as it might fairly be considered the safest course for them, under the circumstances; but I own I do not see any doubt sufficient to justify me in withholding the order which is sought by this petition. It is true that the tolls of a light-house have been held not to be rateable as tolls; but it does not therefore follow that in a lease of a light-house together with the tolls, the tolls are not to be drawn after the light-house as a species of real property. That is one answer to the objections which have been made to this motion. Then, again, it is impossible to consider this property as a mere personal enjoyment of a right which has been vested in the Trinity House by way of confidence, and which they cannot assign; because they have themselves treated the property as matter of contract, and have by the form of their own contracts permitted the parties, with certain restrictions, to make assignments. Then, with respect to the interest of this particular party, I think the act of parliament expressly permits the Trinity House to purchase it. Although Captain Ellison may, independently of the act, have no right to assign his wife's interest except under certain forms; yet, as the act has made a complete title for the purchasers, what is that but giving the sellers the power of converting their interest into hard cash? That cuts the Gordian knot. What has the Court to do but to allow the parties to apportion the money amongst them according to the interests which they had before? The difficulty is solved by the act. Suppose, as has been suggested, that this was a mere covenant that the party should enjoy the tolls; the legislature only says—We will allow you to convert your interest into a sum of money, which the Court shall pay to you. And if so converted, it is his personal property. In the present case, whatever was the nature of Captain Ellison's interest, by the act of Parliament it is converted into money, and is **[536]** therefore his personal property. By his own personal engagement, he would be bound to settle such part as is the subject of settlement.

I should be disposed to let the matter rest here, and to dispose of this case simply upon the construction of the act of Parliament; but being much pressed to give my opinion upon the other point which has been raised, I must say that in my opinion

the lease of these tolls is a chattel real, and that, consistently with modern decisions, that old case of *Rebowe*, if all the grounds on which it appears to have been decided are correctly reported, was not altogether put upon the right grounds.

Motion granted.

EX PARTE ATKINS. IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY ACT. May 2nd, 1837.—A wife in extremis, and having just been delivered of a child, appointed by will real property to her husband, in fee. After her death, the husband gave his bond for securing 3000l. to the infant; which bond recited that he had upon the execution of the will given his wife an assurance that he would make provision for the child: Held, that the 3000l. was a lien on the estate.

[S. C. 1 Jur. 332.]

Maria Godfrey, being seised in fee of a one undivided third part of some freehold lands at Southampton, married Mr. Bradby. After their marriage, the lands were settled upon her and her husband for their lives, with remainder to such uses as she should by deed or will appoint; in default of appointment, to the use, after the death of the husband, of the children of the marriage in fee; and, in default of children, to the right heirs of Mrs. Bradby.

A few years after the marriage, and immediately after being delivered of a daughter, Mrs. Bradby made her will. She was too weak to sign it, but she set her mark to it in the presence of her solicitor, her nurse, and a female friend. By this she devised the whole of her one third share to her husband in fee. She died on the same day, leaving one child only, the daughter before mentioned.

In February, 1824, Mr. Bradby executed a bond to certain trustees, conditioned for securing to Louisa Bradby, the infant daughter of himself and his late wife, the sum **[537]** of 3000l., to be paid to her immediately upon her attaining twenty-one, if that event should happen in his lifetime; if not, within six months after his decease. The bond, after reciting that Bradby was entitled to a one undivided third share of the property in question under the will of Mrs. Bradby's father, and by virtue of Mrs. Bradby's will and appointment, proceeded in these words: "And whereas the said J. Bradby, upon the execution of the said will and appointment, gave his said wife an assurance that he would make a provision for the said Louisa Bradby, and hath therefore agreed to enter into the said bond, &c. Now the condition, &c."

After the execution of this bond, Mr. Bradby purchased the remaining two-thirds of the property, and mortgaged the whole to the petitioners. Bradby afterwards, with the consent of the mortgagees, contracted with the Southampton Railway Company for the sale to them of the whole property for 4500l. But upon ascertaining the nature of the bond, the company refused to pay more than two-thirds of the purchase money to the vendor; and they paid the remaining one-third, namely, 1500l., into court, upon the advice that the recital in the bond gave the trustees a lien for that sum upon the one-third share devised by Mrs. Bradby.

The mortgagees now presented their petition to be paid the 1500l.

Mr. Coote and Mr. L. Wigram, for the petitioners. Mr. Bradby in his affidavit states that the assurance mentioned in the bond was merely voluntary on his part. [The Lord Chief Baron. I cannot hear his affidavit as to that. His evidence must be taken from the recital only.] Where it is shewn that a party has received a benefit in consequence of a promise made, and he afterwards refuses to perform the promise, the Court will convert him into a trustee, and make him perform the promise. But here **[538]** there is no evidence that the husband received the benefit of the wife's will, in consequence of the promise. It must be shewn not merely that the promise was made, but that it was relied upon by the testator: *Chamberlain* v. *Agar* (2 Ves. & B. 259). The case of *Podmore* v. *Gunning* (5 Sim. 485) will be relied upon against the petitioners; but that case went a great length, and the decision, as reported, is only on motion. It is believed that the bill in that case was dismissed.(*c*) A mere promise amounts to nothing. Here it was only an assurance by the husband that he would make a suitable provision for the child; and he did so by bond. There was no promise to pay out of this particular land. [The Lord Chief Baron. If a man makes a will, and then marries

(*c*) It was so. The case has since been reported in 1 Sim. 644.

and has a child, that is in law a revocation of the will, with a view to the benefit of the children. Here the very reverse takes place. A woman marries, has a child, and then makes a will. The law would consider primâ facie that that would be for the benefit of the child. Instead, however, of giving the property to her child, she gives it to her husband. How did it occur to her to make a will for her husband?]

Mr. Wilcock, for the trustees. This transaction was one and entire. The bond might be a proper form of provision for the child, but clearly the father thought himself bound to execute it in consequence of benefits which he received under the will. *Podmore* v. *Gunning* is in point and is a very strong case. When Bradby has paid the money, I admit he would be entitled to the estate; but the Court will not let him have the estate till he has paid the purchase-money. There must be an investment of the money, or he must do what the Court may consider an equivalent. He has shewn that in his opinion not less than 3000l. ought to be settled on the child. **[539]** The 1500l. ought to be applied in part performance of the settlement.

Mr. Cory, for the husband, now offered to make proposals before the Master for settling 3000l. on the infant.

THE LORD CHIEF BARON said that, considering the value of the estate, he thought the proposal fair; and ordered a reference to the Master to approve of a security upon the terms of the bond; and upon that security being given, the money in court to be paid to the mortgagees.

GOULBOURN *v.* BROOKS. May 9th, 24th, 1837.—Legacy charged on real estate, and payable on the brother and sister of the legatee attaining the age of 21, held not to have lapsed by the death of the legatee, before the time of payment; the payment being postponed for the convenience of the estate and not as a condition annexed to the person of the legatee.

[S. C. 7 L. J. Ex. Eq. 33; 1 Jur. 354. See 4 Y. & C. Ex. 578.]

George Brooks, by his will, devised as follows:—"I give, devise, and bequeath all my real estate to my executors upon the trusts after mentioned, that is to say, upon trust that my wife, Mary Brooks, do and shall receive and take my rents during her natural life, if she shall so long continue my widow; and from and immediately after her death or marriage, which shall first happen, then upon trust to pay and apply the rents and profits in the maintenance and bringing up of my son Thomas Brooks, and my daughter Ellen Brooks, if they shall be under age, until they shall atttain the age of twenty-one; and then my will and mind is that at the death or marriage of my said wife, I give and devise my estate above mentioned to my son Thomas Brooks, and the heirs of his body, only yielding and paying to my daughters Martha and Ellen the sum of 100l. each."

The testator died, leaving his widow and three children, namely, Martha, Thomas, and Ellen, surviving him. Martha had attained her age in the lifetime of the testator and married the plaintiff. The widow married again; and in 1831, which was after the marriage of the widow, **[540]** but before the two children Thomas and Ellen attained twenty-one, Martha died. The question was whether the legacy of 100l. left to Martha lapsed, or was payable to the plaintiff as administrator of Martha out of the real estate.

Mr. Bethell and Mr. Dixon, for the plaintiff. This is a devise to the wife until her death or second marriage, and then a chattel interest is provided for the maintenance of the two children, if under age at that time; and subject to that intermediate interest, the estate is to vest in Thomas Brooks in tail, subject to the legacies to Martha and Ellen. The interest in these legacies is vested, but payment postponed for the convenience of providing for the children's maintenance. The legacies being charges on the remainder in tail, and the interest in remainder vesting, the charge is vested also. It was held in the earlier cases,(*a*) that where a legacy is charged on land, and the legatee dies before the time of payment, the legacy is lapsed. That rule applies now, where payment of the legacy is postponed with reference to the circumstances of the devisee, but not where it is postponed with reference to the circumstances of the estate: *Dawson* v. *Killett* (1 Bro. C. C. 119), *Poole* v. *Terry* (4 Sim. 294). When a legacy is charged upon an estate as a portion for a child, and the child dies before

(*a*) See *Paulet* v. *Doggett*, 2 Vern. 86.

the time of payment, the general rule is that the estate is relieved from the portion. But the reason for that rule fails in this instance, because the plaintiff's wife was married at the time of the gift: *Emes* v. *Hancock* (2 Atk. 507).

Mr. Spence and Mr. Harwood, for the defendant. The estate is given, in the first instance, to trustees, who **[541]** must have the fee in order to do their duty as trustees, and provide for the children's maintenance. In a certain event the fee is given to the defendant, and then the testator's will and mind was, &c. The defendant takes the estate upon a certain condition. The estate is not charged with the legacies, as it was in *Poole* v. *Terry*, but a condition is imposed on the party taking it, and that condition is satisfied by the death of the legatee before the time of payment. In *Smell* v. *Dee* (2 Salk. 415) the legacies were given to certain persons at the end of ten years after the testator's death; and although it was contended that the bequest differed from a bequest to a person at twenty-one, inasmuch as it depended on a certainty, and not on a contingency, yet Lord Cowper held that the legacy lapsed. In *Watkins* v. *Cheek* (2 Sim. & S. 199), where legacies charged on real estate were made payable at twenty-one, but the testator expressly declared that they should vest in the legatees at his death, Sir John Leach observed that but for that direction they would certainly have sunk for the benefit of the devisee of the real estate. Where a legacy affects real estate, in order to prevent a lapse, the testator's intention in that respect must be clearly shewn. *Emes* v. *Hancock* illustrates that rule. The devisee of the real estate was not to have it till he attained twenty-three, and then he was to take it upon condition that he paid his sister a legacy out of the estate within two years after his so attaining twenty-three. The sister survived the period when the brother was to take the estate, but died within the two years, and it was held that her administrator was entitled to the legacy. But there the period of payment was only postponed to give the devisee an opportunity of raising the legacies. Here there is no intention to give the daughter any thing before the time of payment. The other children's legacies are not to be raised till that **[542]** period, and it does not appear that the testator intended to make any provision for her by way of marriage portion. *Dawson* v. *Killett* is distinguishable from the present case, because there the legacy was expressly charged on the realty, and afterwards a direction given for payment. Here there is no such direction. *May* v. *Andrews* (1 Cro. C. C. 122) and *Harrison* v. *Naylor* (3 Bro. C. C. 108) are authorities for the defendant.

Mr. Bethell, in reply. In *Watkins* v. *Cheek* payment of the legacy was postponed, with reference to the circumstances of the legatee, and consequently Sir John Leach held that it would have lapsed but for the direction of the testator. In the case in Salkeld, the legacy was given at a particular time, which distinguished that case, and likewise that of *Harrison* v. *Naylor*, from the present. *May* v. *Andrews* was in effect overruled by *Dawson* v. *Killet*. Here the devise to Thomas Brooks was a present interest, subject to the contingency of maintenance. The 100l. which he had to pay was equally a present interest. He takes the estate cum onere.

May 24th.—ALDERSON, B. The principles which are to govern this decision are clear—the only difficulty is to make an application of them.

It has been established that when a legacy is given absolutely, but the time of payment is only postponed, it does not lapse by the death of the legatee before the time of payment arrives. On the other hand, if the arrival of the time of payment be a condition annexed to the legacy, then it does lapse. The familiar instance of a legacy to A. on his attaining twenty-one, which lapses; and of a legacy to A., to be paid on his attaining twenty-one, which does not, shews principle.

[543] The will, therefore, must be carefully examined to see whether the intention of the testator was to make the legacy conditional or not. Here the testator leaves the land to trustees to pay the rents and profits to the wife for life, or during the widowhood; and after her death or marriage, to pay them for the maintenance of his children, until the youngest shall attain twenty-one. And he then adds: "And my mind is that, at the death or marriage of my wife, I give and bequeath my estate to my son Thomas, yielding and paying to my daughters Martha and Ellen 100l. each." The whole difficulty seems to me to arise from the order in which the testator has expressed his intentions. If we invert the order of the two last dispositions, we shall make it clear enough. The testator seems to me to have left, on the death or marriage of his wife, the rents and profits of his estate to his son, charged with these legacies, with a provision that neither the son should enjoy the estate, nor the daughters receive

their legacies, until the youngest child was twenty-one, the rents and profits being to be devoted in the meantime to their maintenance and education.

This brings the case within those authorities which have established that if the payment be postponed for the convenience of the estate, and not as a condition annexed to the person of the legatee, the legacy does not lapse.

I am, therefore, of opinion that this legacy did not lapse.

Decree for the plaintiff, with costs.

CAPE *v.* CAPE. May 11th, 1837.—Testator directed his trustees to apply a legacy to the support and maintenance of the wife of his son H., and for the support and education of his children born in wedlock. There were no children of H. at the testator's death: Held that the wife took the legacy absolutely to her separate use.

[S. C. 1 Jur. 307.]

John Cape, by his will, after giving pecuniary and specific legacies to his wife and to his son George Augustus, **[544]** gave and bequeathed to his executors all the residue of his property, in trust, to be by them applied as thereinafter mentioned, that is to say, to his other sons William and Henry, and his daughter Harriet, to be equally divided between them, except that 100l. should be given to his daughter out of the other shares. By a codicil the testator declared as follows:—"Whereas I did, in and by my said will, give and bequeath unto my son, Henry Cape, a certain portion of my personal estate: now I hereby revoke all the said legacy, and do direct from such share of my personal estate heretofore bequeathed to him, but now revoked, that 300l. be deducted and divided into equal portions between my beloved wife, my son George, and my daughter Harriet; also the residue of such legacy, after deducting the said 300l., I do direct may be applied to the support and maintenance of the wife of my said son Henry, and for the support and education of his children born in wedlock."

There were no children of Henry Cape at the death of the testator, nor did it appear that there were any at the date of the will. Two children were born after the testator's death.

Mr. Sutton Sharpe, for the plaintiff. The effect of this codicil is to give the property absolutely to the wife of Henry Cape. It has frequently been held that an indefinite gift of the income carries the principal: *Clough* v. *Wynn* (2 Madd. 188), *Haig* v. *Swiney* (1 S. & S. 487). The present bequest is of a similar nature, and the words "for the support and maintenance," &c., which seem at first view to limit the wife's interest, will make no difference: *Robinson* v. *Tickell* (8 Ves. 142), *Fowler* v. *Hunter* (3 Y. & J. 506). It is clear that the testator did not mean to die intestate. Having given 300l., part of this share, to his other children, he intended the rest of the legacy to **[545]** go to Mrs. Henry Cape and her children. That is the most beneficial manner of construing this bequest. In a late case before the Vice-Chancellor it was held that a bequest to a man for the benefit of himself and his family was an absolute gift to the legatee.

Mr. Jeremy, for the defendants. The testator, by his will, gave the absolute interest in this legacy to his son Henry. He afterwards altered his intention, having no longer any confidence in his son, and gave the benefit of that legacy to his son's wife for life, and afterwards to his children. He intended the trustees to have the control of the property; and to superintend it for the benefit of the children as well as the wife. The gift was to all Henry Cape's children born in wedlock. He meant all the children of Henry Cape which he might have during the testator's lifetime, or at any time afterwards. It does not appear that Henry had any children at the date of the will. The testator must therefore have meant all his future children: *Deffliss* v. *Goldschmidt* (1 Mer. 417), *Sheppard* v. *Ingram* (Ambl. 448), *Walker* v. *Shore* (15 Ves. 122), *Tebbs* v. *Carpenter* (1 Madd. 290). This case is precisely similar to those where the fund is disposed of for life, and the period of distribution is limited to the death of the tenant for life. Here the death of Henry Cape is the period of distribution, and up to that time there is a possibility of his having more issue. The cases of *Robinson* v. *Tickell* and *Fowler* v. *Hunter* were, in effect, cases of gift to the parent, subject to a provision for his children. In *Haig* v. *Swiney* and other cases of that class, there is a positive gift of the capital to the parent.

Mr. Sharpe, in reply. If this had been a gift to the wife for life, with remainder

to her husband's children, the **[546]** children coming in esse during her lifetime, namely, her own children, would have been entitled; but no children of the husband's coming in esse after that period would have been entitled. But here the will gives no interest to the children, either of the husband or the wife; it only points out the objects to which she was to apply the fund. All that the will directs her to do, she would naturally do without that direction.

ALDERSON, B. My impression is that the testator merely intended to give this legacy to the separate use of the wife; and if there had been children born at the time of the death of the testator, it would have been a question whether they did not take an interest under the will; but as there were no children at that time, I think the wife takes it absolutely to her separate use.

WHITING *v.* RUSH. PEACOCK *v.* RUSH. May 4th, 9th, 1837.—Upon a bill implicating a married woman in various frauds alleged to have been committed by her husband, in obtaining certain policies of insurance, and praying to have the policies delivered up to be cancelled: Held, that her answer and disclaimer, denying that she had any interest in the policies or any separate property, was insufficient.

These suits were instituted by the Pelican and other Insurance Companies, for the purpose of having certain policies of insurance, which had been effected on the life of Miss Helen Abercromby, set aside for fraud; and that the defendants Wheatly and wife, and Wainwright and wife, who were alleged to be implicated in the fraud, might be decreed to pay the costs of the suits; and that the defendant Rush, who had commenced actions on the policies, might be restrained by injunction, &c.

The object of the bills was to shew that Miss Helen Abercromby was in very poor circumstances, and had no interest in these insurances, but that they had been effected for the benefit of the defendant Wainwright, who had married a daughter of Mrs. Abercromby by a former husband. For this purpose, the bills stated that, in July, **[547]** 1829, Mrs. Abercromby and her two daughters, Helen and Madelina (the latter of whom afterwards married the defendant Wheatly) came to live with Wainwright and his wife; that in August, in the same year, Mrs. Abercromby died; and that Wainwright, as her executor, had sworn that her effects were under the value of 100l.; that her daughters, Helen and Madelina, had applied for pensions as officers' daughters, and upon those occasions had made affidavits that they were not worth 10l. a year; that notwithstanding the poverty of these parties, applications had been made at various offices by the defendant Wainwright for policies on the life of Miss Helen Abercromby for a limited period, to a very large amount; that in October, 1830, after two applications had been made for that purpose, and after Miss Abercromby had been strictly examined on the subject, the Pelican Office granted an insurance on her life for two years, to the amount of 5000l.; that about the same time an insurance upon her life was effected for 3000l. with the Imperial Insurance Office, and another insurance to a considerable amount with the Eagle Insurance Office; that in December, 1830, Miss Helen Abercromby, having been previously in good health, died suddenly; that shortly before her death she made two wills, which bore date the same day, by one of which she left all her property for the benefit of the defendant Wainwright and his wife, and appointed Wainwright her executor; and by the other she left all her property to her sister Madelina, and appointed one Warner her executor; that in consequence of the two wills, the parties interested came to an arrangement, under which Wainwright proved one of the wills, and undertook the execution of it; that Wainwright afterwards left this country, and that the defendant Rush was then appointed, by an order of the Ecclesiastical Court, administrator of Miss Helen Abercromby's effects, and in that character had brought the actions.

[548] In reference more particularly to the defendant Mrs. Wainwright, the bills charged generally that she was a participator in the fraud; and amongst other special circumstances, that she attended Miss Abercromby on all the occasions on which the latter had appeared before the directors of the respective companies. In particular the bill of the Pelican Insurance Company stated and charged that upon effecting the policy for 5000l. Miss Abercromby attended at the office with Mrs. Wainwright, and in her presence and hearing was questioned as to the reasons and inducements which led her to effect the insurance, and that her reply was that it was done for her sole

account, and her sole benefit, and that she had not effected, and had no intention of effecting, any other insurance upon her life. The bill then contained many strict inquiries, founded upon these charges, with a view of obtaining from Mrs. Wainwright an explicit answer upon these points.

The defendant, Mrs. Wainwright, her husband being still out of the jurisdiction, put in an answer and disclaimer to each of the bills, by which she denied that there was any scheme on her part to commit fraud, or that she ever had or claimed or pretended to have or claim any right or title to the policies in the bill mentioned, or in respect of any matter mentioned in the bill, and she disclaimed all right, title, and interest in and to the said policies, and in and to any other of the matters mentioned in the bill. She alleged that she had no property to her separate use which might be liable to the claims of the plaintiff; and she claimed the same benefit by her answer or disclaimer as if she had pleaded or demurred to the bill. To the inquiries made by the bill as to her being present at the office when Miss Abercromby applied for the insurance, she made no answer.

Exceptions having been taken to her answer for insufficiency,

[549] Mr. Simpkinson and Mr. G. Richards appeared for the exceptions in the first suit. It is clear that if this defendant were not married she would be bound to put in a full answer. Her being married can make no difference, because she is charged specifically with being a party to a fraud. The question is whether a married woman, putting in an answer, is not bound to answer fully, although answering separately from her husband. In *Wrottesley* v. *Bendish* (3 P. W. 235) Lord Talbot said that, as a general rule, the wife must answer fully, although in the case before him he thought, under the special circumstances, that she was not bound to do so. A party charged with a fraud cannot disclaim and say he had no interest. In *Beauvoir* v. *Rhodes* (*b*) Tibbert was charged as an attorney and as a party to a fraud, and he put in a disclaimer; but it was overruled and he was made to answer. A woman may be made liable for a fraud, even if married. [Alderson, B. Can you make her pay the costs?] If she survived her husband she would have to pay, and the plaintiffs would have the benefit of her answer. She cannot take advantage of the accidental circumstance of his absence. If her husband were here she would be bound to answer.

Mr. G. Turner, for the exceptions in the second suit. A disclaimer put in by a married woman is inoperative against her husband. How can she disclaim away the right which he has in the property? She does not stand in any different situation from any other married woman. It may be said that her answer could not be read against her husband, and therefore is unnecessary. But suppose she has documents implicating herself and her husband, is it to be said that she is not to produce them? Letters between herself and her husband may be produced. Again, the plaintiff may prove that she has separate pro-**[550]**-perty. At all events, if she becomes discovert before the hearing, she will be amenable to the costs of the suit. She has undertaken to answer in part, and therefore should be made to answer fully.

Mr. Stuart, for the defendant, Mrs. Wainwright. If the defendant can shew that she has no interest, and is under no liability, there is an end of the case against her. She has answered every charge that goes to shew that she has any liability, and she disclaims any interest. The argument for the plaintiffs would go to the extent of putting an end altogether to disclaimers. The discovery asked of this defendant is only incidental to the relief sought for; and if the relief fails, the discovery fails also. Now, there can be no relief as against her. No personal decree can be had against a married woman, except there be separate estate, or except, perhaps, there be gross charges of fraud against her personally. It is enough, therefore, for her to shew, in such a case as this, that she is under no liability. In *Glassington* v. *Thwaites* (2 Russ. 458) it was held that a simple disclaimer by one of the defendants was an insufficient defence, because he did not go on to shew that he was under no liability in respect of the matters contained in the bill. Here, the bill charges that she has an interest in the policies, and ought to deliver them up; but she denies that she has any interest in them. In *Greatley* v. *Noble* (3 Madd. 79) a demurrer was put in by Lady Pomfret, and the question was whether the suit could be extended to a married woman on the ground of fraud. The demurrer was overruled on special grounds, but the doctrine

(*b*) Not reported.

of the Court clearly goes to this, that a fraud creates only a general demand against the estate, and that a married woman cannot be made personally liable in a court of equity. If there be separate property, that property, as it must be **[551]** vested in trustees, may be made liable to demands affecting it; but unless that be so, a court of equity has no means of reaching the wife's property, so as to make it liable at all: *Murray* v. *Barlee* (4 Sim. 82; 3 M. & K. 209). *Francis* v. *Wigzell* (1 Madd. 258) is a strong authority in favour of the defendant. There is no pretence for keeping her before the Court, for the purpose of discovery; for, against whom can her answer be used? Not against herself, for she has no interest; nor against her husband, because a court of equity cannot compel a wife to answer, in order to ground any proceedings against her husband: *Le Texier* v. *Margravine of Anspach* (5 Ves. 322). That case went beyond any thing alleged here. Wainwright and his wife are not plaintiffs at law; they may be examined as witnesses at law, and, on that ground alone, there is no necessity to put this defendant to make discovery here.

Mr. Simpkinson, in reply. Suppose this defendant were a widow, could she, charged as she is with being a party to these frauds and arrangements, and the bill praying that these policies may be delivered up as against her, be permitted to protect herself by such an answer as this? Unquestionably she could not. *Glassington* v. *Thwaites* was not a case of mere disclaimer, for it is very seldom that a mere disclaimer can be put in. It is generally an answer and disclaimer. It was so in that case. It began, not by disclaiming, but by stating that the defendant had been an owner in the newspaper, but had parted with his interest. Is the case of this defendant altered by the circumstance of her being a married woman? She says she has no separate property. But the bill goes farther than merely to seek to affect her separate property. It prays the delivery up of an instrument in the fraud connected with which she is charged as a party. Can she say that the plaintiff is entitled to have that instrument delivered **[552]** up as against her, and yet that she is not bound to answer fully upon that subject? It may be admitted that her discovery cannot be used against her husband, and perhaps not against herself, but on the ground that it may be used to some purposes, she is bound to give discovery. What use the discovery may be put to is another question. The case in Peere Williams is express on that subject. The point was raised that the answer could be of no avail, but Lord Talbot said that he would not take upon himself to overthrow what had been the constant practice in these cases, namely, that the wife as well as the husband should answer fully.

May 9th.—ALDERSON, B. I have looked into the authorities, and I think the plaintiff is entitled to my judgment. It is admitted that if the wife is bound to answer fully, she has not done so. But it is contended that as her answer denies that she has any separate property, and contains a disclaimer of any interest in the suit, it is sufficient. In *Glassington* v. *Thwaites* the Court held that a party by a disclaimer cannot get rid of his liability to answer. Now here the relief prayed is that, notwithstanding the interest of this married woman and her husband, a certain deed in the hands of a third person may be delivered up to be cancelled, having been obtained by means of a fraud to which she and her husband were both parties. Now, according to the case cited from Peere Williams, the course of the Court, in such cases, is to compel both husband and wife to answer fully. Whether or not her answer may ultimately be made evidence in the cause is another question. The cases cited as having been determined by Sir Thomas Plumer are quite distinguishable from the present. There, general relief against the married woman was prayed, and a personal decree sought for. I entertain great doubts whether this disclaimer is valid; but even if it were, it would make no difference. The exceptions must be allowed.

[553] THORPE *v.* JACKSON. May 24th, 1837.—Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several; therefore, where four persons had opened a joint account with certain bankers, who had advanced to them money on such joint account: Held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or shewing that the latter were unable to pay

by reason of their insolvency.—But to a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them; such persons being necessarily interested in taking the accounts.

[See 4 Y. & C. Ex. 579.]

The bill stated that Edmund Hamer, since deceased, the defendants James Lomax, Patrick Magee, and one William Dakin, having, in or about the month of May, 1834, opened a joint banking account with the Northern and Central Bank, that bank made various advances to those parties jointly and on their joint account, and also made divers payments to the joint order and on the joint account of those parties; and that by reason of such advances and payments, the said Edmund Hamer, James Lomax, Patrick Magee, and William Dakin, became and were on the 13th day of July, 1836, jointly indebted to the said Northern and Central Bank in the sum of 3808l. 11s. 1d. That Edmund Hamer being, at the date of his will, and at the time of his death, seised or otherwise well entitled in fee simple of or to divers real estates, and being also possessed of personal estate, consisting &c., duly made and published his last will and testament in writing, bearing date the 8th of July, 1836, which was executed and attested so as to pass real estates, whereby he directed that all his just debts, funeral and testamentary charges and expenses, should be paid and discharged out of his estate and effects, and appointed the defendants Thomas Jackson and Luke Trotter his executors. That Edmund Hamer died on the 13th day of July, 1836, without having revoked or altered his will; and that the same was, on or about the 19th day of July, 1836, duly proved by the defendants Thomas Jackson and Luke Trotter, who thereupon possessed themselves of the testator's personal estate and effects, and thereout paid all his separate debts, funeral and testamentary expenses; and that after such payments there remained a considerable surplus in their hands. That the whole of the said **[554]** joint debt which was so due to the said banking company, at the time of the death of the said Edmund Hamer, still remains due and owing, and that since his death the said William Dakin hath become and now is wholly insolvent. That the said banking company, being entitled to have the said debt of 3808l. 11s. 1d., and interest, paid and made good to them out of the estate of the said Edmund Hamer, have requested the said Thomas Jackson and Luke Trotter, as executors of the said Edmund Hamer, to pay and satisfy the said debt out of the estate of the said Edmund Hamer, so received by them, after payment of the separate debts of the said Edmund Hamer; but that those defendants refuse to comply with such requests, pretending, amongst other things, that the estate of Edmund Hamer is not liable to make good or satisfy the same; whereas the plaintiff charges the contrary to be the truth, and that after the payment of the separate debts, and of the funeral and testamentary expenses of the said Edmund Hamer, the residue and surplus of such estate is liable to pay and make good the full amount in which the said Edmund Hamer was at the time of his death indebted to the said banking company, jointly with the said defendants, James Lomax, Patrick Magee, and the said William Dakin.

The bill prayed an account of what, at the time of the death of Edmund Hamer, was due to the Northern and Central Bank of England, on the joint account; and that the defendants, the executors, might be decreed to pay the balance out of the estate and effects of the said Edmund Hamer, after payment of his separate debts, and funeral and testamentary expenses; and that if the said defendants Jackson and Trotter should not admit assets, then that the usual accounts might be taken of the personal estate and effects of the said Edmund Hamer received by the defendants, and that the same might be applied in a due course of administration.

[555] To this bill the defendants Jackson and Trotter demurred; first, for want of equity; and secondly, because William Dakin was not made a party to the suit.

Mr. Temple and Mr. Pigott, for the demurrer. The prayer of the bill claims no payment against either Lomax or Magee, but solely against the executors of Hamer. The bill proceeds upon a mistaken notion of the extent to which a court of equity has made the assets of a deceased partner liable. It must be admitted that the assets of a deceased partner are liable for a joint debt where it is a trading demand, and where it is shewn that the joint creditor cannot recover against the other parties. Now,

first, there is no allegation that this was a trading transaction. These parties may have been joint trustees under a deed, or joint executors, but it does not appear that they were jointly engaged in trade. Again, there is nothing in this bill to shew that the plaintiff cannot recover against the other parties. It is alleged, indeed, that Dakin is insolvent, but it is not stated that he has taken the benefit of the Insolvent Act, and that nothing is recoverable from his estate. If that had been alleged, there might have been some grounds for dispensing with the necessity of his being made a party; but all that is stated is that since the death of Hamer, Dakin "hath become, and now is, wholly insolvent." There is not even a bare statement of insolvency in regard to the defendants Lomax and Magee, and yet no relief is prayed against them. Admitting that they were partners in trade with the deceased, they are the parties primarily liable, and the plaintiff ought to shew a legal incapacity to recover from them before he attempts to charge the assets of their deceased copartner. But suppose they were mere trustees—and for any thing that appears on the bill they were nothing more—it is clear that none of them could have intended to make himself liable beyond the term of his **[556]** trust, which ceased with his death. A court of equity has not decided that all debts which are joint at law are joint and several in equity; not even where all the joint debtors have had the benefit of the money. The only cases in which that doctrine holds are those of trade, or where the security has been made joint by mistake; and even then the security appears to have been given in mercantile transactions alone. That a court of equity, in construing joint debts to be in joint and several, proceeds entirely on the lex mercatoria, is evident from the judgment of Sir William Grant in *Sleech's case* (1 Mer. 564): "I apprehend," he says, "that by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why courts of equity have considered joint contracts of this sort (that is, joint in form), as standing on a different footing from others." Upon the principles here laid down, the cases of *Lane* v. *Williams* (2 Vern. 292), *Daniel* v. *Cross* (3 Ves. 277), *Hoare* v. *Contencin* (1 Bro. C. C. 27), and *Gray* v. *Chiswell* (9 Ves. 118), were decided. In the cases of joint bonds, although the Court, in construing them several, has ostensibly proceeded on the ground of mistake, yet it appears that the bonds were uniformly given for monies borrowed in the course of mercantile transactions: *Primrose* v. *Bromley* (1 Atk. 90), *Simpson* v. *Vaughan* (2 Atk. 31), *Bishop* v. *Church* (2 Ves. sen. 100), *Thomas* v. *Frazer* (3 Ves. 399), *Burn* v. *Burn* (3 Ves. 573). The case of *Cowell* v. *Sykes* (1 Russ. 191) is not at variance with this view of the subject, because there the joint creditor had become a separate creditor of the deceased partner before he made his application to come in and prove his debt.

But supposing the Court should be of opinion that this contract is in equity several as well as joint, it is sub-**[557]**-mitted that the plaintiff, before he can be entitled to the relief here prayed for, should shew that the other parties are insolvent. It must be admitted that the case of *Wilkinson* v. *Henderson* (1 M. & K. 582) is at variance with this position, but that case is in direct opposition to every authority on the subject. Lord Eldon has distinctly laid it down that the insolvency of the other partners is a necessary preliminary to obtaining any relief against the assets of the deceased partner. The case of *Wilkinson* v. *Henderson*, however, is at variance with this opinion of Lord Eldon, and inconsistent with all the principles on which these cases have hitherto proceeded. The consequence of that decision is to throw on the representatives of the deceased partner the necessity of filing a bill against the continuing partners for contribution.

Supposing that the demurrer for want of equity should be overruled, the demurrer for want of parties is good: *Harrison* v. *Hole* (Rep. Temp. Finch, 15), *Cockburn* v. *Thompson* (16 Ves. 326), *Haywood* v. *Ovey* (6 Madd. 113), *Bland* v. *Winter* (1 Sim. & Stu. 246). If the account is taken merely between the creditor and some of the joint contractors, and they have to file a bill for contribution, the defendant in that suit would not be bound by a decree in this suit, to which he is not a party. Besides, although he may be insolvent, it does not follow that he has no available estate.

Mr. Simpkinson and Mr. Bacon, for the bill. Four persons opened an account with the Northern and Central Bank of England. Credit was given and money advanced to the four by the bank, and the money was received and appropriated by the four. One of the four afterwards died, having made his will, by which he charged his real estate with the payment of his debts. He appointed the defendants

his executors. They have possessed his assets, **[558]** have paid all his separate debts, and have a large fund in their hands applicable to the payment of the plaintiff's demand. The plaintiff says that his demand ought to be made good out of the assets in the defendants' possession, but the defendants resist this claim, on two grounds: first, that the assets of their testator are not liable in equity to the satisfaction of this demand; and secondly, that all the parties who ought to be present at the taking these accounts are not before the Court.

Upon the first point, it is admitted that if this had been a partnership dealing the bill would have been right, and plaintiff entitled to enforce his demand against the estate of the deceased partner. It is contended, however, that as it does not appear that this was a partnership dealing, the usual rule of equity will not apply. But there is no authority for that proposition. If four persons have the benefit of a sum of money, it is immaterial in what character they receive it. If they receive it jointly and severally, they are bound jointly and severally to repay it. If they all have the advantage of the money, they, in equity at least, receive it jointly and severally, and the creditor is not bound to proceed against them all. In *Simpson* v. *Vaughan* (2 Atk. 32), where the bill was filed against the executor of a deceased partner, to have a joint bond which had been given by the partners declared several, and made payable out of the deceased partner's assets, Lord Hardwicke said: "The principal ingredient for the plaintiff is that it is not a debt in the way of trade, but an actual loan of a sum of money; and the debt consequently arises from the contract itself; and if there is any defect in the contract, the Court will resort to what was the principal intention of the parties—that they should be severally and jointly bound." So that his Lordship here inferred, from the nature of the contract, that the debtors should be jointly and severally bound. The cases of **[559]** *Bishop* v. *Church* (2 Ves. sen. 100), *Primrose* v. *Bromley* (1 Atk. 89), and *Orr* v. *Chase* (1 Mer. 729), proceeded on the same principles. But then it is said that, admitting relief is obtainable in equity against the assets of the deceased partner, the surviving partners must first be shewn to be insolvent. *Sleech's case*, however, is a direct authority against that proposition, and Sir William Grant's decision in that case was subsequently affirmed by Lord Brougham, in his rehearing of *Devaynes* v. *Noble* (2 Russ. & M. 495). The subsequent case of *Wilkinson* v. *Henderson* is fully in accordance with the opinions of Sir William Grant and Lord Brougham. It was decided by Sir John Leach, on the same principle, that as a joint creditor cannot have any relief in equity against the surviving partners, he must file his bill against the representatives of the deceased partner, and leave them to proceed against the surviving partners. It is clear that Lord Eldon must have adopted that principle in *Cowell* v. *Sykes*, and at all events the authority of Sir John Leach's decision is admitted in *Braithwaite* v. *Britain* (1 Keen, 206). In *Hoare* v. *Contencin* the bill brought by the joint creditors was bad in its inception, and therefore could not be rendered good by the death of one of the partners defendants after the filing of the bill. In *Gray* v. *Chiswell* the only question was whether the joint creditors should be relieved out of the deceased partner's estate, pari passu with the separate creditors, and it was held that they should not. In the present case that is not attempted.

Then, as to the demurrer for want of parties. The omission of Dakin as a party is not objectionable. It is true that the plaintiff has made the other surviving debtors parties, but he was not bound to do so. It may be convenient, but it is not necessary to do so. [Alderson, B. It is convenient for the sake of ascertaining the **[560]** amount of the debt.] In *Wilkinson* v. *Henderson* Sir John Leach said that he could make no decree against Hartley, the surviving partner, the remedy against him being altogether at law, though he might be properly joined for the purpose of contesting the demand. Besides, Dakin being insolvent, no relief could be had against him. The only use he could be put to would be to resist the demand; and he could do that as well in the character of a witness. He is utterly insolvent. [Alderson, B. I do not know that a person who is utterly insolvent has no interest in the suit. He may be unable to pay, but only temporarily so.]

Mr. Temple, in reply. The judgments of Sir William Grant in *Sleech's case*, and Lord Brougham in *Devaynes* v. *Noble*, proceeded on the distinction, before adverted to, between mercantile and other contracts in regard to the species of relief sought by this bill. In *Ex parte Kendall* (17 Ves. 514) such relief was put by Lord Eldon entirely on the ground of the equities between the partners, the joint creditor proceeding in

the first instance against that fund upon the faith of which he allowed the debt to be incurred, and then, upon the failure of that, resorting to the deceased partner's estate as a secondary fund.

ALDERSON, B. The point which I shall reserve for my consideration is whether the principle on which *Sleech's case* was decided is confined to mercantile transactions. If it be so, the defendants will be entitled to the judgment of the Court on the first ground of demurrer. But if the principle contended for on the other side is right—namely, that every joint loan is in equity to be considered joint and several, the defendants will be primarily liable, though the plaintiff does not proceed against the parties who are solvent. In that case all the debtors being principals, the **[561]** right of the plaintiff to proceed immediately against the assets of one of them who is deceased, in preference to proceeding against the survivors, will be established, and the demurrer upon that point must be overruled.

June 21st.—ALDERSON, B. This was a demurrer to the plaintiff's bill on two grounds—first, for want of equity; secondly, for want of parties.

The first is the only material question. The bill is filed by the public officer of the Northern and Central Bank of England against four defendants, viz. Thomas Jackson and Luke Trotter, the executors of Edmund Hamer, deceased, and James Lomax and Patrick Magee, two of the surviving partners of the said Edmund Hamer. The facts stated in the bill are that Hamer, Lomax, and Magee, together with one William Dakin, who is stated since to have become wholly insolvent, opened a banking account jointly with the bank, paid in monies from time to time, and received advances; and that at the time of Hamer's death they were indebted to the Northern and Central Bank in a considerable sum on their joint banking account. That Hamer died, leaving Jackson and Trotter his executors, who were possessed of assets sufficient for the payment of this debt after discharging all their testator's separate debts. The bill prays an account against the defendants, and that the executors of Hamer may pay the same, when ascertained, out of the assets in their hands. To this bill there is a demurrer for want of equity, on the ground that this debt survived at law, and that there is no claim in equity against the representatives of the deceased party.

After looking through all the cases referred to in the argument, I have come to a different conclusion, and think that, as to this point, the demurrer must be overruled. I take the rule to be as laid down by Lord Eldon in *Ex parte Kendall* (17 Ves. 525), namely, "That where a man **[562]** has chosen to take the joint contract of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand." Now, in this proposition, I find no trace of the distinction set up in the course of the argument that such debt must be a mercantile debt incurred by joint traders. Nor can I perceive why that should be so. It is true that the question has most frequently arisen in such cases. But this would naturally occur; for courts of equity, as stated in *Gray* v. *Chiswell*, by Lord Eldon, have, in establishing the rule, acted upon the intention of the parties, and in all mercantile transactions such intention is more obvious, for such contracts by the mercantile law are joint and several. But in *Cowell* v. *Sikes* the two joint debtors were not partners in any trade, and yet the decision there was that the creditor might recover against the deceased partner's effects. It is said that in *Sleech's case* Sir W. Grant has decided upon the distinction now contended for. I do not apprehend this to have been the case. He says, indeed, that by the mercantile law a partnership contract was several as well as joint; and then he adds that this may probably be the reason why courts of equity have considered joint contracts of this sort (that is, contracts joint in form) as standing on a different footing from others. I conceive, therefore, that partnership trading debts are only one, and that the most frequent, case of the general rule; which is that wherever a court of equity sees that in a contract joint in form, the real intention of the parties is that it shall be joint and several, it will give effect to such intention. Now, I think that a contract for a loan of money, giving to the creditor the benefit of the security of several persons, is of that description. Here it is a loan of money by bankers to certain persons, their joint customers. Is it not obviously the intention of both **[563]** parties that the property of all shall be responsible for the money thus obtained? In the case of *Simpson* v. *Vaughan* (2 Atk. 31) Lord Hardwicke, upon this obvious intention, corrected the mistake in the joint bond. Then the question

arises, whether this equity exists until after all the surviving contractors have been found incapable of paying the amount. I think that question concluded by the case of *Wilkinson* v. *Henderson* (1 M. & K. 583), to the reasons of which I fully accede.

The other question raised upon the present demurrer is whether Dakin ought not to have been joined as a party to this suit. I think he ought. In the first place it is not sufficiently stated whether his insolvency is of a permanent description; and secondly, he is at all events interested in taking the account as to the amount of the joint debt, although it is true no decree can be made against him, nor against the two solvent partners.

Demurrer for want of equity, overruled; demurrer for want of parties, allowed.

MILLER *v.* ARROWSMITH. May 31st, 1837.—Notice of a motion to dismiss the bill for want of prosecution must be served on the party's clerk in court, and not on his solicitor; and if the clerk in court be dead, a new clerk in court must be nominated for the purpose of accepting such service.

Mr. Faber, for the defendant, moved that the bill might be dismissed with costs for want of prosecution, the plaintiff not having proceeded in the cause, pursuant to his undertaking to speed. The plaintiff's clerk in court being dead, an affidavit was produced of service of notice of this motion on the plaintiff's solicitor, and of the solicitor's having accepted such service.

Per Curiam. The Court cannot recognise such service. The proper mode of proceeding is to serve a subpœna on the plaintiff to nominate a new clerk in court, **[564]** and upon such clerk being nominated, to serve him with the notice of this motion.

On a subsequent day the motion was renewed, on affidavit of service on the plaintiff personally of notice of the motion, and also of the subpœna to name a new clerk in court. Whereupon, and it appearing that the plaintiff had not appointed a new clerk in court,

The Court made the order as prayed.

BERRY *v.* JOHNSON. June 22nd, 1837.—Where a sale had been directed under a decree, but there was no reference to the Master as to the title, and no available fund in Court: Held, that the purchaser was entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase.

[S. C. 1 Jur. 474.]

The bill was filed in this case by a legatee for the payment of his legacy, which was charged upon the real estate of the testator. There being an insufficiency of personal assets, the Court ordered the real estate to be sold. The property was accordingly put up to auction, and one William Scott became the purchaser of part. The remaining part was purchased by a party who paid his purchase-money into Court, but had received no conveyance, and this purchase-money was the only fund in Court. It being afterwards ascertained by the legal advisers of Scott that a good title could not be made to the premises purchased by him,

Mr. Koe now moved that all costs, charges, and expenses incurred by the purchaser in the investigation of the title, together with the costs of this application, might be reimbursed him by the plaintiff. He cited *Reynolds* v. *Blake* (2 S. & S. 117) and *Smith* v. *Nelson* (2 S. & S. 557).

Mr. Simpkinson, contrà. It would be a strong thing for the Court to say that when a legatee comes here to **[565]** obtain payment of his legacy, and the Court directs a sale, which is its own act, the plaintiff is to be compelled to pay the costs of the purchaser. Here, there is a fund in Court applicable to the general purposes of the suit; and if the purchaser is entitled to have his costs at all, he ought to have them out of that fund. These costs were incurred out of Court, and are not legitimate costs in the cause. The greatest part of them were entirely voluntary, and as to those, at least, the Court can have no jurisdiction. In *Reynolds* v. *Blake* there was a reference in the cause, and the order was for payment of the costs of the reference and of the application, but not for payment of all the costs in investigating the title. On a bill filed for the delivering up of the conveyance to be cancelled, there being no good title,

the Court will not give the party aggrieved all the previous costs of investigating the title. The only case in which the Court will give costs in those large terms is where one party having purchased, another party applies to have the biddings opened; in which case the Court will not grant the application except upon the terms of doing full and complete justice to the purchaser.

Mr. Koe, in reply. The estate was put up for sale by order; the plaintiff has the conduct of the sale, and the purchaser is compelled to confirm the purchase. The only fund in Court consists of the purchase-money paid in by another party, who has not had a conveyance. If that fund is not available for the purposes of the suit, the plaintiff is personally liable. In *Smith* v. *Nelson* there was no fund in Court.

ALDERSON, B. I think the purchaser is entitled to the costs properly incurred in investigating the title and in confirming the purchase. Those costs, and the costs of this application, must be paid by the plaintiff, and he may recover them in the suit.

[566] MARFELL *v.* RUDGE. Jan. 30th, 1838.—Purchaser, under circumstances, allowed to pay his purchase-money into Court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title.

[S. C. 2 Jur. 78. See 4 Y. & C. Ex. 579.]

Mr. Dalzell moved for liberty to the purchaser to pay his purchase-money into Court, and to be let into the possession and receipt of the rents and profits, without prejudice to any objection which he might be advised to make to the title upon subsequent investigation.

The Court observed that this sort of motion was becoming very frequent, and inquired whether it was consented to.

The reply was that notice of this motion had been served on the other parties, and that they had not appeared. Whereupon,

The order was made as prayed.

DIXON *v.* SAMSON. July 4th, 1837.—Testatrix bequeathed a legacy to A., which she declared should be taken in satisfaction of all claims which A. then had or might have upon the estate after her decease. At the time of making the will, A. had a claim upon the testatrix for a legacy under the will of I. S.: Held, that parol evidence was not admissible to shew that this was the only claim which A. ever had upon the testatrix, and consequently that A. was not compellable to elect between the benefit of the will of the testatrix and that of J. S.

[S. C. 1 Jur. 495.]

Joseph Snowball, by his will dated the 26th February, 1821, gave and bequeathed to the defendant the sum of 100l.; and, subject to the payment of his debts, funeral and testamentary expenses and legacies, the testator gave and bequeathed all and singular his estate and effects to his wife Mary Snowball, whom he appointed his executrix.

Upon the death of the testator, Mary Snowball proved the will, and paid to the defendant 53l. on account of his legacy. Afterwards, in September, 1828, she placed in the hands of the defendant, who then lived in London, the sum of 200l. for the purpose of being invested in the funds for her use; the defendant, however, retained that **[567]** money in his own hands. On the 10th January, 1832, which was very shortly before her death, Mary Snowball made her will, whereby, after reciting that the defendant then stood indebted to her in the sum of 200l. received by him of her for the purpose of being invested in her name in government securities, and which had not been by him so applied, gave and bequeathed the said sum of 200l. to the defendant and his brother, Thomas Burn Samson, in equal shares, and declared that such bequest should be, and should be taken and accepted as and in full satisfaction and discharge of all and every claim and demand of what nature or kind soever, which the defendant and the said Thomas Burn Samson or either of them then had upon her, or which they or either of them might have upon her estate and effects

after her decease. And the testatrix appointed the plaintiffs executrix and executor of her will.

In August, 1835, the defendant filed his bill in this Court against the plaintiff, praying for an account and payment of his legacy out of the assets of Joseph Snowball possessed by the plaintiffs. To this bill the plaintiffs pleaded that at the time of the death of Mary Snowball, the defendant was indebted to her in the sum of 200l. for monies lent and advanced, and that the same was greatly more than the amount of what was due from Mary Snowball, as the representative of her husband, in respect of the legacy of 100l.: and that the defendant being so indebted as aforesaid, the said Mary Snowball duly made and published her last will, &c. The plea then set forth verbatim so much of the will of Mary Snowball as is above stated.

The plea came on for hearing before the Lord Chief Baron at the sittings after Trinity Term, 1836, when his Lordship overruled it, upon the ground that it did not necessarily appear that the claim and demand which the defendant was, in the will of Mary Snowball, stated then to **[568]** have upon her, or which he might have upon her estate and effects after her decease, was the claim or demand which he had or might have in respect of the legacy bequeathed to him by Joseph Snowball. The consequence of this decision was that the plaintiffs put in their answer, and no evidence being entered into by them relative to their claim for the 200l., the defendant obtained a decree.

The plaintiffs now brought their bill against the defendant, calling upon him to elect between the benefits intended for him by the will of Mary Snowball, and those intended for him by the will of Joseph Snowball; and in case of his electing to take under the will of Joseph Snowball, that he might be decreed to replace the 200l. The bill contained an allegation that the defendant had not any claim or demand of any nature or kind soever upon the said Mary Snowball, at the date of her said will, other than and except the claim or demand which he had against the said Mary Snowball, as the executrix of the said testator, Joseph Snowball, in respect of the said legacy of 100l. bequeathed to him by the said testator; and that he hath not now any claim or demand upon her estate, save and except in respect of the said legacy.

To this bill the defendant demurred, first, for want of equity, and, secondly, because Thomas Burn Samson was not made a defendant in the suit. The latter ground of demurrer was not discussed.

Mr. O. Anderdon, for the demurrer. The defendant being a legatee under the will of Joseph Snowball, has, in a suit instituted by himself, obtained a decree for payment of that legacy out of Joseph Snowball's assets. The decree was had against the plaintiffs, not as the representatives of Mary Snowball, but as those of Joseph. Yet the equity which the plaintiffs rest upon is, that Mary Snowball, in her lifetime, delivered 200l. to the defendant to be invested in stock in her name, and that the defendant, **[569]** having failed to perform that duty, ought now to be compelled to do so. At all events, that is one of the alternatives in the bill. But the cases have distinctly settled that no bill will lie for the specific performance of an agreement relative to stock, the remedy being entirely at law.

The point as to the construction of the will has been disposed of by the plea. The defendant ought not to be put to his election except in a very clear case. A construction has already been put upon the will by the judgment of the Lord Chief Baron, and no parol evidence can be admitted to contravene the conclusion flowing from the construction of the will itself: *Collins* v. *Doyle* (1 Russ. 135), *Dummer* v. *Pitcher* (2 M. & K. 262). [Alderson, B. There the question was whether there was any election at all. In this case the doubt is to what the election is to be applied.] The question is whether the averment in this bill can be admitted to overrule the plain words of the will, and by that means to raise a case of election. We must take the will as we find it. There might have been a notion in the mind of the testatrix that the defendant had a claim against her estate for the portion of the legacy remaining unpaid, but the Court cannot indulge in conjectures on that head. In terms the testatrix bequeaths this legacy only in satisfaction of claims upon her estate, but it is clear that the defendant's claim was against the estate of the original testator.

Mr. Elderton, for the bill. This is, in fact, a cross bill, and, generally speaking, a demurrer to a cross bill will not lie: Mitf. Pl. 203. The gift by Mary Snowball to the defendant is in satisfaction of all demands on her or her estate, which is a sufficient ambiguity to let in parol evidence. In *Dummer* v. *Pitcher* it was attempted to make

[570] the will speak before the death of the testator; no such question arises in this case. [Alderson, B. The real reason of that and other decisions is that a will of personalty, in reference to the legatees, speaks when it is made, but points to property which is to exist in futuro. Here the testatrix is speaking of debts and claims which are or may be due at the time of her decease. You confine that to this one claim; but how do you know that she had not other claims in her mind? Is parol evidence admissible to explain a bequest of personalty, or a bequest which is not limited to the time when the testator speaks, but extends from that time to the time of his death?] The will can only apply to one state of circumstances, where one state only exists. The bill avers that there was no other demand upon her than this. [Alderson, B. The question is whether that averment is material. If the will includes the present demand, you do not want it. If you are obliged to resort to it in explanation of the will, the question is whether parol evidence is receivable to prove it.]

Mr. Anderdon, in reply.

ALDERSON, B. When the plea in the cause of *Sampson* v. *Dixon* was heard before the Lord Chief Baron, his Lordship was of opinion, independently of any thing arising out of extrinsic evidence, that this will did not extend to the claim which the present defendant then made upon the assets of Joseph Snowball. Then the question is whether I can take notice of any evidence shewing that this was the only claim which the present defendant had upon Mary Snowball, the representative of Joseph Snowball, at the time of her decease. I think I ought not so to do. Where a testator speaks of a state of facts which may exist at any time between the making his will and of his death, evidence is not admissible to shew that there **[571]** was any particular time to which his will was intended to be applicable. The case of *Dummer* v. *Pitcher* and the authorities on which that case rests, and which were decided long before, are sufficient to establish that position.

In the case of real estate, the intention of the party is referable to a state of facts existing when the will is made. In a will of personal estate, the same observation applies to the person of the legatee. But when the testator speaks to facts which may exist any time between the time when he speaks and his death, how is the Court to judge of the particular time to which he refers? I cannot therefore think that, in this case, the party ought to be put to his election. If the plaintiffs are disposed to try the question at law, they have at law a full remedy for all they can claim against the defendant.

Demurrer allowed.

HARBETT *v.* BUCKINGHAM. Jan. 30th, 1838.—After motion by the defendant to dismiss the bill for want of prosecution, the plaintiff wishing to amend his bill must shew special cause of amendment against the order for dismissal, and give two days' notice of the cause which he intends to shew.

In this cause the plaintiff had filed no replication, and the defendant obtained an order nisi for dismissing the bill for want of prosecution.

Mr. G. Richards, for the plaintiff, on shewing cause against the order for dismissal, contended that as no replication had been filed, a mere undertaking by the plaintiff to amend was sufficient cause against dismissing the bill.

Mr. Blenman, contrà, said that, after notice to dismiss for want of prosecution, it was not a matter of course for the plaintiff to amend his bill, but that he must give notice of his intention to amend, and state by affidavit the materiality of his proposed amendments.

[572] Per Curiam. After notice given by the defendant of a motion to dismiss the bill for want of prosecution, the plaintiff must shew some special cause against the order to dismiss: and if he intend to amend his bill, he ought to shew by affidavit the materiality of his amendments; and the practice seems to be that he should give two days' notice of the cause which he intends to shew.

The motion then stood over by consent.

DICKEN *v.* CLARKE. April 20th, 1837.—Testator devised one moiety of the proceeds of his real estate to his son for his life, and the other moiety to his, the testator's, wife, during her widowhood; and directed that in case of the wife's death or marriage in the lifetime of the son, her moiety should go to the son in the same manner as the first mentioned moiety. The testator then directed that in case his son should die in the widowhood of his mother, and leave lawful issue, the son's moiety (and, after the widow's death or marriage, her moiety) should become the property of such issue. The testator then devised as follows: "But in case of such, my son's, demise in the widowhood of his said mother, without leaving lawful issue, then I wish and direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to Mr. T. B.; and in case of the marriage or death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate to J. B." The testator's son survived the widow, and died without issue: Held, that the contingency on which J. B. was to take the estate was destroyed, and that the heir-at-law of the testator was entitled.

Joseph Motershead Dickyn by his will, after making certain specific bequests to his wife, gave and devised all his real and personal estate to his executors and trustees therein named, upon certain trusts, which were declared in the following terms:—"First, I will that my trustees shall pay, or cause to be paid annually, in two half-yearly payments, one moiety or equal half-part of the proceeds of all my property, whether personal or real, to my son Halliday Dickyn, after he shall attain the age of twenty-one years, for and during the term of his natural life; and previously to his attaining twenty-one years, so much of the said moiety as shall be deemed proper to maintain and educate him. The other moiety of the proceeds of my said estate, together with my plate (which I wish in no case to be sold), linen and household furniture, I direct my said trustees to pay, or **[573]** cause to be paid, and allow the use of my said plate, furniture, &c., to my dear wife, so long as she shall continue unmarried, and my widow. And in case of her death or marriage in the lifetime of my said son, I direct her moiety or equal half-part of the proceeds of my estate, whether personal or real, or both together, to be paid, with my plate, furniture, &c., to my said son Halliday Dickyn, in the manner and for the purposes as I have before directed respecting his moiety; but that the principal now placed in trust shall not be absolutely subject to his control, or become his sole property, until his eldest lawfully-begotten child shall attain the age of twenty-one years, but it shall remain in the hands of my said trustees and their representatives in trust for the purposes aforesaid." The testator then directed his estate at Dodleston to be sold within two years after his decease, and gave power to his trustees to dispose of the whole of his landed property, if they thought it prudent, the consent of his son being first had in writing. The testator then, after directing that all monies due to him on bond, &c., should be called in and invested in government or real securities in the joint names of the trustees and of his son, devised and bequeathed as follows:—"In case my son shall die in the widowhood of his mother, and leave lawful issue, then I direct that his moiety or equal half-part of the proceeds of my property, personal and real, shall become the property of such issue, share and share alike; and that the principal of the said proceeds shall, upon the youngest of the said issue attaining twenty-one years of age, be divided amongst them, share and share alike; and if only one, then to such one; but this distribution to be made only in case my said son shall not attain twenty-one years of age, or attaining it, leave no will; if otherwise, then the said property to be subject to such division amongst the said issue as he shall by will direct. I direct also that the other moiety or equal half-part of my said **[574]** property, together with the furniture, plate, &c., shall, upon the death or marriage of his mother, subsequent to my said son's decease, and leaving lawful issue, be subject to the same distribution as is before directed respecting his moiety; but in case of such his demise in the widowhood of his said mother, and without leaving lawful issue, then I wish and direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to Mr. Thomas Burrows, of Cheadle Hulme, schoolmaster, or his representatives, for the maintenance of the female part of his family, &c. And in case of the marriage or

death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate, personal and real, to the Rev. Joseph Burrows, of Brazenose College, for his life, and his heir male, upon the condition of his taking and using, within twelve months after having possession of my property, the surname of 'Dickyn,' subject, however, to the above annuity." The will then contained limitations in favour of other members of the Burrows family, in the event of J. Burrows having no issue, or refusing to bear the name of Dickyn. In a subsequent part of the will the following clause occurred:—"If my son dies without attaining twenty-one years of age, and without leaving lawful issue, I give my books to the Rev. J. Burrows; and I do not wish my said son to have the indiscriminate use of my said books until he attains the age of nineteen years, though I now give them to him: my plate and furniture I direct to be his in the cases of the marriage or death of his mother; and should he be previously dead, leaving no lawful issue, I give them to the Rev. J. Burrows, or to him who shall bear the name of Dickyn, and inherit my other property."

The testator died in 1813, leaving his widow and son surviving him. In 1816 the trustees sold the Dodleston estate, and invested the purchase-money in the funds in **[575]** their joint names. In June, 1831, the widow died. In September following, the son, Halliday Dickyn, who had attained the age of twenty-one, died intestate, and without ever having been married, leaving Joseph Burrows surviving him.

The bill was filed by Joseph Dicken,(*a*) the heir-at-law of the testator, against the surviving trustees and Joseph Burrows, praying that the plaintiff might be declared entitled in fee to the unsold real estates of the testator, and absolutely entitled to the net proceeds of the sale of the Dodleston estate; that the trustees might be directed to make to the plaintiff the necessary conveyances and transfers, and might account to him for the rents and profits of the real estate, and the dividends of the stock in which the purchase-money for the Dodleston estate had been invested, from the death of Halliday Dickyn.

At the hearing of the cause, the plaintiff abandoned all claim to the personal estate of the testator, and to the proceeds of the sale of the Dodleston estate.

Mr. Hodgson and Mr. Rudall, for the plaintiff. It is a well settled rule of law, that if words of contingency contained in a will are express and unequivocal, the gift must be governed by that contingency, though the result may seem to involve an absurdity, or may be attended with inconvenience or hardship: *Denn d. Radclyffe* v. *Bagshawe* (6 T. R. 512), *Doe d. Everett* v. *Cooke* (7 East, 269; 2 Smith, 236), *Toldervy* v. *Colt* (1 Y. & C. Ex. 621; 1 M. & W. 250). Here the contingency on which Joseph Burrows was to take was the death or marriage of the testator's widow, after the death of the son, leaving no issue. That contingency having been destroyed by the death of the mother **[576]** in the son's lifetime, the interest of Burrows is at an end, and the plaintiff is entitled. It is certainly open to conjecture that the testator intended Burrows to take, at all events, upon the death of the son without issue; but the Court cannot indulge in such a conjecture in opposition to the express words of the will. Besides, if any latitude is given to conjecture, it is equally reasonable to suppose that the main object of the testator in framing these minute limitations was to impose certain restrictions on his son during a certain period. He might not intend that his son should will away the estate, unless he survived his mother. The son being an infant, it might be thought necessary that he should be restricted in his power of disposition, or the testator might have some jealousy of his having that power in his mother's lifetime. This gives a rational construction to the will, upon the mere supposition of the testator's being a prudent man. But, dealing with the will according to the rules of law, the true construction of it necessarily excludes the notion of an estate tail in the son. The case of *Lees* v. *Mosley* (1 Y. & C. 589) has set that question at rest. Besides, the power of appointment given to the son is sufficient to exclude any estate tail in him. Then is there any estate for life in the son, upon which the estate of Joseph Burrows can be supported? If there is neither one nor the other of these estates, how is he to take? It is observable that the estate given to the son's issue is limited to take effect during the lifetime of the mother. The testator must be presumed to have known the law, and he may have limited the estate in that

(*a*) The plaintiff established his heirship to the testator on the father's side, notwithstanding the difference in the spelling of his name and that of the testator.

manner, in order to avoid a perpetuity, and give the mother, in a certain event, a larger interest: *Pells* v. *Brown* (Cro. Jac. 590), *Lady Lanesborough* v. *Fox* (Ca. T. T. 262), *Holmes* v. *Lock* (in Dom. Proc.). Upon the whole, there is a clear gift to the mother for her life, and the estate limited **[577]** to Joseph Burrows is a contingent remainder, expectant on the mother's life estate, and to take effect only in the event of the son dying without issue in the mother's lifetime. [Alderson, B. That construction is strengthened by the clause which gives the furniture to Burrows, upon the death or marriage of the mother, should the son "be previously dead, leaving no issue."] Then the event not having happened on which the contingency depends, the Court cannot alter the will: *Doe* v. *Brabant* (4 T. R. 706). [Alderson, B. The testator seems to have intended that his son should not make a will unless he had issue.]

Mr. Temple and Mr. Hayter, for the defendants. Where the words creating the contingency are so clear as to leave no doubt of the testator's intention, the Court is not at liberty to look beyond the particular clause in which the words occur. But where there is an obscurity in the expression of the contingency, so as to create a doubt whether it completely embraces the testator's intention, the Court will look at the general intention of the testator, and in many cases has gone to the extent of overruling the particular intention, in order to carry into effect the general intention. No man can say here what the particular intention of the testator was. He intended to give his wife a life interest in a moiety of the estate. He gives his son, in equally positive terms, a life interest in the other moiety. On the death of his wife, he directs her moiety to be disposed of in like manner as his son's moiety; that is, he gives it to his son for his life. Upon the determination of that estate, the property is given to the issue of the son. The Court may construe the word "issue" as "children," so as to exclude any question of remoteness; in which case the children, if there had been any, would have taken as tenants in common in fee, subject **[578]** to the father's power of appointment. The son took a life estate, capable of being enlarged into a fee, if he had a child attaining twenty-one; if otherwise, then only a life estate, with a power of disposition. Upon the death of the two tenants for life, or failure of issue attaining twenty-one, the testator devises his estate over, that is to say, he devises it, charged with an annuity of 40*l*., to Joseph Burrows. It is said that the gift to Burrows is founded on an express contingency, which has failed. That construction is certainly tenable, if the general intention of the testator is to be entirely overlooked. But it is obvious that the testator's general intention was to give the estate to Burrows, on failure of his own immediate family. He intended to retain the estate in his own family so long as there was a widow or son, or children of a son in existence, but no longer. The clause which comprehends the gift to Burrows should be read thus: "And in case of the marriage or death of my present wife, my said son being dead, or in the event of my son dying without lawful issue, then I give, &c." Or the words "my said son, &c." may be considered as included in a parenthesis, and read thus: "My said son dying and leaving no lawful issue." If the will be construed otherwise, the Court must come to the conclusion that the testator meant to give the estate over to Burrows only upon a complicated contingency; but it is obvious that such was not his meaning. He had no intention to benefit his heir-at-law.

Mr. Hodgson, in reply, was stopped by the Court.

Alderson, B. The contingency on which this estate is devised over is expressed in too clear terms to admit of any reasonable doubt. The testator first gives a moiety of the estate to his son for his life, and the other moiety to his wife for her life or widowhood, and directs that the latter moiety shall, upon the death or marriage of the wi-**[579]**-dow in the son's lifetime, go to the son in the same manner as the previous moiety. He then provides for the son dying during the widowhood of his mother, leaving lawful issue, in which case the issue are to take the son's moiety (and also the widow's moiety upon her death or marriage), share and share alike; but at the same time if the son chooses to make a will, he is at liberty to do so for the purpose of providing for the issue, in such shares as he may think proper. But if the son die without issue, during the widowhood of his mother, then the testator devises the whole of the property to her for life, subject to an annuity of 40*l*. Then comes this clause: "And, in case of the marriage or death of my present wife, my said son being dead and leaving no lawful issue, then I give the whole of the proceeds of my estate, personal and real, to the Rev. Joseph Burrows." Now, it appears to me that the whole of the devise to Mr. Burrows is subject to the contingency expressed in the

former clause, relative to the property coming to the mother upon the death of her son, leaving no lawful issue. The contingency there expressed is recapitulated in the last clause, and is stated to be the marriage or death of the mother taking place at a time when the son is dead leaving no lawful issue. Those are the plain words of the testator. Whether he had any other intention than what he has expressed I cannot tell. The events on which, according to the expressed intention of the testator, the devise over is to take effect are the marriage or death of the widow at a period after the death of the son, leaving no lawful issue. Neither of those events having taken place, the estate goes to the testator's heir-at-law.

Decree accordingly.

[580] SALKELD *v.* PHILLIPS. June 1st, 1837.—Defendants, by their answer to a vicar's bill, denied the right of the vicar to the tithes claimed, alleging the right to be in the rector. Plaintiff then amended his bill, charging that the defendants ought to set forth what tithes the rector was entitled to, and how his right was made out. Defendants demurred to this part of the amended bill: Held, that the demurrer was overruled by the answer.

The bill was brought by the vicar of Crosley-upon-Edon, against certain occupiers within that parish, praying for an account and satisfaction of certain small tithes.

The defendants, by their answer to the original bill, admitted the collation and induction of the plaintiff, and that he was the lawful vicar of the above-named parish; but they denied his title to the tithes claimed, alleging the right and title to such tithes to be, and always to have been, vested in the rector for the time being of the parish, save and except so far as the same had been barred by the statute 2 & 3 Will. 4, c. 100. They also insisted, that if the plaintiff ever had title to such tithes (which, however they did not admit), he was barred by the statute.

The plaintiff amended his bill, by charging that the defendants ought to set forth of which of the several titheable matters and things aforesaid by name, and within which of the lands occupied by the defendants respectively, the tithes do not belong to the plaintiff as such vicar as aforesaid, but belong to and ought to be paid to, the rector of the said parish; and that the said defendants ought to set forth of which of the said titheable matters the tithes belonged to the rector for the time being of the said parish before the said act, and have ceased to belong to him by virtue of the said act; and that they ought also to set forth how they make out that the right to such tithes did formerly, and before the passing of the said act, belong to the rector of the said parish and not to the vicar thereof, and by what means such right has been barred; and that they ought to set forth which of the said titheable matters and things the plaintiff is not entitled to the tithes of, by reason of the said act, or which of the lands occupied by the said defendants respectively, are thereby exempted from the payment of such tithes, &c.

[581] The defendants demurred to so much of the amended bill as consisted of the charges relating to the rector's alleged title to the tithes; and as to the residue of the bill, they answered that they did not insist otherwise than in the manner, and to the extent mentioned, in their former answer, that the plaintiff's right had been barred by the statute.

Mr. Boteler and Mr. Johnson, for the demurrer, contended that the plaintiff, who could only claim by the strength of his own title, had no right to enquire as to the rector's title. It was nothing to the vicar whether the rector was barred or not by the statute.

Mr. Simpkinson and Mr. Purvis, contrà, cited *Atkinson* v. *Hanway* (1 Cox, 360; see 2 Atk. 119), and contended that the original and amended bill forming but one record, the demurrer was overruled by the answer.

Mr. Boteler, in reply, referred to *Smith* v. *Bryon* (3 Madd. 428).

ALDERSON, B. It seems to me that the demurrer is overruled by the answer, the case made by the answer being totally inconsistent with that made by the demurrer. The demurrer proceeds on the ground that, admitting the plaintiff's right as stated in the bill, he is not entitled to the relief prayed; whilst the answer wholly denies the vicar's right.

I think the demurrer ought to be overruled on the ground that the original and amended bill form one record, and that the question demurred to is answered.

Demurrer overruled.

[582] BEST *v.* GOMPERTZ. June 1st, 1837.—Filing a cross bill against a party who is in contempt in the original suit is a waiver of such contempt on the part of the party who files it; and the defendant in the cross suit, by clearing his contempt in that suit, will clear it in both.

In March, 1834, a bill was filed by the defendant against the plaintiff, charging him with various frauds in certain money transactions which had taken place between the parties. The plaintiff put in an answer which was referred for impertinence, but the Master reported it not impertinent. The defendant then took exceptions to the Master's report, but the exceptions were overruled. The plaintiff then issued a subpœna for the costs of these proceedings, which, the defendant failing to pay, was committed to the Fleet. He afterwards procured himself to be removed into the custody of the Marshal of the King's Bench; whereupon an application was made to that Court for an order that he should be kept in close custody, but that application failed. Subsequently to these transactions, the plaintiff filed the present bill, by way of cross bill, against the defendant, for a discovery of facts in aid of his defence to the original bill. To the cross bill, the defendant having put in an answer and demurrer, the plaintiff took exceptions to the answer, and argued the demurrer. The demurrer being overruled, the defendant submitted to the exceptions.

The defendant having at length put in his answer to the cross bill, and having tendered 20*l.* as the full amount of the costs of his contempt in the cross suit, now moved to be discharged out of custody.

There was a cross motion by the plaintiff that the defendant should be kept in close custody within the Court of King's Bench till the contempt in both suits should have been cleared.

Mr. Simpkinson, for the first motion, contended that the defendant was entitled to his discharge notwithstanding that the costs of the contempt in the original cause **[583]** had not been paid, inasmuch as filing a cross bill, and calling upon the defendant to answer, was a waiver by the plaintiff of any right which he might have previously had to treat the non-payment of costs in the original cause as a contempt in this cause: *Anon.* (15 Ves. 174), *Hoskins* v. *Lloyd* (1 S. & S. 393), *Gray* v. *Campbell* (1 Russ. & M. 323). He also urged, independently of the ground of waiver, that the plaintiff had no right, under any circumstances, to connect the contempt in the original cause with that in the cross cause: *Clarke* v. *Dew* (ibid. 103), *Ricketts* v. *Mornington* (7 Sim. 200).

Mr. Elderton, contrà, contended that the defendant had no right to choose which matter he should discharge himself for, and that for the purpose of resisting this motion an original and cross cause were the same: *Ward* v. *Eyles* (Moseley, 377), *Kemp* v. *Mackrell* (3 Atk. 812), *Wenman* v. *Osbaldiston* (2 Bro. P. C. 276). As to the question of waiver, the step taken must be with reference to the matter which makes the contempt. [Alderson, B. A proceeding in the cause seems sufficient.] At all events, under stat. 11 Geo. 4 and 1 Will. 4, c. 36, the defendant, in order to clear his contempt, must put in a full and sufficient answer, and that it is so must appear by his own affidavit; for, if the plaintiff were to take an office copy of the answer, it would be a waiver of the contempt in both causes: *Sidgier* v. *Tyte* (11 Ves. 202). [Alderson, B. The affidavit would only amount to the defendant's ipse dixit that he has put in a full answer.]

Mr. Platt, for the Marshal of the King's Bench.

Mr. Simpkinson, in reply.

[584] ALDERSON, B. The question is whether the contempt had been waived so as to prevent the plaintiff from holding Gompertz in custody for the costs of more than the last proceedings; and it appears to me that it has. Therefore let the Master tax the plaintiff's costs of the defendant's contempt in not putting in his answer, and upon those costs, together with the costs of the demurrer and exceptions (which have been already taxed), and the costs of this application being deposited by the defendant with his clerk in Court, let the exceptions be set down for argument. The plaintiff is not entitled, on this proceeding, to any costs in respect of the proceedings in the King's Bench, or in the cause of *Gompertz* v. *Best*; and with respect to those to which he is

entitled, let him deliver his bill of costs within three days. The motion as to close custody must stand over till it is seen whether the answer is sufficient or not.

Order accordingly.

REYMER *v.* GUNSTONE. July 11th, 1837.—Where a defendant had been in contempt for want of an answer, through the mistake of the Warden of the Fleet in refusing to take the answer, the Court ordered that the costs of the contempt should be costs in the cause; and, on failure of the plaintiff to take exceptions to the answer within a limited time, that the defendant should be discharged.

Mr. Jeremy, for the defendant, moved that an order which the plaintiff had obtained in May last, for taking the defendant's answer, might be discharged, the defendant having put in an answer. In support of the motion, he read the defendant's affidavit, stating that the papers containing materials for his answer had been, in the first instance, detained by counsel; that when the answer was prepared, he applied to the Warden of the Fleet to take it, but that the Warden refused to do so, alleging that he had no authority; that after this had occurred, the order in question was obtained. Jeremy then stated the nature of the case as it appeared on the record, with a view **[585]** to shew that the circumstances, as there disclosed, were favourable to the defendant; and he contended that under the stat. 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, rule 17, the Court had a discretionary power in regard to the costs of the contempt, and that in this instance they ought to be made costs in the cause. The affidavit stated that the defendant was unable to pay the costs.

Mr. Stevens, contrà, said that the order now sought for could only be made on payment, by the defendant, of the costs of the contempt, and on his making it appear to the Court that the answer was sufficient. In this case it appeared, from the copy that had been served on the plaintiff's solicitor, that the answer was insufficient.

ALDERSON, B. The defendant says that he would have put in his answer, but for the mistake of the Warden of the Fleet. Under all these circumstances, I think that the costs should be costs in the cause. Upon the other point I am sorry to be obliged to make a precedent against the defendant; but it is a useful rule that the party against whom a bill is taken pro confesso should inform the other party what the nature of his answer is. The particular inconvenience in this case is not so bad as the general inconvenience that would result from a contrary practice. The plaintiff, therefore, must have time to take exceptions to the answer, but if he does not do so within a fortnight, let the party be discharged. As the Court will not sit at that time, the Master will undertake, in this particular case, to look into the exceptions.

Order accordingly.

[586] STORY *v.* JOHNSON. June 26th, July 5th, 1837.—Where one of several tenants in common has conveyed away his share of the estate, in distinct portions, to different individuals, upon a bill subsequently filed for a partition of the whole estate, the Court, in making its decree, will have regard not merely to the legal rights of the original tenants in common, but to the equitable rights of all parties actually interested in the estate; it will, therefore, carry the object of the bill into effect, by directing a distinct partition of each of the several portions of the estate in which the alienees of the quondam tenant in common respectively have an interest. Therefore, where A., B., and C. were tenants in common, in undivided thirds, of an estate comprising Blackacre and Whiteacre, and C. conveyed his interest in Blackacre to D., and his interest in Whiteacre to E.; upon a bill filed by A. and B., for a partition of the whole estate, the Court (reversing a former decree, which had sanctioned a different mode of partition) directed that Blackacre should be divided into three parts, and each part should be conveyed to A., B., and D. respectively; and that Whiteacre should be divided into three parts, and each part should be conveyed to A., B., and E. respectively.—A court of equity, in decreeing a partition, does not act ministerially, and in obedience to the call of those parties who have a right to the partition, but founds itself upon the general jurisdiction given to courts of equity. It will, therefore, on a bill of partition, adjust the equitable rights of all the parties interested in the estate; and will, for that purpose, give special instructions to the commissioners of

partition, and even, in cases of necessity, nominate the commissioners.—A court of equity, in decreeing partition, will have regard to the provisions of the statute 8 & 9 Will. 3, c. 31, s. 4.—Tenant for life, with remainder to A., B., and C., as tenants in common in fee, granted a lease of the estate to D. for twenty-one years, which lease was confirmed by A. and C.: Held, that the lease was good as against A. and C., and that B. could not impeach it in a suit for partition in which he was co-plaintiff with A.—Where a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease.—Facts which have occurred since the decree, and which, therefore, were not comprehended in the pleadings, may be proper ground for a rehearing, if they shew error in the decree. —After leave has been given for a rehearing in the Court of Exchequer, it is unnecessary for the petitioner to state in his petition of rehearing in what respect he conceives the decree to be erroneous, or what is the nature of the decree he seeks.

[See 4 Y. & C. Ex. 580.]

In pursuance of the order made in this cause on the 19th of November, 1835,(*a*)[1] a commission of partition, in the form of the former commission, was directed to six new commissioners, who were chosen in the same manner as the former commissioners, and also approved of by the Master. Of those commissioners, the four who were chosen by the plaintiffs made their return, or certificate, dated the 9th of April, 1836, whereby it appeared that, having divided the whole estate into three equal parts, they allotted that part which comprised the George Inn to William Standard Jones. The two commissioners chosen by the defendants having dissented from this certificate, and it appearing to the Court that this certificate was in effect the same as the former, the Court on the 24th of June, 1836, ordered it to be quashed. On the making **[587]** of this order, the Lord Chief Baron, after hearing the arguments of counsel, said that he adhered entirely to the observations which he had made on the former occasion, thinking that those observations, as reported, were not in the slightest degree stronger than were warranted by the circumstances of the case.

On the 15th of July, 1836, the plaintiffs moved for a new commission, but that motion was ordered to stand over, in order to give the defendants an opportunity of having the cause reheard for the purpose of varying the decree.

On the 16th December, 1836, the Court, upon the petition of the defendant Johnson, and after hearing the arguments of counsel,(*a*)[2] ordered that notwithstanding the decree made on the original hearing had been made upwards of six months, the petitioner should be at liberty to present a petition to have the cause set down for hearing, for the purpose of having the decree altered or varied.

In consequence of this order, the defendant Johnson presented his petition for the purposes mentioned in the order. The petition, which was signed by counsel, after stating the various proceedings in the suit, and setting forth at length the decree and the Master's report consequent thereon, stated that the petitioner felt himself aggrieved by the decree, but assigned no reason for his complaint, nor suggested in what particulars the decree was erroneous.

The cause coming on for rehearing,

Mr. Temple and Mr. Phillimore objected that the order for the rehearing had been obtained ex parte, and said **[588]** that, although the defendant had obtained leave to present a petition of rehearing, it did not therefore follow that he was entitled to have the cause reheard. [The Lord Chief Baron. You had an opportunity of making your objections when the petition for leave to rehear was argued. Is there any instance of opposition being made to the ordinary petition of rehearing signed by counsel?] *Nerinson* v. *Stables* (4 Russ. 210) is an authority to shew that such opposition may be made. Here there are two grounds of opposition. First, the petition

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(*a*)[1] See ante, vol. 1, p. 538.

(*a*)[2] On the argument of this petition, the following cases were cited on behalf of the petitioner:—*Fox* v. *Bardwell*, 2 Wood, 338; *Mills* v. *Banks*, 3 P. W. 1; *Buck* v. *Fawcett*, 3 P. W. 242; *M'Lachlan* v. *Rob*, 1 Y. & C. 267; *Halford* v. *Halford*, 1 Y. & C. 270; *Watson* v. *Duke of Northumberland*, 11 Ves. 153.

does not state what decree it is that the petitioner requires, but only that he is aggrieved by the former decree and wants a new one. The petitioner ought to have given notice of the nature of his objection: Fow. Prac. vol. 2, p. 200. The other objection is that the petitioner states new facts which are not in the pleadings, as a reason for rehearing the cause. After stating the bill, answer, and decree, it goes on to state the proceedings of the commissioners, and that they came to such and such conclusions. It then alleges that those conclusions are wrong, and that, in order to avoid the effect of them, the Court ought to rehear the cause. But *Nevinson* v. *Stables* decides that the cause ought only to be reheard on the pleadings. Besides, the petition states an acquiescence under the decree. The party has joined in the commission and named commissioners. There has likewise been a reference to the Master to charge the defendant with the payment of money. After acquiescence a rehearing will not be permitted: *Macartney* v. *Blackwood* (Ridgw. Knapp & Sch. 602), *Wood* v. *Griffith* (1 Mer. 35; 19 Ves. 550). [The Lord Chief Baron. In the party's attempt to act under the decree he may discover the error in it.]

Mr. Simpkinson, for the petitioner, contrà. Upon the point of acquiescence there are much stronger cases than **[589]** the present; for instance, *Brophy* v. *Holmes* (2 Molloy, 1). As to the other objection, notwithstanding the dictum in Fowler, it is not the practice in the Exchequer, upon a rehearing or appeal from the whole decree, for the appellant to state what decree he thinks the Court ought to direct. The practice in this Court is similar to that in the House of Lords, where the appellant gives no reason for his appeal.

Mr. Temple, in reply, cited Smith, Chan. Pr. vol. 2, p. 44, and 2 Eq. Abr. title Appeals, and contended that upon petition for leave to present an appeal in the House of Lords, the party is bound to state his reasons. [The Lord Chief Baron. He is not bound to do so. He may bring his appeal something in the same way as he would bring a writ of error at law, alleging simply that the decree was for the plaintiff, whereas it ought to have been for the defendant. But there is no general rule on the subject. In the *Douglas* cause, before Lord Thurlow, various minute reasons were given, forming almost a volume.]

THE LORD CHIEF BARON. I am of opinion that as the cause now stands, the plaintiff can raise no other objection to the rehearing than he might have done had the defendant presented his petition within six months after the cause was originally heard. The whole effect of the late proceedings has been to put the cause in that situation; and, therefore, any other objections than such as might have been urged within that period come too late.

Two objections, however, have been made which it is competent for the party to take at the present stage of the proceedings. One of them is that the petition embraces facts which were not before the Judge who pro-**[590]**-nounced the decree. If these facts existed before the decree, and there was otherwise no error in the decree, they could not be ground for rehearing; and the petition would be dismissed, because the Court could not act upon such facts. But that observation does not apply to facts which have occurred after the decree, or shew error in the decree. Suppose, after ten years spent in the Master's Office, the parties find themselves aggrieved by some erroneous practice, originating from an error in the decree. In that respect a statement of subsequent facts may be of great use upon a petition for rehearing. In such case complaint may reasonably arise out of facts which may have signified nothing to the Judge who determined the cause at the original hearing. I do not find it suggested that any fact here stated occurred before the decree, or might have been used as a ground for the decree. That being so, I think this case is not within the authorities cited by Mr. Temple.

Then as to the objection that the petition states no reasons for the rehearing. Certainly, if it be the practice for the party seeking a rehearing, if he means to review the whole decree and alleges error in all parts, to set forth what decree he conceives he ought to have—or, supposing the party to object to particular parts only of the decree, if it be the practice for him to state in what respect he conceives those parts to be erroneous, then this petition does not comply with that practice. If, on the other hand, the practice is not as I have just stated it, the petition is correct. Upon that I shall make no final order till I find from the books what the practice is; though, I confess, I should be glad if the gentlemen on both sides would agree upon it rather than leave it to my investigation.

I have consulted Lord Lyndhurst upon the subject of the decree, and he entirely coincides with me in the opinion that it was erroneous in this respect—that Johnson **[591]** might by means of it be compelled to take that part of the property in which he has no interest. In fact the parties are placed in that situation that, upon a division of the property into three parts, they might all have parts in which at present they have no interest. I throw this out for the consideration of the plaintiffs' counsel.

His Lordship having pronounced this judgment, the plaintiffs' counsel agreed to waive the objection which had been made as to the form of the petition; but as the plaintiff, Story, persisted in his opposition to the proposed variation in the decree, the cause was now reheard on the merits. The principal facts of the case having been already stated (ante, vol. 1, p. 538), it will be unnecessary to add more than a few particulars.

The purchase made by the plaintiff, Story, of the share of Edward Jones in the property in dispute, was effected by means of certain indentures dated the 9th of April, 1824, whereby that share was conveyed to George Raby and his heirs, in trust, for securing an annuity of 53l. to John Davies, and subject thereto in trust for Story in fee; and it was declared that the annuity was secured to John Davies, in trust for Edward Jones and Elizabeth his wife, for their joint lives, and the life of the survivor of them, and, after the decease of the survivor, in trust for Richard Jones and his assigns for his life.

The purchases made by the defendants, Joseph Johnson and James Gardner, of Richard Jones's share of the property, were effected by separate conveyances to each of those parties, by indentures of lease and release, dated the 26th and 27th of June, 1826; the conveyance to Johnson comprising Richard Jones's share in the George Inn, and nine acres of land adjoining, and that to Gardner comprising Jones's share of the remainder of the property. **[592]** It appeared, however, that the contract for sale had originally been made with Johnson alone, who acted as agent for Gardner as to the purchase made by the latter.

The plaintiffs in the original bill were John Story, Edward Jones and Elizabeth his wife, George Raby, William Standard Jones, and Richard Jones; the defendants were Joseph Johnson, James Gardner, and Joseph Davies. The bill prayed a partition of the Ifield estate, an account of the rents and profits received by the defendants, Johnson and Gardner, since the death of Richard Hall, and that, in case it should appear that the last named defendants had held in their own occupation any parts of the estates beyond the respective shares which should be allotted to them, then that it might be referred to the Master to fix a fair occupation rent on the same, &c.

The defendant Johnson, by his answer, insisted that, in addition to his one-third share of the fee simple in the George Inn, with the appurtenances which he had acquired from Richard Jones, he had also a present interest for twenty-one years in the entirety of that part of the property, by virtue of a lease made to him thereof by Richard Hall in November, 1820; which lease he alleged to have been confirmed by all the remainder-men. It appeared in evidence that a memorandum of confirmation had been endorsed on the lease, and signed by Edward Jones, who was then of age, and by his brothers, who were then minors; and that Edward Jones and his father had, at the same time, executed a bond to the defendant, for securing the ratification of this instrument by the minors when they came of age. The lease was afterwards virtually confirmed by Richard Jones, on coming of age, by the sale of his share of the property to Johnson; but it did not appear to have been confirmed by William Standard Jones, unless the mortgage which he executed to Johnson of his one-third share amounted to a confirmation.

The defendant, Gardner, by his answer, relied in like **[593]** manner on the leases and confirmations of leases of the parts of the property in which he was in the possession.

In January, 1831, the defendant, James Gardner, died, leaving his daughter, Elizabeth Jane, the wife of Henry Arnett, his heiress-at-law, and having by his will appointed his wife, Sarah Gardner, and also his daughter and her husband, to be the executors of his will. The suit was accordingly revived against those persons.

In February, 1832, the defendant, Joseph Johnson, died, having by his will given and devised all his undivided third share in his freehold estate called the George Inn at Ifield, with the appurtenances, and also the lease under which he held the entirety of those premises, to his son Joseph Johnson, his heirs, executors, administrators, and

assigns; and having appointed Thomas Smith and Nathaniel Miller his executors. The suit was accordingly revived against Johnson the son, Smith, and Miller.

In the last mentioned bill of revivor, it was suggested by the plaintiffs that, notwithstanding the expressions in the will of the testator, Joseph Johnson, he was not, at the time of his death, the holder of any good and valid lease of any part of the premises, and therefore that the devise contained in his will respecting such lease was nugatory, invalid, and of none effect. The bill then, after praying revivor in the usual manner, prayed that, if necessary, the said lease, or alleged lease, might be declared null and void.

The present defendants insisted on the validity of the leases and confirmations made to the original defendants, Johnson and Gardner.

By the decree made on the hearing of this cause on the 5th of August, 1833, it was ordered that a commission of partition should issue in manner and form as before stated (ante, vol. 1, p. 540); and it was ordered that the premises to be **[594]** allotted to the plaintiff, Story, should be conveyed to him in fee, subject to the trusts of the indentures of the 9th of April, 1824; and that the premises to be allotted to William Standard Jones should be conveyed to the defendants, Smith and Miller, and their heirs, by way of mortgage, for securing what should remain due on the mortgage made by William Jones to Johnson the father, but subject to redemption by W. S. Jones, his executors, &c.; or, in case the mortgage should be paid before the time of such allotment or conveyance of the premises, then to the use of W. S. Jones in fee. And it was further ordered that the premises so to be allotted to the defendants, Joseph Johnson, Sarah Gardner, Henry Arnett, and Elizabeth Jane, his wife, should be conveyed to them in fee simple, in such parts and proportions, and in such manner, as they might direct. And it was further ordered that the two several leases, dated respectively the 3rd of November, 1820, from Richard Hall, the son, to the defendants, Joseph Johnson and James Gardner, and also the lease from Richard Hall, the son, to the defendant, James Gardner, dated 29th of May, 1819, were not binding as to the third part or share of the plaintiff, William Standard Jones, of and in the estates and premises in the said pleadings mentioned. And it was thereby referred to the Master to take an account of all the rents and profits from the death of Richard Hall, in the said pleadings named, of the messuages and premises, with the appurtenances, called the George Inn, and of all and singular other the messuages or tenements, lands, and premises, contained in the said indenture of lease, bearing date, &c. (the lease to Johnson). And it was further ordered that the defendants, Johnson, Smith, and Miller, should be charged with a fair occupation rent, from the decease of the said Richard Hall, in respect of such messuages or tenements, lands, and premises; and it was thereby referred to the Master to take an account of the rents and profits, from the death **[595]** of the said Richard Hall, of all and singular the messuages and premises contained in the two several indentures of lease, bearing date, &c. (the leases to Gardner); and that the defendants, Sarah Gardner, Henry Arnett, and Elizabeth his wife, be charged with a fair occupation rent, from the decease of the said Richard Hall, in respect of such messuages and premises, &c.

The main object of the defendants, in seeking to vary the decree, was to have those parts of it altered which related to the appointment of the commissioners and the division of the property, and which declared the leases to be void as against William Standard Jones.

Mr. Temple and Mr. Phillimore, for the plaintiffs, in support of the decree. The purchase made by Johnson was legally of the whole of Richard Jones's share, though he afterwards agreed to divide that share with Gardner. By the terms of the contract between Johnson and Richard Jones, the latter was to convey to Johnson, or as he should direct. His directing a portion of the property to be conveyed to Gardner does not vary the nature of the original contract, which was solely between Johnson and Richard Jones. Therefore, for the purposes of this suit, Johnson must be considered as having purchased the entire share of Richard Jones.

With respect to the leases, it is clear that they were invalid in their inception, having been made by a party who was only tenant for life; but it is contended that they are rendered valid by the memorandum of confirmation. [The Lord Chief Baron. Against Edward Jones only, not against the minors.] Unless all have confirmed, the leases are void. The parties being tenants in common, no lease of the whole, by one

only, would be good against any. One tenant in common cannot grant a lease of any part. It must be a joint lease by all or none. No man can have a right of possession against a tenant in common, who has **[596]** not executed a lease. [The Lord Chief Baron. A tenant in common may lease his undivided part.] That would only entitle the lessee to rents and profits, but not to possession. [The Lord Chief Baron. It places the lessee for the time being in the same situation as the tenant in common himself.] A lease is a demise of a right of possession; and one tenant in common cannot convey a right of exclusive possession. Here, the lease purports to be of the whole estate under a reserved rent recoverable upon the whole. Except it is a good lease of the whole, it is a good lease of nothing. It will not operate as a good lease of an undivided third part. Upon the covenant to pay rent you could not bring an action for a portion. [The Lord Chief Baron. It is clear that a court of equity would compel the execution of a lease of one third in that case.] At any rate, the Court cannot make a declaration as to the validity of the lease in a bill of partition. If the bill had been to set aside the lease, it would have been multifarious.

It is asked to make a special decree. But in case of partition, the Court has less discretion than usual. It has a mere concurrent jurisdiction with a court of law as to a writ of partition. The Court is, what the Chancellor is on the common law partition, namely, the issuer of the writ. The court of equity issues it under its seal. The form of the writ is matter of notoriety. If Lord Lyndhurst's decree is varied, it will be a case of the first impression. There is no case in which the form of the commission, or of the order for the commission, has ever been varied. When the title is proved, as it is in this case, the Court declares the plaintiff entitled to a commission. Upon a writ of partition at law, when the party had proved his right, the Court ordered the jury to be summoned. The duty of the Court in ordering it, and the duty of the jury, were distinct. So the duty of a court of equity in ordering the commission, and the duty of the commissioners, are **[597]** distinct. If the matter were within the cognizance of the Court, commissioners would not have been appointed, but there would have been a reference to the Master. [The Lord Chief Baron. That may be an argument against the Court reviewing the proceedings of the commissioners, but it is difficult to see how it applies here.] We contend that there is no instance in which the Court has given any specific direction as to the writ of partition. The Court can only make partition of the original estate in common. To hold otherwise would be to say that the plaintiffs shall not have two-thirds of the entire estate, but two-thirds of a part here and two-thirds of a part there. That would be to let in the mischiefs contemplated by the statute (31 Hen. VIII. c. 1). The Court, therefore, will make division of the property without reference to existing circumstances, upon the ground that one tenant in common cannot create a particular interest in the property, either for himself or any other party, to the detriment of the other tenants in common: *Warner* v. *Baynes* (Amb. 589), *Low* v. *Franks* (1 Molloy, 137), *Swan* v. *Swan* (8 Price, 518), Seton on Decrees, 488.

Mr. Simpkinson and Mr. Bichner, for the defendants, Johnson, and the executors of Johnson the father. The first question is whether a declaration can be made against the validity of the leases in a suit framed like the present. The principal plaintiffs are Story, who purchased Edward Jones's share after the confirmation; Edward Jones, who has a remaining interest in consequence of the annuity; William S. Jones, who quoad the confirmation is a stranger; and Richard Jones, the remaining tenant in common, and who sold his interest in the premises to Johnson and Gardner. Now, it is impossible to say that Edward Jones could impeach these leases. In the absence of any fraud, and he alleges no fraud against the defendants, he must be **[598]** bound by his own deeds. If, then, as against him the leases are good, how can they be impeached in a suit in which he is a co-plaintiff? The plaintiffs are married together for the purposes of the suit. An instrument or act which is binding on one is binding on all. No two persons can stand together as plaintiffs, the one admitting and the other denying the validity of a deed: *Wentworth* v. *Turner* (3 Ves. 3), *Hunter* v. *Richardson* (6 Madd. 89), *Cholmondeley* v. *Clifton* (Turn. & Russ. 107), *Jones* v. *Garcia del Rio* (ibid. 297), *Bill* v. *Cureton* (2 M. & K. 503). And the general rule, that the plaintiffs must have a community of interest, has been settled by a variety of cases, ending with *Glyn* v. *Soares* (3 M. & K. 450). It is obvious, therefore, that so much of the decree as declares these leases void against any party is erroneous. *Whaley* v. *Dawson* (2 Sch. & L. 367).

Again, the decree is erroneous in directing that the whole property shall be divided into thirds. It is said that the conveyances to Johnson and Gardner only operated as a conveyance of an undivided third of the whole. The proposition is, in truth, that a man having an undivided third part in a property held in common, cannot convey a portion of it to any person. Is it meant to be contended that before the statute of Henry 8th one tenant in common could not convey in this manner? Yet that statute does not alter the law, but only gives power to a tenant in common, or joint-tenant, to compel a partition. The conveyance of one-third in different portions to different parties does not prevent the other tenants in common from holding as they did before. They would hold the George Inn in common with Johnson, and the rest of the property with Gardner. Your Lordship, on some former proceedings in this suit, put a question which decides the whole case. **[599]** Suppose several persons to hold lands in Yorkshire and in Middlesex, under one title, as tenants in common, could not one of the tenants in common deal with his interest in each county as he thought fit? Could it be contended that, having sold his interest in one county, the purchaser might afterwards, on a partition, be compelled to take an interest in the other county? Such a proposition is not only contrary to justice, but at variance with the authorities. In a case mentioned by Viner (*Anon.*, Brownl. 157; 16 Viner, Abr., Partition (S.), pl. 14), thirteen men having joined in the purchase of a manor, the conveyance was of a moiety to one of them in fee, and the other moiety to the other twelve in fee: the twelve made a feoffment to J. S. of twelve several tenements, and J. S. made twelve several feoffments to those twelve: now the thirteenth man who had the other moiety, brought one writ of partition against them all, pretending that they held insimul et pro indiviso; and by the opinion of the whole Court it would not lie, but he ought to have brought several writs. Other authorities incidentally illustrate the same proposition: Co. Litt. 186 b., 193 b. If one joint-tenant can bind his companion surviving him, by a lease for years herbagii terræ, it follows a fortiori that he can grant a portion of the estate itself. The inconvenience arising to the companion cannot be greater in the one case than in the other.

Upon these authorities it is submitted that the decree directing the property to be divided into thirds, and directing mutual conveyances of the several thirds to the respective parties, is erroneous. Certainly, if the decree be acted upon in this respect, the effect will be to merge the interest of Johnson in that of W. S. Jones and Story. It is said that a partition in equity is a matter of right, and that the Court has no power to direct a partition in any other than the ordinary form. There is no **[600]** authority, however, for that proposition; on the contrary, it is clear, from several cases, that the Court, in directing a partition, will have regard to all equitable circumstances, and will give special directions to the commissioners, or even name the commissioners. *Swan* v. *Swan* (8 Price, 518), which has been cited for the plaintiffs, is rather an authority against them. What was the result of that case? No commission was granted. The tenant in common was in possession, and had laid out money on the premises; and although it was asserted that a commission of partition was a matter of right, and the Court had nothing to do but to issue the writ, yet the Court directed an inquiry as to the nature and value of the improvements. Again, in the case of *Lord Clarendon* v. *Hornby* (1 P. W. 446), where there were two parties, one having two-thirds, and the other one-third of the estate, Lord Macclesfield directed that the party having the two-thirds should have the house and park, making compensation to the other party.

There is another objection to the decree, namely, as to the mode of appointing the commissioners. The effect of the decree, in this respect, is to give a majority of the commissioners to Story and W. S. Jones. The commission should be directed to persons to be therein named, and the order should be that each party do join in striking commissioners: *Smith* v. *Ilderton*,(c) *Watson* v. *Duke of Northumberland* (11 Ves. 163), Smith, Chan. Pr. 860).

Mr. Lane, for the defendants, the representatives of Gardner, was proceeding to address the Court, when the plaintiffs' counsel objected that he could not be heard, inasmuch as the parties for whom he appeared had not joined in the petition of rehearing.

(c) In Ch. not reported.

The Lord Chief Baron. In common justice he has [601] a right to be heard upon the whole of the matters that affect his clients.

Lane then proceeded with his argument, addressing himself principally to the evidence in the cause.

Mr. Temple, in reply. The objection as to misjoinder of the plaintiffs only holds on demurrer; not after years have elapsed and a decree has been had. It is, in fact, an objection for multifariousness; and that can only be disposed of by demurrer. The question as to the validity of the leases might be decided with proper materials, but the leases cannot be declared valid against Edward Jones without knowledge of the circumstances under which they were made. [The Lord Chief Baron. The bill suggests no fraud upon Edward Jones for the purpose of obtaining the confirmation.] It was dealing with an expectancy, and the defendants ought to shew that the confirmation was founded on good consideration. If the lease is void at law it cannot be set up in equity. Upon the main objection, as to the rights of division, it has never yet been heard that a tenant in common, who has done nothing to embarrass the estate, coming here for a partition, is to have his bill dismissed because somebody else has embrangled his part of the estate. No decree for partition has ever yet been made in which the estates created by the partition have not been made to correspond with the estates created by the original trust. Here, the estate having been an estate in common in thirds, the partition must be in thirds. Originally partition could only have been had in respect of the estates of parceners, who were a given set of persons. Richard Jones could not make a tenancy in common different from that made by the testator's will; and his assignees take with knowledge of the will. How could he place his assignees in a better position than himself? In *Clarendon* v. *Hornby* Lord Macclesfield re-[602]-commended a particular mode of division, but he did not say that he could enforce his recommendation by a decree, nor was the decree in that case made with any such recommendation. Lord Eldon felt the same difficulty in *Watson* v. *The Duke of Northumberland*, and probably what was there done was done by consent. The case in Brownlow is at variance with all the other authorities, a circumstance which is noticed in Allnatt on Partition. The right of partition cannot be affected by the sub-contract of a tenant in common.

July 5th.—The Lord Chief Baron. This is a rehearing of a cause that was the subject of a decree of Lord Lyndhurst, upon a bill of partition of certain lands in the county of Sussex, comprising, amongst other premises, an inn or public-house and nine acres of land, placed under peculiar circumstances. It appears, by the undisputed facts of the case, as stated in the bill, admitted by the answer, and proved by the evidence, that Richard Hall was, under the will of a relation, seized as tenant in tail,(*a*) of the premises in question, with remainder in fee to Edward Jones, William Standard Jones, and Richard Jones, as tenants in common. The premises consisted of a certain estate in the parish of Ifield, in the county of Sussex, and of an inn called the George Inn, at Crawley, in the same parish. It appeared that Mr. Hall, during his lifetime, granted a lease of the George Inn and some cottages, with about nine acres of land, to a person of the name of Johnson, the original defendant in this cause, for twenty-one years; and that he also granted leases, one or more, to a person of the name of Gardner, of certain other premises forming part of the estate in question, for the same term. In 1821, during the lifetime of Hall, the tenant in tail, [603] Edward Jones, who was then of age, and William Standard Jones, joined in signing upon the back of those leases a confirmation of them; and inasmuch as William Standard Jones was under age, and Richard Jones was also but sixteen years of age, Edward Jones, the elder brother, and his father, entered into a bond of indemnity to Johnson and to Gardner in the sum of 500*l.* for the purpose of securing to them a confirmation by William Standard Jones when he should become of age, he being then about twenty, and by Richard Jones. This confirmation was made for a valuable consideration; it is indorsed upon the leases, which is the act of confirmation, and it is expressed to have been made for 90*l.*; but I think it was stated in the answer, or in some of the proceedings, that only 60*l.* had been paid, and I presume, from that circumstance that the sum was divided into three parts, and that Edward Jones obtained his part, and William Standard Jones, who was twenty years of age, probably had his, and that the

(*a*) At the original hearing it was made a question whether Richard Hall was tenant for life or in tail, but for the purposes of the rehearing it was immaterial.

other part was reserved until the younger man came of age. After this confirmation Hall died, and after the death of Hall, it appears that Mr. Story, one of the plaintiffs, purchased the interest of Edward Jones for an annuity of 53l. a year for the life of Edward Jones. It appears also that Mr. Johnson purchased of Richard Jones when he came of age, all his interest in the George Inn, the cottages and the nine acres of land; and about the same time Gardner purchased the interest of Richard Jones in all the remaining portion of his one-third. Those purchases were made, I think, altogether for a sum approaching nearly to 2000l. It seems also that in the year 1829, William Standard Jones borrowed of Johnson, upon mortgage of his one-third undivided share, the sum of 600l. which still remains unpaid. That being the state of the parties, a bill is filed by Story and the Joneses for a partition. The facts are stated in the answers, and proved in the evidence, as I have just now stated; and **[604]** although when the case was reheard before me, some question was made about the purchase of the interest of Johnson, I am surprised, on looking at the bill and the answers, to find that the very facts that are in controversy are both stated in the bill and in the answers, and proved by the evidence. It is perfectly clear from the evidence that at the time the bill was filed the position of the parties was this—that Edward Jones, or rather Story, standing in his shoes, and W. S. Jones and Johnson, were tenants in common of the George Inn, of the cottages, and nine acres of land; and that Story, as representing Edward Jones, W. S. Jones, and Gardner were tenants in common of the remaining part of the original estate, in which remaining part Johnson had no scintilla of interest, any more than Gardner had in the public-house called the George Inn, the cottages, and the nine acres of land.

In this state of things a bill for a partition is filed by Story and Edward Jones, and William Standard Jones, against Johnson and Gardner. Now, upon the facts stated in the answer, and which I have adverted to, it might be a very considerable question whether that bill could have been sustained, as it is perfectly clear that at common law, had the parties been disposed to proceed at common law, upon a writ of partition there must have been two writs of partition, inasmuch as the parties were not all interested in the same subject-matter of the partition. I take that to be perfectly clear, not only upon principle, but decided cases. It might, therefore, have been at least a question, whether or not such a bill could be sustained, had the objection been made; but the objection was not made, and perhaps very properly; because as all parties were willing to come to a partition, it would have been only an additional expense to have put them to file another bill. It is certainly clear that if Johnson had sought a partition of his interest, he could not have made Gardner a party to the bill, because Gardner had no earthly interest in the only **[605]** subject-matter in which Johnson was interested; and in like manner, if Gardner had sought a partition, he could not have made Johnson a party to the bill. But however, as the case is reversed and the parties who filed the bill were themselves all interested, although the defendants were not all interested in the same subject-matter, the objection could not be taken in limine; and as it was not argued at any period of the case, I consider it as passed over, and I only advert to it now for the purpose of illustrating the principle on which I think I am bound to decide this case.

Now, the first question is how to deal with these leases. I find that in the decree made by Lord Lyndhurst, he does not take any notice of the lease granted to Johnson or of the confirmation of that lease by Edward Jones, but that he does take notice of the interest in that lease which it might be supposed William Standard Jones has; because, as against him, he declares that the lease is not binding. That arises out of the bill of revivor and supplement, in which the two plaintiffs call upon the Court to set aside, if necessary, the lease that had been stated in Johnson's and Gardner's answers. Now, looking with some anxiety into the authority of the Court in this matter, and to the claims of the parties, it appears to me that the statute 8 & 9 Will. 3, c. 31, obliges me to take notice of that lease; and that the mode adopted by a court of equity for settling partitions of joint estates must follow the principle and the rules of law; otherwise, that the court of equity would do great injustice. Now, in the 4th section of that statute there is an express provision, "in case such partitions be made." That statute was made for the purpose of giving further facilities to parties entitled to writs of partition at law; and it enacts that "in case such partition be made, returned, and filed, he or they that were tenant or tenants of any of the said messuages or lands, tenements, and hereditaments, or any part or parts thereof, **[606]**

before they were divided, shall be tenant or tenants for such part set out severally to the respective landlords or owners thereof, by and under the same conditions, rents, covenants, and reservations, where they are or shall be so divided; and the landlords and owners of the several parts and purparts so divided and allotted as aforesaid shall warrant and make good unto the respective tenants the said several parts severally after such partition, as they are or were bound to do by any copies, leases or grants of their respective parts before any partition made; and in case any demandant be tenant in actual possession to the tenant to the action for his part and proportion, or any part thereof, in the messuages, lands, tenements, and hereditaments to be divided by virtue of a writ of partition as aforesaid, for any term of life, lives, or years, or uncertain interest, the said tenant shall stand and be possessed of the said purparts and proportions for the like term, and under the same conditions and covenants when it is set out severally in pursuance of this or any other act, statute, or law to that purpose." Now it appears to me that I could not with propriety make an order for a partition of these estates, without reference to the interest of the parties in this lease, which interest is brought before me by the proceedings in the case; and therefore it becomes important that I should state whether the lease so granted to Johnson is a subsisting lease against all or any of the parties. Now it appears to me that it is a good lease as against Story, because Story represents Edward Jones, and Edward Jones gave a confirmation of this lease, which was clearly binding at law, for a valuable consideration, and which he could under no circumstances retract; because it has been settled by decided cases that if tenant for life grant a lease for a certain number of years, and the tenant in remainder in fee confirm that lease during the life of the tenant for life, such confirmation is binding on the tenant in fee.

[607] My opinion, therefore, is that Edward Jones having received a consideration for the confirmation of this lease, and having confirmed it, Story, who purchased his interest after that confirmation, is bound by that lease. The same may be said of Gardner as to his portion, though a distinct portion, of the premises. With respect to W. S. Jones, there is nothing to shew that he was bound by the lease; but I think I am not at liberty to declare, by any proceeding in this case, that, as against him, the lease is void; and for this reason; that the prayer upon that subject is introduced into a bill filed by Edward Jones and W. S. Jones; and it appears to me that I could not have entertained such a bill had its only object been to set aside that lease. Suppose this had been an original instead of a supplemental bill: the parties would then have appeared as plaintiffs, jointly praying to set aside a lease which had been confirmed by one of them, without the least suggestion of any fraud or imposition on him when he confirmed it. Under such circumstances he clearly could not join in a prayer with another person who had an inconsistent interest, praying that the interest of that person should be fortified by his joining in the prayer; and the bill would have been dismissed. For these reasons, it seems to me that I cannot make this supplemental bill the ground of a declaration that the lease in question is void; but I say nothing about it, because nothing appears to shew that William Standard Jones confirmed it. There is, indeed, a suggestion in the answers of Johnson and Gardner—in that of Johnson especially—that W. S. Jones confirmed it by the mortgage which he took from Johnson; but I do not recollect that the mortgage was read in evidence, or, at least, if it was, that it contained any allusion to the lease, so as to shew that the mortgage was granted subject to the lease. If it had been so granted, it would doubtless have been a confirmation of the lease; but, in the absence of evidence upon that point, I take it for granted that **[608]** there is nothing contained in the mortgage which is binding in this respect on the interest of William Standard Jones.

Then how stands the case between the parties? At the moment I am called upon to make the decree, the case stands thus: that Story and William Standard Jones, and Johnson, are tenants in common each of an undivided third part of the George Inn, and certain cottages and nine acres of land, comprised in the lease to Johnson; that Edward Story and William Standard Jones, and Gardner, or they who represent Gardner, are tenants in common, in undivided thirds, of the remaining part of the estate; that Johnson is not only, under his title from Richard Jones, the owner in fee of one undivided third part of the George Inn and the nine acres of land, but that he is also tenant, for the remainder of the term unexpired, of another third part, namely, that which belonged to Edward Jones; the remaining third part belonging

to William Standard Jones. It appears, therefore, upon this part of the case, that Johnson ought to account to Story or Edward Jones for one third part of the rent reserved by that lease since the time of Hall's death, and that he ought to account to William Standard Jones for one third part of the fair occupation rent, to be determined by the Master. That, I understand, the Master has determined: and I presume the parties would not wish that the decree should be altered in any of those parts, or that any further expense should be incurred with respect to them, which I do not propose to alter by my present decree. The same may be said, mutatis mutandis, of Gardner and his lease, because his was confirmed in the same manner.

Again, the mortgage which is proved to have been granted by William Standard Jones must be considered as operating upon all his undivided third part in both parts of the estate; Johnson, therefore, would be entitled as mortgagee in possession as far as the house and the nine acres of **[609]** land are concerned, to retain that until the mortgage be satisfied, and he also would be entitled to have his mortgage secured upon the remainder of the share assigned to William Standard Jones. I think a provision is made in the decree of my Lord Lyndhurst for that purpose, because the parties are required to convey to the executors of the deceased Johnson the interest of William Standard Jones, for the purpose of satisfying that mortgage. That, of course, would remain as it stands, with the addition that a third part of the house conveyed to William Standard Jones, his separate share, must also be subject to the mortgage.

Then, the alterations that I propose to make in the decree are these: that a commission should issue, directed to two commissioners to be named by the parties (I confine the number to two for the purpose of saving expense and securing impartiality, for we know very well that six may be as irregular in their verdict as two), that the parties shall all agree in naming the commissioners, and in case they should not agree, then that it be referred to the Master to appoint two commissioners of his own authority (for which I will state my reasons presently); that those commissioners shall be authorized and directed to make an equal partition of the George Inn, the cottages, and the nine acres of land comprised in the lease to Johnson, between the present defendant Johnson, Story, and William Standard Jones, subject (as to the one-third part conveyed to Story) to the remainder of the lease still unexpired; that the same commissioners shall be directed and required to make an equal partition between Story, William Standard Jones, and the representatives of Gardner, of the remaining part of the estate, subject in like manner to the leasehold interest existing in one-third of those premises under the confirmation of Edward Jones; that the Master be directed to settle what shall be a fair occupation-rent for the George Inn and adjoining premises, and **[610]** that one-third of that be accounted for to William Standard Jones; that the Master, in like manner, settle what shall be a fair occupation-rent for the portion of the premises leased to Gardner, and that one-third of that be accounted for to William Standard Jones; and lastly, that the portion awarded to William Standard Jones, of whatever it may consist, be subject to the mortgage which he is admitted to have made of it to the late Mr. Johnson, and be conveyed to the executors of Johnson, subject to that mortgage.

I will now advert to the reasons which have induced me to direct the commission to be issued to two persons, and with a reserve to the Master in case the parties disagree. I am very well aware that, according to the general practice, the parties are to choose their own commissioners. That practice may be very satisfactory, and, in ordinary cases, proper; but it is merely a matter of practice for the purpose of facilitating the ends of justice. If it be found, in any particular case, that the parties will not name commissioners, or will not agree upon commissioners, or that the commissioners named will always take a partial view of the subject, I see nothing in principle to prevent the Court from ordering the Master, who is its general functionary, to appoint a commissioner (as the Court itself might appoint a commissioner if it thought fit), for the purpose of executing the objects of the decree. I do not require any precise case of the same description to be brought before me to justify me in making such an order. It appears to me that if the parties can agree upon each individual commissioner, that would be the best tribunal. If they cannot do that, but are content to name one and one, that I have no objection to. Let the commissioners so chosen be inserted in the commission; but if the parties cannot agree, let the Master appoint, of his own authority, two commissioners whom he may think

proper persons to make the partition. With respect to the house and the nine **[611]** acres of land, I am fully aware of the difficulty of making a partition. If the estates were large enough I should be very much disposed to do as was done by Lord Macclesfield in the case of *Lord Clarendon* v. *Hornby*, where he said he would advise the commissioners, the house being large and the estate large, to give the house to one, and a larger portion of the estate to the other, to prevent the inconvenience of making a division of the house. That seems a very obvious recommendation to any commissioners of common sense, and need hardly be made where the circumstances of the case permit it. If the circumstances do not permit it, or the parties will not agree to have the division effected by means of pecuniary compensation on the one hand or the other, as the case may be, the commissioners have nothing more to do than to divide the house in the best way they can. Upon that I can give no direction.

LEE *v.* MILNER. July 3rd, 10th, 1837.—The undertakers of the Aire and Calder Navigation were empowered by Act of Parliament to make a canal and a tram-road leading therefrom, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tram-road, they gave notice, pursuant to the act, to the owners of a certain spot of land, of their intention to purchase it for the purposes of the tram-road. The landowners resisted the purchase, on the ground that the undertakers had deviated from the parliamentary line in the construction of their canal: Held, that as the deviation worked no injury to the objectors, and as the undertakers did not admit any intention to abandon the original line, and there remained ten years in which they might complete their works, this objection was untenable.—Acts of Parliament for making canals, rail-roads, &c., are powers given by Parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect as regards his own lands, and also a right to require that no variation shall be made to his prejudice elsewhere. But where the act of Parliament is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation elsewhere, which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings.

[For further proceedings see 2 M. & W. 824.]

Under the provisions of the 9 Geo. 4, c. 98, the undertakers of the navigation of the rivers Aire and Calder are authorized, at their own costs, to make a navigable cut or canal from the river Calder, near a place called the Broad Reach, to another part of the river near a place called **[612]** Woodnook. They are likewise empowered by the same act to make an aqueduct, and to form various collateral branches in connexion with the cut or canal; also to make a railway or tram-road from the intended cut or canal near a place called Stanley Ferry, to communicate with a public highway leading from Leeds to Wakefield, near a place called Lofthouse Gate. By the 6th section it is enacted that the undertakers in making the intended cuts, canals, channels, branches, railways, or tram-road, shall not deviate more than one hundred yards from the course delineated on the map or plan authorized by the act. By subsequent sections the undertakers are bound, within five years from the passing of the act, to agree for, or cause to be valued and paid for, the lands, tenements, and hereditaments required for the purposes of the works thereby authorized; and within fifteen years from the same period to complete and make navigable and passable all the works.

In pursuance of this act, the undertakers, within the five years limited for that purpose, effected purchases, or entered into contracts for the purchase of all the land required for the cut or canal, and they completed that part of the canal which was in the neighbourhood of Woodnook. Instead, however, of bringing the canal actually to Woodnook according to the course laid down in the map, they brought it through land which they had purchased for that purpose, to a spot lower down the river, near a place called Fairies' Hill. By this deviation the canal was made to pass more than one hundred yards from the course marked out on the map.

The undertakers also, within the period prescribed by the act, purchased and paid

for all the lands required for the railway or tram-road, except a piece of land numbered 147, which was the subject of this suit. They had also, at the period of instituting this suit, entered upon, staked, set out, and ascertained such parts of the land as they **[613]** thought necessary for the tram-road, according to the course described in the map or plan; but they had not actually made the tram-road in any part of the line, nor completed that part of the canal with which the tram-road was to communicate.

In December, 1832, the undertakers gave notice to the plaintiffs, who, as trustees of the Lake Lock Rail-road Company were the owners of number 147, of their readiness to purchase that piece of ground for the purposes of the projected tram-road. Number 147 was the spot at which the projected tram-road would cross the Lake Lock rail-road. It was situate near Lofthouse Gate, and was entirely out of the way of the canal.

In consequence of this notice, an inquiry was had before a jury under the 20th section of the statute, for the purpose of awarding the amount of compensation and damages to be paid to the plaintiffs, and the jury awarded the sum of 6l. for compensation for the value of the land, and 2800l. for future damages. The undertakers refused to pay the damages, but paid the compensation money into Court, and were proceeding to take possession of the piece of ground, when the plaintiffs filed their bill, and obtained an injunction against them.

The bill proceeded on the ground—first, that the plaintiffs had abandoned their intention of making the new cut according to the parliamentary line; secondly, that they had no right to work the cut and the tram-road contemporaneously, but were bound to complete the former in the first instance; and thirdly, that at all events they had no right to take possession of the piece of ground in question, without paying or tendering to the plaintiffs the sum of 2800l., which had been assessed as future damages.

In Trinity Term, 1834, the defendants moved before Lord Lyndhurst, C. B., to dissolve the injunction, when his Lordship ordered a special case to be drawn up for **[614]** the opinion of this Court, and in the meantime the injunction to be continued. The case came on for argument on the plea side of this Court in Trinity Term last; when the Court, upon the second and third points above stated, gave judgment in favour of the defendants.(*a*)

In consequence of this decision, the defendants now moved again to dissolve the injunction, and the only remaining question was whether the motion could be resisted upon the first ground taken in the bill: namely, that the defendants had abandoned the intention of making the new cut according to the parliamentary line.

The defendants by their answer stated as follows:—that the canal so made from or near the point A. (the spot in the map where the deviation began), past D., and thenceforward to the river Calder, at the point H., near Fairies' Hill, has for the present been made in lieu of that portion of the proposed canal, which lies eastward of the point A.; but they say that they have not altogether or finally abandoned all intention of making, nor have they expressed their determination not to make the said canal in any line eastward of the said point, other than the said line from A. to D., and thenceforward to the point H., or to any other point; on the contrary, they say that the lands are actually purchased by the said undertakers for making the said last-mentioned portion of the proposed canal, which lies eastward of the point A., and whether they will or not abandon the same, or whether they will or not still persevere in making such last-mentioned portion of the canal, and abandon the portion which they for the present have made, is a matter entirely open for the consideration of the said undertakers. They say they believe that the said cut so made as aforesaid is not expressly within or described in the said act, or in the map **[615]** or plan in the said bill mentioned, and therefore is not within the express enactments of the said act; and that it is for the present a substitution, and may, if it should be deemed advisable, be permanently a substitution for the line which is described in the said act, and the said map or plan.

Mr. Bacon, for the motion.

Mr. Boteler and Mr. Hayter, contrà. The case comes back into this Court, for the purpose of trying the question as to the intention in the defendants to make the

(*a*) See the case very fully reported in Meeson & Welsby's Reports, vol. 2, p. 824.

cut in the parliamentary line. The answer upon this point is vague and unsatisfactory, and affords strong grounds for presuming that the defendants have abandoned all intention of proceeding according to the act of Parliament. If that be so, it is clear that the Court will not take away the plaintiff's land. The probability that injury may result to the plaintiffs under such circumstances, is a sufficient ground for the interference of the Court, *Gibson* v. *Smith* (2 Atk. 182): and the mere denial by the defendants of their intention to commit the injury is immaterial; *Jackson* v. *Cator* (5 Ves. 688). If parties in the situation of the defendants choose to contract with the public by means of an act of Parliament, they are bound by the precise terms of the act, and cannot deviate from it in the slightest degree. That rule was laid down by Lord Eldon in the case of *Blakemore* v. *The Glamorganshire Canal Company* (1 M. & K. 154, 162) and is applicable here. *Rex* v. *Cumberworth* (3 B. & Ad. 108; 1 Nev. & P. 197) is also in point. Besides, if parties who have obtained an act of Parliament, on the faith that they have funds for a particular purpose, appropriate those funds to other purposes, **[616]** there is reason to doubt whether they will have funds sufficient to execute the original purpose, and in that case the Court will interfere by injunction; *Agar* v. *Regent's Canal Company* (1 Swanst. 250, cited). In the present case the terms of the act are very explicit, and ought to be rigidly adhered to.

Mr. Bacon, in reply, observed that in the case of *Blakemore* v. *The Glamorganshire Canal Company*, the time limited by the act for the completion of the works had expired ,which was not the case here. He likewise contended that the answer of the defendants shewed no permanent intention of abandoning the parliamentary line.

In the course of the argument the Court asked the plaintiff's counsel whether they were disposed to take an issue as to whether the deviation would be injurious to their clients; but they replied in the negative.

July 10th.—ALDERSON, B. In this case the only question reserved for my opinion is whether the injunction prayed by the bill ought to be continued.

When the case originally came on to be heard before Lord Lyndhurst, he reserved several questions for the opinion of the full Court on a special case. Those questions have been heard and decided; and the case now coming on for further directions has been argued before me.

The injunction was obtained on several grounds. One ground was that the payment by the defendants of the whole compensation awarded by the jury was a condition precedent to the taking possession of the piece of land belonging to the plaintiffs; and there can be no doubt that if any compensation had been warranted by the act of **[617]** Parliament, in respect of contingent injury, the Court would have been bound by the amount found by the jury, and would have continued the injunction until payment. But on that point the Court have already, after argument, given their judgment for the defendants. This ground for continuing the injunction therefore fails.

Another question was whether the works could be allowed to go on contemporaneously, or whether the completion of the canal with which the railway was to communicate was a condition precedent to the taking possession of land for the purpose of making that railway. On this point, also, the defendants have already obtained the opinion of the Court in their favour.

The remaining question is whether the injunction can be supported on the ground alleged by the bill, that the defendants have finally abandoned their intention of making the new cut in the parliamentary line. Now the facts are these. It appears that in one part of the line, not at all adjoining the land of which the possession is sought to be obtained, the defendants have made a cut deviating in some parts from the parliamentary line more than 100 yards. This cut is made through lands belonging to the defendants, and the plaintiff's counsel, on my enquiring, during the argument, whether they would wish to take an issue to try whether such deviation will in any way affect adversely their interests, have declined to accept such issue. I must take it, therefore, for granted that such deviation is of no prejudice whatever to the plaintiff. The answer also distinctly states, in reply to the interrogatories put by the bill, that this deviation has been made by the defendants for the present, but that they have not finally abandoned the intention of making the cut in the parliamentary line; that this question is still open for their consideration and adoption, and that they have actually bought, and are in possession, of the land necessary for

the purpose of doing so. By the act they have fifteen years [618] in the which to perform the whole works, although they are bound to get possession of the land for the purpose of the works within the first five years after the passing of the bill.

It is urged that the defendants do not, in their answer, say affirmatively that they do intend to complete the works in this part in the parliamentary line; and that their having made the other cut is decisive to shew what their ultimate intentions must be. But if their not answering affirmatively be relied on, it is a sufficient explanation of it, that they have never had the question so put to them as to require such an answer, and that the plaintiffs are in fault in that respect, for not having properly framed their interrogatories as to that point. And I am by no means prepared to say that the other circumstance (when I look to the positive oaths of the defendants) is to be taken as conclusive on the point of their having finally abandoned the parliamentary line.

I think, upon all these facts, that the injunction ought not to be continued; and my judgment proceeds on two grounds, which I will shortly state. I have had occasion before to consider the law on this subject, and I think it may be stated thus:—These acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This I conceive to be the real view taken of the law by Lord Eldon in the case of *Blakemore* v. *The Glamorganshire Canal Company*, to which I was referred. In that case that learned Judge says, "It may be of little [619] consequence to A. B. whether the canal is brought to his lands through the land of C. D. or of E. F.; but if the Legislature has said it shall be brought through the lands of E. F., the Court of Chancery would enjoin them from bringing it through the lands of C. D." But this expression, I apprehend, means this: that only those lands of A. B. which the Legislature has given them authority to take, viz. those adjoining the lands of E. F., shall be taken. This is, therefore, but the first branch of the proposition which I have stated: that the power given by Parliament as regards the lands of A. B. shall be strictly and literally performed. But Lord Eldon went further in that case, and directed issues to be tried. Those issues afford a proof of the second branch of my proposition. They were "whether the works done below and out of the plaintiff's land would injure Mr. Blakemore's works." But if the proposition contended for now had been true that no variation at all could be allowed, this issue would have been wholly unnecessary. In Mr. Agar's case, which was mentioned at the bar, one point, it is said, was that the Regent's Canal Company could not, for the sum which they had power to raise, complete their works; and if that were clearly made out, Lord Eldon says, in the case before referred to, that a court of equity would probably grant an injunction; and I fully accede to that proposition, in case the fact were clearly made out, and arose either out of circumstances occurring after the passing of the act, or from a failure to raise the sum contemplated by the act; for, to take any man's land, where the whole work can never be performed, is clearly injurious to him, and a substantial breach of the condition on which the Legislature granted the right to do it. So, again, if the termini were changed, and, instead of proceeding to some great town or city, the canal or railway were to terminate in some obscure village, the same result would follow. But I cannot accede to the proposition that where the con-[620]-tract, as far as regards the land of the complaining landowner, is exactly performed, any variation made at a distant point, and with the consent of the landowner there, and producing no real injury to the complaining landowner, ought to be the ground for an injunction, in a court of equity, to be granted at his application. That is the case here; and, on this ground, I should be prepared to discontinue the injunction.

But in this case, there is another ground, also, on which I may proceed. At all events, it must be clearly made out that there is a final abandonment of the parliamentary line. The defendants are required to obtain the land within five years, and to complete the works in fifteen. There are, therefore, ten years during which they have a right to deliberate, and even to change any resolution they may have taken.

How can the Court properly continue an injunction against them, to prevent their getting possession of this land, when, for aught we can tell, they may strictly and accurately follow the parliamentary line after all? The plaintiff must therefore shew that the defendants have not merely deviated for the present, but that they have finally abandoned the parliamentary line. This they have failed to do.

On this ground, also, the defendants are entitled to the judgment of the Court.

Injunction dissolved.

PRICE *v.* NORTH. Nov. 10th, 1837.—Where lands had been purchased under a decree in a creditors' suit, the Court, on the application of a creditor who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase, on the ground of misdescription of the land in the particulars of sale.—Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale.—Quære, whether any party, except the plaintiff, in a creditors' suit, can apply to open the biddings, or to set aside a sale made by order of the Court in that suit.—Payment to the solicitor for all parties in the suit, is equivalent to payment into Court.—The conduct of a creditors' suit taken out of the hands of the plaintiff, on the ground of delay and mismanagement in regard to the sales of real estates, delay in the payment of money into Court, and the appropriation by the plaintiff's solicitor of rents and profits of the estates in discharge of his costs.

[S. C. 7 L. J. Ex. Eq. 9. Applied, *Earl of Durham* v. *Legard*, 1865, 34 Beav. 611. Reported on another point, 4 Y. & C. Ex. 509.]

The bill was originally filed by Roderick Price (since deceased) and David Jenkins, on behalf of themselves and **[621]** all other the creditors of the testator, Roderick Gwynne, for the administration of Gwynne's assets. The petitioner, William Meyrick, a solicitor, was reported a specialty creditor of the testator.

In pursuance of an order made in May, 1829, certain of the real estates of the testator were put up for sale by public auction in July, 1831, in 57 lots, one of which, lot 50, was described in the particulars of sale as follows:—"Seven fields, 14 acres more or less, part of Godrewed farm; tenant, John Hughes; yearly rent, 42l.; tenancy from year to year." The 8th condition of sale was to the effect that if there should appear any mistake or error in the description of the premises in the particulars of sale, or any other mistake or error respecting the premises, the same should not annul the sale, but should be the subject of compensation.

It appeared that lot 50 was not sold at the auction, but was, in November, 1831, purchased, by private contract, by Mr. Henry Jones, for the sum of 973l. By the terms of that contract, the purchase was to be made according to the conditions of sale at the auction. By an order dated the 21st of May, 1832, this purchase was confirmed, and it was declared that Jones should be at liberty, on or before the 12th of June then next, to pay his purchase-money into court, and might thereupon be let into possession of the premises.

The petition alleged that Henry Jones had not paid his purchase-money into court, or taken a conveyance of lot 50, and yet that he had entered into possession of those premises, and received the rents and profits thereof; and moreover that the seven fields comprised in lot 50 were incorrectly described in the particulars of sale, inasmuch as the admeasurement thereof was stated to be 14 acres, whilst, in fact, the same consisted of 27 acres, or thereabouts; that the rent of 42l., mentioned in the particulars, was much less than the annual value, the purchaser having **[622]** since let the premises for 80l.; and that, under these circumstances, the premises had been sold for a sum greatly under their actual value, which was, as the petitioner believed, about 1600l. The petition prayed a reference to the Master, to ascertain the proper amount of compensation in respect of the misdescription, and that the same, and also the original purchase-money, with interest on the whole, according to the conditions of sale, might be paid by Jones, or that the order of the 21st of May, 1832, might be discharged, and the lot resold.

It appeared from the evidence given on behalf of the petitioner that if the acres mentioned in the particulars of sale were to be taken as statute acres, there was clearly

a misdescription; and although the parties opposing the petition gave evidence that, at the time of the sale, there was a verbal statement that the admeasurement was by customary acres, yet it did not appear that such statement was made by any authorized agent on the part of the vendors. With respect to the allegation as to the nonpayment of the purchase-money, it appeared that Jones had paid the money, within the time limited, to the solicitor who acted for all parties in the suit, but that the solicitor had delayed the payment of the money into Court.

The petitioner had presented a former petition on this subject in February, 1837, which was disapproved by the other creditors. No reason, however, was given for his not having sooner taken steps in the matter; and in order to shew that he must have had early information of the misdescription, the opposing parties proved that he acted as the attorney of Mr. Crawshay, the purchaser of other lots, whose purchase was confirmed in December, 1836.

Mr. Simpkinson and Mr. Booth, for the petition. The word "acres" in the particulars of sale, must, primâ facie, be taken to mean statute acres. There is nothing in the particulars or conditions of sale which, either directly or [623] indirectly, leads to a contrary supposition. All that can be said on the other side is that there was a verbal explanation at the sale that these were customary acres; but that is not the way in which a sale ought to be conducted under the order of this Court, and the creditors are not bound by it. The only question is whether this application is made in due time. As to that, it is clear that we come to the Court before the purchase has been completed. No doubt, a sum of money was paid by the purchaser to his solicitor, but it was not paid into Court till after this petition was presented. Non constat that the sum so paid to the solicitor was this purchase-money; but even if it was, it is not a payment into Court, and the purchaser is not entitled to any indulgence. If it be said that this application cannot be made by a creditor, *Tanner* v. *Radford* (*a*) is an authority to the contrary. In that case an order was made at the instance of a creditor that the purchaser should be discharged from his purchase, and that the report confirming the purchase should be set aside, and that the Master should proceed to a resale.

Mr. W. M. James, for the purchaser. This application comes too late. The purchase in question was confirmed in May, 1832; and after the confirmation of the Master's report of a purchase, the Court will not open the biddings: *Morice* v. *Bishop of Durham* (11 Ves. 57), *White* v. *Wilson* (14 Ves. 151). No fraud was committed in this transaction. When the other lots were sold a positive statement was made as to the extent of the property, and that statement was known to the vendors' solicitor. [The Lord Chief Baron. The party making the declaration at the sale was not the auctioneer or the avowed agent of the vendors.] At all events, the petitioner gives no reason for his delay. It is [624] obvious, from his dealings with Mr. Crawshay, that he must have been acquainted with the misdescription of the property so far back as 1833. Why, then, does he lie by till the year 1837? If a person enters into a contract for purchase under a decree, and, six years afterwards, is compelled to relinquish it on grounds of value alone, no person will purchase except at such a price as will indemnify him against such a litigation as this. Besides, the petitioner has no right to make this application. A creditor in his situation has no locus standi in this Court till he has taken the case out of the hands of the plaintiff's solicitor. The special circumstances of the case, which has been cited to shew the contrary, do not appear.

Mr. Sutton Sharpe, for the plaintiff. The creditors for whom this suit is instituted have proved their debts to the amount of 15,000l., the petitioner's debt being about 358l. The petitioner acts as his own solicitor, and, if he succeeds in this application, will be a gainer to a considerable amount; while, on the other hand, he can only lose a small sum. He is, therefore, not in the ordinary situation of a creditor making an application of this nature. This purchase was not questioned by any of the other creditors. The statement at the auction was made by the party who was employed to fix the reserved bidding. He was a creditor upon the estate, and must have been known to the other parties. He makes a statement that these acres were really customary. The lot is put up, and the price offered does not reach the reserved bidding, which is 1150l. The price subsequently given by the purchaser was considered fair at a meeting of the creditors, of which the petitioner had notice. Why, then, has

(*a*) Not reported on this point. See 6 Sim. 21.

he delayed his objections to the present time? Besides, a creditor cannot present such a petition as this. If a creditor allows another person, as plaintiff, to conduct the suit, he must abide by it; otherwise no one would deal with a plaintiff in a creditors' suit. [625] In *Tanner* v. *Radford* the purchase was made by a person who was solicitor for the plaintiff, and who was alleged to have purchased for the benefit of the plaintiff. The application was not against a third person, but against the plaintiff himself. A creditor may apply, as against the plaintiff, to take the case out of his hands, or to prevent his having a particular benefit, but not against a third person. If a third person deals with my attorney, I cannot apply against him; I must proceed against my attorney. A stranger, who deals with the plaintiff in a creditors' suit, is fully justified in the act, and cannot be prejudiced by the conduct of the plaintiff in his character of trustee for the other creditors. The case cited proves no more than that every creditor has a right to attack the conduct of the plaintiff.

Mr. Simpkinson, in reply. The argument on the other side proceeds on the supposition that the object of the petition is to rescind and resell; but that is only an alternative which is offered to the purchaser for his own benefit. The object of the petition is to carry into effect the true spirit and meaning of the contract. The petitioner makes no accusation of fraud, but calls upon the purchaser to perform his contract really and substantially. The objections which have been urged on the ground of delay are immaterial, because the petition, so far from impeaching the sale, proceeds on the validity of the sale. It is said that the plaintiff in a creditors' suit is the agent of all the creditors; but that is not true to the extent contended for. A creditor is not bound hand and foot by the plaintiff, nor does he delegate any authority to the plaintiff. Besides, this is not the sale of the plaintiff, but of the Court.

The Lord Chief Baron. If I were called upon to dispose of this petition upon the question, whether or not [626] Mr. Meyrick has a locus standi in this Court, I should desire further time for consideration before I gave my judgment; but, under the circumstances of this case, I think it unnecessary for me to give any opinion upon that point.

It is said that, upon the facts as proved on behalf of the petitioner, this sale ought either to be set aside altogether, or modified by a reference to the Master, directing him to ascertain what addition ought to be made to the price agreed to be given by the purchaser, by reason of the misdescription of the premises, and according to the conditions, of sale which he entered into. I know that courts of equity have gone a great way in allowing contracts of this nature to be altered on the ground of misdescription, but I own it appears to me that such a misdescription as this would not be ground for modifying the contract, but for avoiding the sale altogether. Assuming, however, that this case comes within the limits within which courts of equity have proceeded in modifying contracts such as these, must there not be also some limit as to the time in which they will act? Without resorting to the principles of law laid down by Lord Eldon (to which, however, I fully accede), if I allow this party to open the biddings four years after he has become acquainted with the facts on which he founds this application, why may I not allow him to do the same after twenty years? The ground on which I dismiss this petition is that Mr. Meyrick, assuming that he would have a right to present his petition if he had presented it within a reasonable time, has not made it appear to the Court that he was not apprised of these facts in 1833. It appears that at that time he not only had as a creditor an interest in seeing every thing properly and legally done, but that, as the solicitor of Mr. Crawshay, he had in his own office the means of ascertaining the extent of the estate; for he says that in 1833, in negociating for Mr. Crawshay, he became acquainted with the value of the [627] estate, and how he could be acquainted with the value without being acquainted with the extent, I am at a loss to know. I must, therefore, assume that at that time Mr. Meyrick knew the extent of this property; and then the question is whether in opposition to all the other creditors who repudiate such a proceeding, he ought to come forward in the year 1837 and petition to have this matter go back to the Master. It appears to me that there are two sufficient reasons for not acceding to such an application. One is that the purchaser, upon the faith that he has obtained the benefit of this contract, may have laid out large sums of money on the premises, and to say that in four years afterwards the Court might alter his interest in the property, would be to say that the Court might do it after any indefinite time. The

other is that, as I have the interests of the other creditors to take care of, I ought not to refer the matter back to the Master, if the probability is that he would have great difficulty in ascertaining the actual value of the property at that time. Now, it appears to me, considering how much the value of land varies in the course of time and with reference to its situation, that the Master could not arrive at any result on this subject without great difficulty; and, therefore, I think that the possible expense of such an enquiry in his office, is alone a sufficient answer to this application.

As to the purchaser, I think he ought to be taken to have done his duty. Vaughan was his solicitor and that of the other creditors. If it was his duty to pay the purchase-money into Court, what could he do more than pay it to the person who was acting as solicitor for all parties? If he had paid it to his own solicitor, who was not the solicitor of the other parties, this observation would not apply; but, paying it in the manner he does is equivalent, as far as he is concerned, to paying it into Court. It was Vaughan's business to pay it into Court when he received it.

Petition dismissed, with costs.

[628] A petition was now presented by Meyrick, praying that the conduct of the cause might be taken from the plaintiff Jenkins, and might be given to the petitioner.

The petition, supported by affidavit, stated the original decree, dated 10th July, 1810, directing the usual accounts of the personalty and enquiries as to the testator's real estates; that by his report, dated 30th April, 1812, the Deputy Remembrancer stated the amount of debts and credits, and, amongst other credits, a balance of 269l. due from T. H. Gwynne, and found that the testator was, at the time of his death, the owner in fee of certain real estates, some in possession, and others in reversion expectant on the life estate of T. H. Gwynne; that by the decree made on further directions, dated the 4th May, 1812, T. H. Gwynne was ordered to pay his balance into Court on or before the 4th February ensuing, and the deputy Remembrancer was to proceed to a sale of the testator's real estates; that no steps were thereupon taken by the plaintiffs for effecting a sale of the real estates of which the testator was seized in fee at the time of his death, or for securing the rents and profits for the benefit of the creditors; that T. H. Gwynne never paid the balance due from him into Court, and no steps were taken by the plaintiff to enforce the order for that purpose; that T. H. Gwynne died in 1826, but that no steps were thereupon taken by the plaintiff for selling the real estates or securing the rents for the benefit of the creditors; that by an order of the 21st May, 1829, it was referred to the Master to approve of a scheme for a sale of the estates in lots, and that the Master accordingly caused the estates to be put up for sale by auction in lots on the 20th July, 1831, when several of the lots were sold; that lot 50 was not sold at the auction but purchased by private contract by Henry Jones, who, by an order of May, 1832, was ordered to pay his purchase-money into Court on the 12th June then ensuing; that Henry Jones purchased this lot at an undervalue by reason of the plaintiffs having **[629]** misdescribed the premises (see ante, p. 621, 622), and that his purchase-money was not paid into Court until the 17th June last; that Philip Vaughan, of Brecon, had, throughout the proceedings, acted as the solicitor for all parties interested in the suit, and had had the sole management thereof, and of the sales which had been made under it; and that he had also been employed by Henry Jones in the matter of his purchase, and had been instructed to prepare the conveyance; that upon the sale of the estates in 1831, several persons had purchased lots, but had paid their purchase-money or had taken possession at times inconsistent with the order, and that one of them, William Crawshay, had paid only part of his purchase-money into Court: and, lastly, that the plaintiff or his solicitor, Vaughan, was in the receipt of the rents of the several estates from the respective deaths of the testator and T. H. Gwynne, until the purchasers were let into possession, but that no accounts of the rents was ever rendered, nor had they been brought into Court in the cause.

Mr. Vaughan, by his affidavit, stated in substance that the delay of the sale was occasioned, in the first instance, by the infancy of one of the parties who was entitled in reversion under the will of the testator; that the estates afterwards became depreciated; and that, in 1831, five of the creditors were appointed to conduct the sale, under whose directions he acted; that various lots were then sold, of which

one lot was sold to Mr. Crawshay; that Crawshay had refused to pay his purchase-money, and had raised various points of law which had delayed the proceedings, and that the petitioner Meyrick acted as his solicitor; that he, Vaughan, had not been concerned as solicitor in the cause throughout all the proceedings, nor at any time was he concerned for all parties in the suit; those who represented the real estates appearing by sepa-**[630]**-rate solicitors. He admitted that he had received, to his own use, the rents of the real estates, but he stated that he had taken them in discharge of his costs, which they were not sufficient to satisfy, and that he was ready to account for them.

It appeared that under the will of the testator the estates were vested in his daughter, Anna Maria Holford, for life, with remainder to her son James P. G. Holford, and other of her sons, in tail; and that in 1828, when the sons were of age, a proposition was made by Mrs. Holford to the creditors, with a view of bringing the suit to an end, but that that proposition was declined. This, and some other circumstances, are noticed more particularly in the arguments and judgment.

Mr. Simpkinson and Mr. Booth, for the petition. In suits instituted by creditors, the Court will not allow the same solicitor to act for all parties. The same solicitor cannot act for the creditors and also for parties who are accountable to the estate: *Spode* v. *Smith* (3 Russ. 511). Independently of that circumstance, the interests of the creditors in this case have been grossly neglected. An order which had been made in 1812 for the payment into Court of a balance due from T. H. Gwynne, was never enforced, although Gwynne lived till 1826. It is immaterial, in that view of the case, whether Vaughan was the plaintiff's solicitor at that time or not, for the conduct of the plaintiff was equally blameable. But, according to Vaughan's own statement, he seems to have begun acting for the plaintiff in 1820; therefore, from 1820 to 1826, there was culpable neglect in not enforcing that payment, and loss of interest to the creditors. Then there was a manifest neglect in the conduct of the sales. After your Lordship's decision upon the former petition, we shall say nothing **[631]** upon the sale of lot 50 as affecting the purchaser; but we are entitled to say that that sale was grossly mismanaged by the persons who conducted it. Besides, it is not disputed that although the purchase-money for that lot was paid by Jones to Vaughan in January, 1832, it was not paid into Court by Vaughan till June, 1837; and yet, in the meantime, Jones was let into possession by an order of the Court. No reasonable cause whatever is assigned for the delay in winding up these proceedings. Whatever the objections of Mr. Crawshay were to the title of the premises which he purchased, it was the plaintiff's duty to make him pay his purchase-money into Court.

The remaining ground of this application is the receipt of the rents and profits by Vaughan, without accounting for them. It now appears, for the first time, that they have been paid in part discharge of his costs, but he had no lien upon them for his costs. [The Lord Chief Baron. One does not see how he could receive the rents, except for the reversioners.] And if he received for the reversioners, he acted for all parties. It is scarcely necessary to cite cases in support of this application, but *Powell* v. *Wallworth* (2 Madd. 183), and *Fleming* v. *Prior* (5 Madd. 423), are in point.

Mr. Sutton Sharpe, for the plaintiff. When it is said that a solicitor acts for all parties in a creditors' suit, the meaning is that he is the solicitor both of the creditor and the debtor. That was not the case here. This suit was instituted for the purpose of charging these real estates with Roderick Gwynne's debts. The parties representing the real estates have always contested the matter and appeared by separate solicitors. The conduct of the petitioner is disingenuous; for he was acquainted with all the facts connected with the suit from the beginning. The **[632]** suit was not in fact conducted solely by the plaintiff, but by committees of creditors who held various meetings during the progress of it. The petitioner was himself present at several of these meetings, particularly at the meeting in 1828, when Mrs. Holford's proposition was considered. It is clear, therefore, that the plaintiff did not act for himself only, as is usual in creditors' suits, but for the body of the creditors; and the petitioner knew that fact. The delay of the sale originally arose from the minority of the reversioners, for at that time the parol could demur. When the infants came of age, Mrs. Holford made a proposition for a settlement with the creditors; but that proposition being rejected, principally through the means of the petitioner, a further delay took place. After that period there was a depreciation in the property, but in 1831 part of it was sold.

The payment of Jones's purchase-money into Court was delayed by reason of the petitioner's notice to Vaughan that he intended to dispute the validity of that purchase. Besides the lots so purchased originally formed part of the same farm with the lots purchased by Crawshay, of which the title is objected to. With respect to the receipt of the rents, it is submitted that Vaughan's conduct, under the circumstances, was completely justifiable.

Mr. Simpkinson, in reply. There is no proof of any acquiescence on the part of the petitioner in the misconduct of the plaintiff, more especially as it appears that, in 1832, Meyrick requested Vaughan to apply for a receiver, which Vaughan omitted to do without assigning any reason for his omission, or mentioning the proposition to the other creditors. With respect to the delay, it seems proper to advert to the practice of the Court of Chancery in cases of this nature. That practice, which is regulated by Ord. 56, 3rd April, 1828, might be adopted with advantage in this Court.

[633] THE LORD CHIEF BARON. My decision upon the last petition has no necessary or natural connexion with this. I thought it unnecessary to grant the prayer of that petition, because it was presented by a creditor after a lapse of four years from the time he first became acquainted with the circumstance of which he complained, against a bonâ fide purchaser, who had paid his purchase-money into Court as shortly as he could.

This is a petition presented by a creditor in a creditors' suit, complaining of such miscarriage on the part of the plaintiff and his solicitor, as requires, in his judgment, a change in the mode of conducting the suit. I consider that where a bill is filed by a creditor for the common benefit of all the creditors, the matter is placed entirely in the hands of the Court, and that all parties before the Court are equally bound by the order of the Court; and that in case of misconduct in any of the parties whose duty it is to carry a decree into execution, the Court will administer a remedy in the same manner as where one of its own officers is guilty of misconduct in the execution of its decrees. In a suit so constituted, the interest of the general body of the creditors is administered by the Court, and the Court must see that interest duly consulted. Has it been duly consulted in this case? It appears to me to be by far the most probable conclusion to be drawn from the circumstances which have been proved that it has not been duly consulted.

In 1828, when the tenant for life of these estates died and the persons entitled in reversion were of age, a question was entertained whether or not a proposition which had been made by those persons and their mother, Mrs. Holford, with a view of bringing the suit to a conclusion, should be acceded to. A meeting took place, and the offer made by Mrs. Holford was to pay all the debts up to the year 1812 with interest. At that meeting, Meyrick and other creditors attended and objected to that settle-**[634]**-ment. They must have objected to it on the ground that the decree would produce a larger fund for them than what this lady offered them. They must have thought it better to go in and obtain payment of their debts under an order of the Court than under that compromise. Yet it appears that these proceedings have gone on to the year 1837, and that the estate has not been administered, nor the creditors paid. I am not satisfied that the delay has been duly accounted for which took place between the year 1828, when the creditors met, and the year 1831, when, for the first time, a sale was made of part of the estates.

Then, with respect to the sale of lot 50 by private contract, in December, 1831. That lot was sold to Henry Jones for 973l. Jones paid his purchase-money to the gentleman representing the plaintiff, in January, 1832, and he was accordingly let into possession. In March following, an application was made by the party conducting the suit, for an order on the purchaser to pay his purchase-money into Court, and the order was accordingly made. It does not appear that any creditor knew that the money was not in Court, and bearing interest for the general benefit; but it appears that from January, 1832, to June, 1837, five years and a half, the money remained in the hands of the plaintiff and his solicitor, and was not accounted for; and it is left to the ingenuity of counsel to surmise that objections to the title stood in the way of payment of this money into Court, which had been actually paid to the solicitor. Though it is in his hands all the time—though it is in the hands of the individual conducting the suit for the benefit of the creditors, it is not applied for their benefit but his own. Therefore, considering him merely as an agent of the Court, conducting a suit for the benefit of the suitors, I cannot say that the delay in this instance is one

which can be tolerated by the Court. It is a delay of such a nature as might, under some circumstances, prove very serious to the [635] purchaser. What would have been the case if the money had been paid to an officer of the Court and he had retained it? The result would have been that the Court would have dismissed that officer; or at all events would have charged him with 5l. per cent. interest.

Again, it appears that when the estate was not sold in 1828, a suggestion was made by Meyrick to Vaughan relative to the appointment of a receiver. That might have been a proper suggestion if the rents were adequate for that purpose, and, on the other hand, it might have been proper to refuse it; but it is not disputed that Meyrick's proposition was made with a view of being taken into consideration by the creditors generally. Yet it is charged against Vaughan that he did not inform the creditors of this proposition; but that, on the contrary, he kept possession of the premises, and took to his own use the rents and profits which ought to have been placed in the general fund, and the answer which he gives on this subject is that he took those rents in discharge of his costs. But the Court ought to have been allowed to say, whether or not they should have been so appropriated, the order being that the estate should be sold and the money paid into Court. It was an oversight, to say the least of it, not to state to the creditors how the rents were applied.

There are other circumstances, though perhaps not so strong or specific as those which I have mentioned, which bring me to the conclusion that the conduct of the suit ought to be taken out of the hands of the present plaintiff. Then the question is whether it ought to be placed in the hands of Meyrick. It seems to me that a distinction must be made in regard to his character as a creditor, and as the solicitor of one of the parties, who is accountable to the estate. As a creditor no objection would be made to him by the Court or the creditors; but, as the solicitor of Crawshay, who is one of the remaining accounting par-[636]-ties, I think it is not desirable that he should have the conduct of the suit. I shall, therefore, refer it to the Master to appoint a creditor for that purpose.

Order accordingly.

EX PARTE PAYNE. IN THE MATTER OF THE GREAT WESTERN RAILWAY ACT. Nov. 11th, 1837.—Words of recommendation in a will held not to amount to a trust.

[S. C. 7 L. J. Ex. Eq. 1; 1 Jur. 818.]

The company, having purchased lands of the petitioner, had paid the purchase-money into Court, under a clause of their act of Parliament, which authorizes that mode of proceeding in the case of a purchase from infants, tenants for life, and other persons under legal disabilities. The company conceived that the words of the will under which the petitioner was entitled to the property in question left it doubtful whether she took an estate for life only or in fee. The petitioner having presented her petition to have the money paid out of Court to her absolute use, the question now came on for the decision of the Court.

The words of the will (the testator having in the first instance devised the property absolutely to the petitioner, his daughter, in fee) were as follows:—"And I do hereby declare that the estate and property hereinbefore devised and bequeathed by me to my said dear daughter is intended as some reward for her affectionate, unwearied, and unexampled attention to me during my illness for many years, and is kept separate from the other interests she will take under this my will, as a memorial and testimony thereof. And I direct my said daughter to keep the buildings, gardens, and premises in good repair, order, and condition; and in case she should happen to marry, I strongly recommend her to execute a settlement of the said estate, and thereby to vest the same in trustees, to be [637] chosen and approved of by her, for the use and benefit of herself and her assigns for her life; with remainder to her husband and his assigns for his life: with remainder to all and every the children she may happen to have, if more than one, share and share alike; and if but one, the whole to such one, or to such other uses as my said daughter shall think proper, to the intent that the said estate, in the event of her marriage, may be effectually protected and secured."

It appeared that the petitioner was fifty-eight years of age.

Mr. Monro, for the petitioner, observed that under this will she took absolutely, and that there could be no trust, because neither the persons to whom the estates were

limited, nor the estates themselves, were certain. It was true the petitioner might marry, and have children, but until those events occurred the parties to take were uncertain; and even then the estates were uncertain, for they were limited to her husband and children, or to such other uses as she should think proper.

Mr. Stevens, for the company, did not oppose the petition.

THE LORD CHIEF BARON was of opinion that the petitioner had a right to convey the property absolutely, and therefore made the order as prayed. (*a*)[1]

[638] MARTINEAU *v.* COX. Nov. 11th, 1837.—A partner, resident in England, of a house carrying on business abroad, is not bound to set forth a schedule of books, &c., relating to and in the custody of the foreign house.

[S. C. 7 L. J. Ex. Eq. 18; 1 Jur. 818.]

This was a bill seeking to charge the defendant, as a partner in a house carrying on business as merchants and factors in Portugal, with the value of certain bombazeens, which the plaintiff had, through the medium of the defendant, consigned to the Portugal house for sale. The defendant resided in London, where he carried on business as a merchant on his own separate account, and had had, in that character, various dealings with the plaintiff. Amongst other things, the bill charged that there were in the possession or custody of the house in Portugal various books of account, papers, writings, and memorandums, whereby the partnership between the defendant and that house would appear, and whereby certain dealings mentioned in the bill would appear to have been carried on between the plaintiffs and the defendant on the partnership account. To the inquiries founded on this charge, the defendant answered that he could only set forth such books, &c. as concerned his separate dealings with the plaintiff, and such as related to consignments which he had made for them to the Portuguese firm; but that he knew nothing of the books, accounts, and transactions of the Portuguese house as a partnership. He admitted that, to a certain extent, he was a partner in the Portuguese house. An exception having been taken to the defendant's answer for insufficiency,

Mr. Rogers appeared in support of the exception. Although the defendant may have no personal knowledge of the matters enquired after, he has the means of knowledge, and it does not appear that he has taken all the steps he might have taken to get the information required. In *Neate* v. *Duke of Marlborough* (ante, p. 3) it is laid down that **[639]** if a bill state a fact not denied by the answer, by which it appears that the defendant has the means of making the inquiry, he must answer as to the result of his inquiry. Here, the defendant has the means of inquiry. The books in question are in the possession of the Portuguese house; and the possession of one partner being the possession of the other, he ought to set forth a schedule of these books.

THE LORD CHIEF BARON. The case which has been cited has no application to the present. Situated as the defendant is I do not think he is bound to write to his partner for these books. His partners are in another country, and he has no control over their dealings and transactions. A man is not bound to know the affairs of a partnership in Portugal or in India, in which he may happen to have a share. He is bound by their transactions, it is true, but he is not bound to know them. Suppose the defendant gave a schedule of these books, and the partners abroad refused to give them up; how could this Court enforce their production? The Court is not bound to commence the exercise of a jurisdiction which it cannot ultimately enforce. I cannot make an order on a gentleman in Portugal.

Exception overruled.(*a*)[2]

[640] ARTHUR BOWEN, PEREGRINE BOWEN, AND LUCY BOWEN, Spinster, *Plaintiffs*, AND JAMES SCOWCROFT THE ELDER, CHARLES BOWEN ALLEN, JOHN ARTHUR ALLEN, PEREGRINE SHAW ALLEN, THOMAS SCOWCROFT, WILLIAM BOWEN SCOWCROFT, MARTHA ELIZABETH SCOWCROFT, HUGH ARTHUR FENDER

(*a*)[1] See *Lechmere* v. *Lavie*, 2 M. & K. 197.
(*a*)[2] See *Farquharson* v. *Balfour*, Turn. & Russ. 190.

SCOWCROFT, RICHARD MATHIAS, THOMAS GWYNNE, AND JAMES SCOWCROFT THE YOUNGER, *Defendants.* July 7th, Dec. 1st, 1837.—Devise to the testator's two brothers, Arthur (who was his heir-at-law) and Peregrine, one-third part each, share and share alike, of testator's lands and premises at A., subject to the life interest therein of the testator's father, the other remaining third part of the said lands and premises to the testator's sisters, Mary and Lucy, share and share alike, making a sixth part to each, of the said lands and premises, and in case of their demise, he willed, bequeathed, and devised their respective shares to be equally divided among their children, or their lawful heirs, observing first, that his (the testator's) father was entitled to raise the sum of 2000l., by mortgage or otherwise, according to a bond executed to him by the testator: Held, first, that the words "in case of their demise," applied to the devise to the two sisters only, and had no reference to the previous devise; secondly, that the devise to Peregrine, the younger brother, was for life only; and, thirdly, that the two sisters took estates for life only in the shares devised to them, with remainder to their children, as tenants in common in fee.

[S. C. 7 L. J. Ex. Eq. 25.]

William Bowen the younger, by his will, dated the 4th November, 1810, duly executed and attested to pass real estate, devised as follows:—

"In the name of God, Amen. I, William Bowen, jun., Captain in his Majesty's 59th regiment of Infantry, &c. &c. &c., do declare this to be my last will and testament. I will and bequeath to my two brothers, Arthur and Peregrine Bowen, Esquires, one-third part each, share and share alike, of the lands and premises in Prendergast and Ambleston, county of Pembroke, in which my father William Bowen, sen., Esquire, has a life interest, according to a bequest or deed executed by his late uncle Francis Bowen, Esquire, deceased (my grand-uncle), and settled by him on me in remainder, after the decease of my much respected father, said William Bowen, sen., Esquire, who, I sincerely hope, may enjoy it for many, many years to **[641]** come; the other remaining third of those said above-mentioned lands and premises, in Prendergast and Ambleston, I will and bequeath to my dear sisters, Mary Allen and Lucy Bowen, share and share alike, making a sixth part to each, of the before-mentioned lands and premises; and, in case of their demise, I will and bequeath and devise their respective shares or proportions to be equally divided amongst their children or their lawful heirs, observing—first, that my dear father, William Bowen, sen., Esq., is entitled to raise the sum of 2000l. sterling, by mortgage or otherwise, according to a bond or deed executed by me to him on the 15th April, 1802, for that purpose. I also will and bequeath to my dear father 10l. sterling, to purchase a mourning ring, or any other token of remembrance. I further will and bequeath to Mary Bradshaw, of Newark, five hundred star pagodas, or two hundred pounds sterling, which I lately deposited with Messrs. Harrington & Co., agents at Madras, who are hereby authorized and directed to pay the same into the hands of my executors, to be remitted by them to the said Mary Bradshaw. I also will and bequeath to my brother, Peregrine Bowen, all the personal property I may die possessed of, as well as any prize money I may hereafter become entitled to, by the capture of the Isle of France and its dependencies, requesting my dear brother to purchase out of it a gold watch, of the value of twenty-five guineas, to be presented as a gift of true esteem to my kind friend Henry Rees, Esq., attorney-at-law. I do hereby constitute and appoint Lieutenant Richard Lenton and Paymaster Hickman Rose, of his Majesty's 59th regiment, to be my lawful executors to this my last will and testament."

The testator, at the time of making his will, and thenceforward down to the time of his death, was seised or entitled to the reversion or remainder in fee simple expectant on the death of his father William Bowen, the elder (and **[642]** subject to two terms of 900 years and 1000 years, vested in trustees for raising and paying to the said William Bowen the elder, his executors or administrators, under one of the said terms, a sum of 2000l., and for raising and paying, under the other of the said terms, a like sum of 2000l. to the said William Bowen the younger, his executors and administrators), of and in divers hereditaments situate in the parishes of Prendergast and Ambleston, in the county of Pembroke.

The testator died shortly after the date and execution of his will, without having

ever been married, and without having revoked or altered his will with respect to his real estate, leaving the plaintiff Arthur Bowen, his elder brother and heir-at-law, and the plaintiff Peregrine Bowen, his only other brother, and two sisters, the plaintiff Lucy Bowen and Mary Allen, then a widow, and since deceased.

William Bowen the elder died some time after the testator, and Mary Allen, after the date and execution of the testator's will, intermarried with the defendant James Scowcroft the elder, and afterwards died, leaving eight children surviving her, namely, the defendants Charles Bowen Allen, her eldest son and heir-at-law, and the defendants John Arthur Allen and Peregrine Shaw Allen, her children by her first husband John Allen deceased; and the defendants Thomas Scowcroft, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, her children by her second husband, the defendant James Scowcroft the elder.

After the death of the testator, but during the lifetime of his father, the tenant for life, the defendant James Scowcroft the elder, and Mary his wife, levied a fine sur conusance de droit tantum of the one-sixth part or share of Mary Scowcroft in the estates devised by the will of **[643]** the testator. No uses were, at that time, declared of the fine. The tenant for life died shortly after the levying of this fine; and upon his death, the defendant, James Scowcroft the elder, and Mary his wife, entered into the receipt of the rents and profits of the one-sixth share of the estates devised by the testator's will, and they continued in such receipt.

Mrs. Scowcroft died suddenly in consequence of an accident, having, immediately prior to her decease, executed a short deed, declaring the uses of the fine levied by her to be to her husband, the defendant, James Scowcroft, and her brother, the plaintiff, Peregrine Browne, in fee. The intention of the parties, however, was, though not expressed by any deed, that Mrs. Scowcroft's share should be sold, and the proceeds applied for the benefit of her children.

The bill was filed by Arthur Bowen, Peregrine Bowen, and Lucy Bowen, against the husband and children of Mrs. Scowcroft, and against Richard Mathias and Thomas Gwynne, to whom the plaintiff, Arthur Bowen, had assigned his share, upon certain trusts, for payment of his debts, and it prayed a partition of the estates.

By the decree made on the hearing of the cause, dated the 13th of July, 1835, it was referred to the Master to inquire and report to the Court what children of Mary Scowcroft were living at the time of the death of the said testator; and whether any children of the said Mary Scowcroft, deceased, were born subsequently to the death of the said testator, and whether any and which of them were since dead, and whether any and which of them who had died, died intestate or not, and who were the heirs-at-law or devisees of such of them who had since died; and if the Master should find that all the children of Mary Scowcroft who were then living, or the heirs or devisees of such **[644]** of them who were then dead, were parties to the suit, then the said Master was to inquire and report to the Court what shares and interests the said plaintiffs and defendants respectively, or any or either of them, were respectively entitled to in the hereditaments.

The Master, by his report, dated the 1st of July, 1837, certified that the plaintiff, Arthur Bowen, by the will of the testator, or as the heir-at-law of the testator, or partly by such will and partly as such heir-at-law, became seised of or entitled to one-third part or share of and in the said hereditaments in fee simple: and by the said will, or as such heir-at-law, he also became seised of or entitled to an estate of inheritance in reversion, immediately expectant upon the decease, or other sooner determination of the estate for life therein of the plaintiff, Peregrine Bowen, of and in another third part or share of and in the same hereditaments: and that such two-third parts or shares of and in the same hereditaments were then vested in the said defendants, Richard Mathias and Thomas Gwynne, upon the trusts of the indentures of release of 12th February, 1833, in the report mentioned. And the Master found that the testator, by his said will, devised one-third part or share of and in the said hereditaments to the plaintiff, Peregrine Bowen, for his life; and that the plaintiff, Peregrine Bowen, was seised of or entitled to such third part or share of and in the said hereditaments for his life. And the Master found that the said testator, by his said will, devised one-sixth part or share of and in the said hereditaments to the said Mary Scowcroft, formerly Mary Allen, for her life, and after her decease, the said testator devised such sixth part or share of and in the said hereditaments to all the children

of the said Mary Scowcroft, in equal shares, as tenants in common in fee simple; and that the defendants, [645] Charles Bowen Allen, John Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments, as tenants in common in fee simple, in the following shares, that is to say, the said Charles Bowen Allen, to three-tenth shares of such last-mentioned sixth part or share, the said James Scowcroft the younger, to two-tenth shares of such last-mentioned sixth part or share, and the defendants John Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-tenth shares of such last-mentioned sixth part or share in equal shares; and the Master found that the said testator by his will devised one other sixth part or share of and in the said hereditaments to plaintiff, Lucy Bowen, for her life, and, after her decease, the testator devised such last-mentioned sixth part or share of and in the said hereditaments to all the children of the said Lucy Bowen in equal shares, as tenants in common in fee simple; and that the said Lucy Bowen was then seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments for her life, with remainder in fee simple to her children, if she should have any, in equal shares, as tenants in common; that the said Lucy Bowen had never been married; and that the remainder in fee simple of and in the said last-mentioned sixth part or share of and in the said hereditaments, on the decease of the said Lucy Bowen, was undisposed of, in the event of the said Lucy Bowen not having any child, and that the same, in that event, would descend to the plaintiff, Arthur Bowen, as the heir-at-law of the said testator; and that the interest which would so descend to the said Arthur Bowen passed, by the said indenture of the 12th day of February, 1833, to the [646] said defendants, Richard Mathias and Thomas Gwynne, upon the trusts declared thereof by the same indenture.

To this report the defendant, James Scowcroft the elder excepted, on the ground that the Master ought to have found that, by the testator's will, Mary Scowcroft took and became entitled to an estate in fee simple, or an estate tail, of and in one equal sixth part of the hereditaments; and that, by means of the fine levied by the exceptant and the said Mary Scowcroft, his then wife, at the Spring Great Sessions in the year 1825, and by means of the indenture of the 1st day of September, 1825, the said last-mentioned sixth part of the said hereditaments became and was then vested in the exceptant and the plaintiff, Peregrine Bowen, as joint tenants for an estate in fee simple, or for a base fee, determinable on the failure of issue, inheritable under such estate tail.

The defendants, the younger children of Mary Scowcroft, also took two exceptions to the Master's report, the first of such exceptions being that the Master ought to have found that the defendants, Charles Bowen Allen, John Arthur Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were then seised of or entitled to the one-sixth part or share of and in the said hereditaments devised to Mary Scowcroft, as tenants in common in fee simple, in the following shares:—That is to say, the said Charles Bowen Allen to one-eighth part or share of such last-mentioned sixth part; the said James Scowcroft the younger to two-eighth parts or shares of such last-mentioned sixth part; and the defendants, John Arthur Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-eighth parts or shares of such last-mentioned sixth part or share, in equal shares; and the second exception [647] being that the Master ought to have found that the sixth part or share, by the said will devised to the plaintiff, Lucy Bowen, was subject to a cross remainder, or an executory devise or limitation in the nature of a cross remainder, on the decease of the said Lucy Bowen, and in the event of her not having any child, to or in favour of the persons to whom the other sixth part of the said hereditaments was given or devised by the said will; and that the exceptants and the said Charles Bowen Allen and Peregrine Shaw Allen were in that event entitled, or would in that event be entitled, to the same or the like shares and interest of and in the last-mentioned sixth part or share as they were then entitled to of and in the said sixth part or share originally devised to the said Mary Scowcroft, formerly Mary Allen, and her children.

Mr. Hodgson, in support of the exception taken by the defendant, James

Scowcroft the elder. The devises to the testator's brothers and sisters were devises in fee, with alternative devises to their children in fee, in case any of the brothers or sisters should die in the lifetime of the testator. As all of them survived the testator, they took absolute estates in fee. In *Turner* v. *Moor* (6 Ves. 557) a legacy to A., or in case of his death to his issue, was held to give A. an absolute interest. In *Cambridge* v. *Rous* (8 Ves. 12) legacies were given to two sisters, with a direction as to each, that in case of her death her legacy should devolve on her sister. This direction was held to be confined to the case of a lapse by the death of either in the lifetime of the testator, and that, surviving the testator, they took absolutely. In deciding that case, the Master of the Rolls observed: "As to the first question in this cause, whether Martha Kuyck Van Mierop was **[648]** entitled absolutely to the legacy or for life only, the words in which the bequest over is expressed have not, in themselves, nor have they by construction, received a precise and definite meaning in which they must be uniformly understood. The expression itself is incorrect, as it applies words of contingency to an event which is certain. No man can, with propriety, speak of death as a contingent event which may or may not happen. When, therefore, a testator so expresses himself, the question is what he means by that inaccurate expression. He may, perhaps, have had some contingency in his mind, as that the legatee was dead at the time he was making the will, or might be dead before his own death, or before the legacy should be payable; and then the inaccuracy consists in not specifiying the period to which the death was to be referred." It is remarkable that in the present case, as in the case last cited, the testator was in India at a distance from the legatees, and might not know whether they were living or dead, and therefore might speculate upon that event. The words "in case of their demise" mean their death before some particular event, as the death of the testator himself. The expression is certainly ambiguous, but in *Ommaney* v. *Bevan* (18 Ves. 291) and *Slade* v. *Milner* (4 Madd. 129) similar expressions were held to mean the death of the legatee in the lifetime of the testator. It may be said that the cases cited were all cases of bequests of personal estate, whilst the present case is one of devise of real estate; but there is no substantial distinction; there is no greater authority for modelling the estate for life into an absolute interest or perpetuity in the one case than in the other. In *Chalmers* v. *Storil* (2 Ves. & B. 222) the testator gave to his wife and children all his estate, real and personal, to be equally divided among them, subject to two annuities, on death to devolve to his **[649]** children equally, and in case of the death of the wife her portion to descend to the children equally; in the event of their dying before her, their portions to be enjoyed by the wife during her life, with a limitation over upon the death of all. In that case the question arose whether the bequest to the wife was for life or absolute, and the point with reference to the real estate was treated as doubtful by the Master of the Rolls, who directed a case. It does not appear what became of the matter subsequently. There are other cases involving the same principle. In *Doe* v. *Prigg* (8 Barn. & C. 231) there was a devise to A. for life, with remainder to the surviving children of William Jennings and John Warren, and to their heirs for ever, the rents and profits to be divided between them in equal proportions, share and share alike; and it was held that the word surviving referred to the testator's death, and not to that of the tenant for life. The difficulty there was what meaning should be assigned to the word surviving. The word survivors or survivor necessarily imports a contingency. The first impression would therefore be that the gift was a gift for life, with a contingent remainder in fee. But in *Doe* v. *Prigg*, and in other cases, the word surviving was held to mean surviving the testator. This principle seems to go through all the cases, that wherever there is a contingency the contingency is referred to the death of the testator: *Clayton* v. *Lowe* (5 B. & Ald. 636), *Wright* v. *Stephens* (4 B. & Ald. 574). If the devises be treated as alternative devises, then the children would take the fee; and, treated as alternative devises, what has been contended on the part of the parents will equally apply to the case of the children. Where there are alternative devises, either devise may be read first. All that the Court requires to be satisfied of is that the testator intends to give the fee away from the heir; **[650]** and that being done, it is immaterial how it is moulded by the subsequent limitations. Supposing the fee to pass then, as all the brothers and sisters survived, they would take in fee. But if the Court should think the principle not to apply to all the four, but to be confined to the two sisters, still the argument would be the same. If extended to all four,

then Peregrine and Lucy, being unmarried, might perhaps be held to take estates tail; while Mary, being married, might be considered to take an estate for life only, with remainder to her children in fee: *Wild's case* (6 Co. 17). On a devise to A. and his children, it was formerly held that if A. had any children, the devise created a joint tenancy in fee in the whole of them: *Oates* v. *Jackson* (2 Str. 1172). It is true that Sir John Leach held differently to this in *Jeffery* v. *Honywood* (4 Madd. 398).

That Peregrine took an estate in fee may also be contended on another distinct ground. The words used by the testator are, "I will and bequeath to my two brothers, Arthur and Peregrine, one-third part each, share and share alike;" Arthur being the elder brother and heir-at-law and Peregrine being the younger brother. If the words "share and share alike" be construed not to give them a tenancy in common in fee, but to apply to the share only, then the words "share and share alike" would be tautologous and unnecessary; but the clear meaning of the testator was that his two brothers should be entitled in like manner. There being a devise to two persons, one of whom is the heir, as tenants in common, the devise amounts to a devise to both as tenants in common in fee, because the heir necessarily takes the fee. In *Dickens* v. *Marshall* (Cro. Eliz. 330) it was certainly held that the words "share and share alike" created a joint tenancy; but the law is now the other way. **[651]** It is material to distinguish this case from *Nowlan* v. *Nelligan* (1 Bro. C. C. 489). In that case the testator gave his whole property to his wife, making no provision for his daughter, expressing his knowledge that it was his wife's happiness, as well as his own, to see her comfortably provided for; but in case of death happening to his wife, he desired his executors to take care of the whole for his daughter. The interest given to the wife was cut down to an estate for life, with a remainder to the daughter absolutely. Any other construction would have defeated the testator's manifest intention. In the present case, if the testator's intention is to prevail, then it must be held that the devises in this case were alternative devises in fee, or else that estates tail were taken by Peregrine and Lucy, or by Lucy alone.

Mr. Spence and Mr. John Evans, for the defendant, Charles Bowen Allen, the eldest child of Mary Allen, afterwards Mary Scowcroft. Mary Scowcroft took merely an estate for life in the real estate, with remainder to her children in fee, as found by the Master. All the authorities cited in support of the proposition that she took a larger estate apply to personal estate only. In cases of personal estate, where the first gift is indefinite, the gift is considered to be absolute for two reasons—first, the gift being indefinite, without limitation, is necessarily considered absolute; secondly, the words "in case of demise," following such a bequest, carry with them an air of contingency, which compels the Court to find a meaning for them, which it does by referring the words, in case of death, to the case of the death of the legatee in the lifetime of the testator. The expression itself, as observed by the Master of the Rolls, in *Cambridge* v. *Rous* (8 Ves. 12) is incorrect. In *Turner* v. *Moor* (6 Ves. 557) the Court relied on **[652]** the word "or" as distinguished from the word "and," as shewing that a substitution was intended; and, in another case, the word "but" was relied on for a similar purpose. In the present case the word used is "and." No such construction, therefore, can prevail. *Turner* v. *Moor* and *Cambridge* v. *Rous* were both cases of legacies of personal estate; so, also, were *Lowfield* v. *Stoneham* (2 Str. 1261), *Hinckley* v. *Simmons* (4 Ves. 160), *King* v. *Taylor* (5 Ves. 186), and various other cases which are collected in Jarman's Powell on Devises (vol. 2, p. 764). It is equally clear that an indefinite devise of real estate, without words of limitation, only carries an estate for life. No modern decision can be found in support of the contrary proposition. The last case in favour of a contrary construction is the case cited from Pollexfen (*Fortescue* v. *Abbott*, p. 479). In *Chalmers* v. *Storil* (2 Ves. & B. 222) there was a mixed devise of real and personal estate, and the decision, so far as it went, applied only to the personal estate. In that case the word "estate" was also used, which might perhaps have been contended to pass the fee. In *Doe* v. *Prigg* (8 B. & Cr. 231) the decision turned upon the word "surviving." The only question there was whether children surviving meant children surviving at the death of the tenant for life, or children surviving at the death of the testator. There was no attempt to convert an estate for life into an estate in fee. In *Clayton* v. *Lowe* (5 B. & Ald. 636) the devise was not indefinite, being, in the first instance, to the grandchildren in fee; and the rule is that where a devise in fee is followed by several alternative limitations over, which aggregately provide for the death of the devisee

under all circumstances, the case is analogous to that of a limitation if he die generally, and are therefore held to refer to the **[653]** death of the devisee in the lifetime of the testator. *Clayton* v. *Lowe* is referred to in Jarman's Powell on Devises (vol. 2, p. 765), as shewing the effect of this rule. In *Fortescue* v. *Abbott* (Pollex. 479; Sir T. Jones, 79; Fearne's Contingent Rem. 243) it was taken for granted by all parties that the devise was of an estate for life only, and the question was whether it was a vested or a contingent remainder.

Mr. James Russell and Mr. Hindes, for the defendants, some of the younger children of Mary Scowcroft. Mary Scowcroft took only an estate for life, with remainder to her children in fee. It is contended as one point that those children only are entitled who were living at the death of their mother; but without carrying the argument so far, it may be sufficient to contend that Mary Scowcroft took an estate for life, with remainder to all her children as a class: *Billings* v. *Sandon* (1 Bro. C. C. 393). On the part of these defendants similar arguments, as to the distinction between devises of real estate and bequests of personal estate, as those urged on the part of the defendant, Charles Bowen Allen, were addressed to the Court, and the same cases, and also *Jeffery* v. *Honywood* (4 Madd. 398) were relied on.

Mr. Elderton, for one of the younger children, contended that Mary Scowcroft took an estate for life, with a vested remainder in fee to such of her children as were living at the death of the testator.

Mr. Campbell, for the defendants Mathias and Gwynne, the trustees of the plaintiff, Arthur Bowen, the heir-at-law. All the cases cited are cases which were decided on **[654]** their own special circumstances. It is admitted in all the cases that the words "in case of death" are ambiguous. In *Galland* v. *Leonard* (1 Swanst. 161) the property was entirely personal, and the whole interest in the personal estate was conferred by the will on the tenant for life. The words in case of the death were held to mean, not the death of the testator, but of a prior tenant for life. The circumstances of that case have no application to the present. [Alderson, B. Is there not a fallacy in arguing that, because an indefinite devise of land is construed a devise for life only, that such was the intention of the testator? The probability is that in all these cases the testator meant what is generally understood by the words used by him. In nine cases out of ten, as to personal estate, the construction is according to the testator's intention; but on the contrary with regard to real estate.] This case is not attempted to be argued on the intention of the testator, but on the legal construction of the words used; and the intention must be considered to have been according to the legal construction. [Alderson, B. The first point is whether the devise extends to all four devisees. The will contains a passage, following the devise, to which my attention has not been called. The passage to which I allude is this: "Observing, first, that my dear father, William Bowen, sen., Esq., is entitled to raise the sum of 2000l. sterling, by mortgage or otherwise, according to a bond or deed executed by me to him on the 15th day of April, 1802, for that purpose." I presume that this was a charge upon the whole estate.] If one part of the will may be read in a parenthesis, so, unquestionably, may this. The whole effect of the passage, however, is merely to notice the charge, and that the devisees are to take subject to this charge, as also to the prior estate for life of the testator's father. The rule dedu-**[655]**cible from all the cases seems to be that where, from the general context of the will, it may be collected that the testator in using the terms, "in case of the death" of a legatee, intended that the legacy should go over upon his decease, whenever it might happen, then the words denoting a contingency should be rejected, and a vested interest be presumed. The rule is so stated in Roper on Legacies (vol. 1. p. 524, 3rd edit.). In *Slade* v. *Milner* (4 Madd. 144) there was an immediate indefinite gift, and therefore of an absolute interest. In *Turner* v. *Moor* (6 Ves. 557) the legacy was to A. absolutely, "or," in case of his death, to his issue; which was a clear alternative gift. In *Billings* v. *Sandon* (1 Bro. C. C. 393) the words used were the same as in the present case. In *Nowlan* v. *Nelligan* (id. 490) the words used were nearly the same, but there was an implied trust for the daughter. All the cases were cases relating to personal estate. In *Lord Douglas* v. *Chalmer* (2 Ves. jun. 501), which was also a case of personal estate, the bequest was to A., and, in case of her decease, to her children, share and share alike; and it was held that A. took an estate for life, with remainder to her children absolutely. In all the cases, where the rule of substitution has been adopted, if the words used had been the same which are to be found in the

present case, it would have been held that there was a clear remainder. In either case, whether there be a substitution or not, the estate devised is only of an estate for life. The meaning of substitution is to substitute some person for another person to whom the estate has been previously devised, and for the same estate, and not to devise the estate to one for life, and then, in case of the death of that person, to give it to another for a larger estate. It has been argued that the words "in case of their de-[656]-mise" apply to all the brothers and sisters; and this has been put upon the principle of equality. The devise, however, to the two brothers in the will is totally separate from, and unconnected with, the devise to the two sisters, and the words used are different in each devise; and there is a distinct sentence between the two devises. The construction contended for would be contrary to the rule of grammatical construction, which is to refer the words "in case of their demise" to the last antecedent, that is, the two sisters to whom he had given the one-third, that is, the one-sixth each. In *Chalmers* v. *Storil* (2 Ves. & B. 220), in case of the death of the wife, the portion of the wife was directed to devolve on the children equally. That, also, was the case of personal estate; there being no devise of real estate. There is a total distinction between this and *Wild's case*. In that case the devise was to A. and his children, or issue; in the present case the words are, "to the children and their heirs." This distinction was taken in *Ives* v. *Legge* (Fearne on Contingent Remainders, 377), and the principle was acted upon in *Jeffery* v. *Honywood* (4 Madd. 398). It has also been contended that as Arthur takes an estate in fee, Peregrine takes an estate in fee likewise, because the devise is of one-third part each, share and share alike; but that construction cannot arise until the fact is obtained that Arthur takes the fee as the heir-at-law. It was not the intention of the testator to die intestate: he did not anticipate the uniting of the fee in Arthur, as heir-at-law, with the estate for life which he devised to him. *Fortescue* v. *Abbott* does not bear upon the present case. In *Goodtitle* v. *Edmonds* (7 Term Rep. 675) the Court excluded the strained construction now sought to be put on the words "share and share [657] alike." In *Dickens* v. *Marshall* (1 Cro. Eliz. 330) the question was whether the parties took as joint tenants or tenants in common. That case, however, excludes the construction attempted to be put on the words "share and share alike." In that case it was also held that the devisees took estates for life, although one of them, as in the present case, was also the heir-at-law. So also, in *Pettywood* v. *Cook* (id. 52), under a devise of three houses to the testator's wife for life, with remainder, as to one house, to each of the testator's children in fee, and with a clause that, if any of them should die without issue, the survivors should enjoy totam illam partem equally between them, it was held that these words gave the survivors an estate for life only.

Mr. Hodgson, in reply. Admitting that the cases cited on the part of James Scowcroft the elder are cases of personal estate only, still it is contended that no substantial distinction exists in this case between a bequest of personal estate and a devise of real estate. It has been argued on the other side that an indefinite gift of land is a gift of an estate for life only, but this is not quite accurate. It is true the devisee, according to the construction of law, takes for life only, but that is not according to the intention of the testator. All the Judges have lamented this, and a clause is inserted in Lord Langdale's bill for altering the law in this respect (see stat. 7 Will. 4 & 1 Vict. c. 26, s 28). This rule of law seems to have been arrived at in modern times. There is an obvious distinction between a gift after the decease of the devisee and a gift in case he should die. In *King* v. *Taylor* (5 Ves. 186) the case of *Newlan* v. *Nelligan* was discussed, and in that case a clause of survivorship between two [658] legatees, if either of them should die, was confined to a case of lapse, and did not prevent the legacies vesting. In the present case, as in *King* v. *Taylor*, all that the testator intended was to guard against a lapse by the death of the legatee in his life time. What could the testator mean by the words "in case of their demise?" If he meant after their death, then there would be a gift to the children, not by construction, but by express words: there is nothing in the will to shew that he meant any thing more than to guard against a lapse. If so, the gifts are clearly alternative gifts. Words of inheritance are annexed to the gift to the children, which demonstrate an intention to disinherit the heir in one case, and why should not the same principle apply to the other. It has never been decided that the rule of law applies to personal estate only. To which of the devises do the words of inheritance apply? It has been said that according to grammatical construction, they must be

confined to the last antecedent, the devise to the two sisters, but this is begging the question. There are various devises throughout the will, and the words "in case of their demise" apply just as forcibly to the whole of the devises as to one of them. The reference to the charge in favour of his father shews also that the testator had the whole of the estate in his contemplation. All the devises are alternative devises; there is no distinction in the shares, and the devises operate to give a fee to all the devisees. As to *Wild's case*, the rule there laid down is that if A. devises lands to B. and to his children or issues, and he hath not any issue at the time of the devise, the gift is an estate tail; this, however, is contrary to the intention of the testator, for the gift is immediate.

With respect to Peregrine's share, it must necessarily be assumed that the testator knew that the devise to Arthur would have no operation, but that he would take **[659]** in his character of heir-at-law; and by the gift to Peregrine in the same terms as the gift to Arthur, he must have intended that Peregrine should take in the same manner as he must be assumed to have known that Arthur would take. With regard to the shares given to Lucy and Mary, a clear difference exists, one being tenant in tail, the other tenant for life; the remainder in the one case is clearly vested, in the other contingent.

Dec. 1st.—ALDERSON, B. In this case I have considered the will of the testator and the points submitted in the argument to me.

The testator by his will bequeaths to his brothers Arthur (his heir-at-law) and Peregrine, one-third part each, share and share alike, of the lands and premises in Prendergast and Ambleston, and the other remaining third part of the said lands to his sisters Mary and Lucy, share and share alike, making a sixth part to each; and then (he adds), "And in case of their demise, I will and bequeath their respective shares or proportions to be equally divided amongst their children or their lawful heirs." In the latter part of his will he also bequeaths the whole of his personal estate, subject to his legacies, to his brother Peregrine.

Now, on this will, several questions have been made, but I do not purpose to consider them in the order in which they were made, because a more simple course seems to me to be to state the view I take of the will.

In the first place it seems to me that the words "in case of their demise" are only applicable to the devise to the two sisters, and have no reference to the previous devise to Arthur and Peregrine. The consequence is that the question as to Peregrine depends, in my judgment, on the first devise alone—and there being no words of inheritance, I think he only took an estate for life. The **[660]** words share and share alike in a devise to him, jointly with the heir-at-law, were relied on. But I think these words insufficient. There were similar words in *Doe* v. *Edmunds* and *Dickens* v. *Marshall*, but they were held insufficient; and besides, in this case the testator, in the subsequent devise, construes these very words by the words "making one-sixth part," which have reference only to the extent of land given, and not to the quantity of estate. It is said that the intention must have been to leave both brothers an equal interest. That may be so, but I cannot act upon a mere conjecture which, even as a conjecture, is shaken by the next bequest of the whole personalty to Peregrine alone, which, for aught I can tell, may have been the way in which the testator intended the equality to arise.

I think, therefore, that Peregrine took an estate for life only in one-third part.

Secondly, as to the estates given to the sisters. The question is what meaning is to be given to the words "in case of their demise." Mr. Hodgson contended that these words mean "in case of their demise before the time of my decease," thereby making the devise to the children and their heirs a substitution for the devise to the parents. And if so, there is good ground, no doubt, for contending that the intention was to give to the parents, as well as to the children, a fee simple.

Many cases to this effect were cited; but they were all cases of personal property, and no case has been, or I believe can be cited, in which such a construction has been applied to a devise of land. There is an obvious distinction between the two. A bequest of personal estate to A. gives him the whole interest—a devise of land to A. gives him only a life interest. In the former case, therefore, the words "in case of their demise," preceding a bequest over, cannot well have their proper effect except by considering them as applicable to a bequest over as a **[661]** substitution for the previous gift, in case the party to whom it is given should not survive the testator.

But in the case of land, the most natural meaning of the words (which seems to me to be "after their demise"), may very reasonably have its full effect. In reading this will, therefore, I think I ought to give that meaning to the words used by the testator; and then there is no doubt that the Master is right in coming to the conclusion that Mary Allen took an estate for life in one-sixth, with remainder to her children in fee as tenants in common, and that in the events which have happened, Charles B. Allen is entitled to three-tenths thereof, James Scowcroft, jun., to two-tenths, and the other children to one-tenth each.

Lastly, as to Lucy Bowen's share. It was contended as to this, that she took an estate tail, having no children at the time of the testator's death. But I think this is not so, and that it is distinguishable from *Wild's case* on the same grounds as were taken by Sir John Leach in *Jeffery* v. *Honywood*. Indeed, on this part of the case, *Jeffery* v. *Honywood* seems precisely in point.

I think, therefore, that in this part of the case also the Master has drawn a right conclusion from the will.

All the exceptions, therefore, must be overruled.

[662] GRENFELL *v.* GIRDLESTONE. Dec. 1st, 4th, 5th, 15th, 1837.—Upon a bill filed by a judgment-creditor one day before the stat. 3 & 4 Will. 4, c. 27, came into operation to obtain the benefit of a judgment entered up and docketed 28 years ago, since which time it did not appear that the creditor had taken any steps to enforce payment of his demand: Held, that the plaintiff was barred of all equitable relief by lapse of time alone, independently of the question whether satisfaction of the judgment could or could not be presumed.—Upon a bill filed by a creditor to enforce a judgment of 28 years standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period: Held that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound, under the circumstances, to shew to demonstration that the judgment had not been satisfied. Semble, that since the stat. 9 Geo. 4, c. 14, an acknowledgment of the debt by the debtor to a third person is not sufficient to take the case out of the Statute of Limitations.—Where the records of certain proceedings in a Welch court of judicature had by an order improperly obtained in this Court been deposited with an officer of this Court: Held, nevertheless, that they were to be deemed to be in the proper custody until the order so obtained should be rescinded.

[S. C. 7 L. J. Ex. Eq. 42. Referred to, *Godwin* v. *Culley*, 1859, 4 H. & N. 373. See *Stamford Banking Company* v. *Smith*, [1892] 1 Q. B. 765.]

In Easter Term, 1805, the plaintiff and the late Dr. Hughes, as executors of the will of Thomas Williams Esq., late of Llanidam, in the county of Anglesey, obtained and entered up a judgment in the Court of King's Bench against Thomas Grindley for the sum of 3375l and costs, which judgment was duly docketed. At the time of entering up this judgment, Grindley was seised in fee of two estates in the county of Carnarvon, and several estates in the county of Anglesey. The estates in Carnarvonshire were subject to a mortgage to one William Casson for 800l., which was secured by an indenture of demise dated the 5th of August, 1804, for the term of 500 years. The other estates were subject to a mortgage to a Mr. Roberts for the term of 500 years, under an indenture of demise, dated in 1802.

On the 30th of November, 1805, Grindley agreed, by articles in writing, to sell two of the estates to Robert Morris, as agent for William Alexander Madocks for 1120l.; and he, on the same day and in the same manner, agreed to sell two others of the estates to W. A. Madocks for 4130l. These agreements comprised both the estates in Carnarvonshire. At the time of this transaction, notice in writing of the judgment for 3375l. was served by the plaintiff on Morris, as the agent for Madocks.

Subsequently to these agreements, another agreement **[663]** respecting the same premises, bearing date the 13th of December, 1806, was executed by Grindley and Madocks. By this document it was stipulated that the conveyances should be prepared on behalf of both parties by Mr. Shadwell; that a proper abstract of title should be

furnished on or before the 30th of December; that all mortgagees and other proper parties should join in the conveyances; and that the premises should be conveyed on or before the 1st of February following, when the remainder of the purchase-money should be paid. The agreement then contained the following clause:—"And the said Samuel Grindley agrees that the said conveyance shall contain all proper and necessary covenants for the title to the said farm and hereditaments; and he declares and engages that the incumbrances now affecting the same are the following only, which are to be paid out of the said purchase-money, and the mortgage assigned to the said William Alexander Madocks, or a trustee nominated by him, on or before the 1st day of February next: To the executors of the late Thomas Williams, Esq., about 1300l., and interest from April, 1804; to John Roberts, of Newsfynydd, 800l., and interest; to Mr. Casson, 600l., and interest."

By indentures of lease and release of the 20th and 21st of March, 1810, and made between Grindley of the first part, J. B. Sparrow (since deceased) and the defendants, H. R. Williams and John Bradley, of the second part, and the several other persons, creditors of Grindley, who should by themselves or their agents execute the said indenture of release, of the third part, it was witnessed that, for the considerations therein mentioned, Grindley released and conveyed to the use of Sparrow, Williams, and Bradley, and their heirs, all the above-mentioned estates, subject to all leases and mortgages or annuities affecting the premises, upon trust, with all convenient speed to sell the same, and, after payment of all costs attending the trust, **[664]** to pay off a certain mortgage therein stated to be due to William Harvey, Esq. (which was afterwards satisfied), and all other mortgages and annuities affecting the premises, and pay and divide the clear residue of the purchase-monies towards payment of the creditors, parties to the said indenture of release, their respective executors, &c.; and the surplus, if any, to such persons as Grindley should appoint, and subject thereto, to the use of Grindley, his executors, administrators, and assigns.

Neither the plaintiff nor his co-executor, Dr. Hughes, was a party to this deed of trust.

Soon after the execution of this deed, Grindley died, leaving his son, the defendant, Samuel Grindley, his heir-at-law, and his widow, Sarah Grindley, his administratrix.

On the 28th August, 1810, a bill was filed in the Court of Great Session, by the creditors under the trust-deed, against Samuel Grindley the son, Sarah Grindley, and the trustees, praying the usual accounts of the intestate's personal estate and effects, and that the same might be applied in payment of their debts; and that, if necessary, the real estates of the intestate might be sold for that purpose. Upon the cause coming on for hearing on the 1st April, 1811, the Court directed the accounts to be taken, and an inquiry to be made as to the real estates of the intestate, and the incumbrances affecting them; and on the 19th of August, in the same year, the registrar made his report, stating, amongst other things, the contracts between Grindley and Madocks, and that the same had not been completed; when the Court, by its order on further directions of the same date as the report, ordered and decreed that the trustees, Sparrow, Williams, and Bradley, should be at liberty to complete the agreement with Madocks, and receive the remainder of his purchase-money. Upon Madocks failing to complete the purchase, pursuant to this order, a further order was made that the trustees should be at liberty to file a bill against him. They, ac-**[665]**-cordingly, in the year 1815, filed their bill in the Court of Great Session against Madocks, to compel him to complete the contracts; but it appeared that he was then out of the jurisdiction of that Court, and in embarrassed circumstances, and no further proceedings were had in that suit.

All the estates comprised in the trust-deed were ultimately sold, subject to existing incumbrances, and the money paid to the creditors.

While these proceedings were going on against Grindley and his representatives, it appeared William Casson was taking steps to recover the 800l. due upon his mortgage. For that purpose he, in 1808, filed a bill of foreclosure against Grindley, which was afterwards continued against Madocks. In August, 1810, Madocks paid off this mortgage, and took an assignment of the mortgage term of 500 years to a trustee for himself. Afterwards, by an indenture dated the 28th December, 1811, he granted an annuity for three lives to Edward Stone (since deceased), on the security of the Carnarvonshire estates, on which occasion the term of 500 years, so held by Madocks' trustee, was assigned to the defendant Metcalfe, in trust for Stone. By another

indenture dated the 1st February, 1812, Madocks granted a similar annuity to James Bellamy (since deceased), upon the security of one of the estates in Anglesey. Upon that occasion Bellamy paid off the mortgage to Roberts, and Roberts's term of 500 years was thereupon assigned to a trustee in trust for James Bellamy.

Madocks died in 1828, without having, as it appeared, completed his contracts to purchase.

The annuities having become in arrear, the annuitants, or their representatives, took possession of the lands on which the annuities were secured. At the time of the institution of this suit, the interest of Edward Stone was represented by the defendant Girdlestone, as his sole executor; and that of Bellamy, by the defendants Girdlestone and John Bellamy.

[666] The bill, which was filed the day before the late Statute of Limitations (stat. 3 & 4 Will. 4, c. 27) came into operation, alleged that at the time when the judgment was so entered up against Samuel Grindley he was utterly insolvent, and so remained until the time of his death; and all his lands, hereditaments, goods, and chattels, were so mortgaged and incumbered that even if the plaintiff had taken out execution on the judgment, he could not have satisfied it by taking the person or property of Samuel Grindley in execution. The bill also charged collusion between Madocks and the trustees, whereby the latter were induced not to take the proper proceedings against him; and, further, that the plaintiff was wholly unable to avail himself of the judgment at law, owing to the legal estate in the premises being outstanding in persons wholly unknown to the plaintiff, who acquired such legal estate before the judgment was entered up.

The bill prayed that the plaintiff might be declared entitled to have the sum of 3375l. so secured by the judgment, and the interest thereon, satisfied out of the hereditaments now in the possession of the defendants Girdlestone and Bellamy, and out of the purchase-monies for the said hereditaments received by the trustees, subject however, so far as regarded the Carnarvonshire estates, to the mortgage of 800l., if any thing remained due in respect thereof; but if the Court should think that the plaintiff was bound to pay what was due in respect of the mortgage, then that he might be at liberty to redeem the same, and having so done, might have his judgment satisfied in manner before mentioned. The bill then, after praying various accounts against the annuitants and against the trustees, prayed that, if necessary, this bill might be deemed and taken to be a supplemental bill to the creditors' bill in the Welch Court.

[667] The plaintiff entered into evidence of the insolvency and embarrassments of Grindley and Madocks, from the time the judgment was entered up to the times of their respective deaths.

Upon the counsel for the plaintiff tendering in evidence the proceedings in the Welch Court, in order to prove Grindley's insolvency,

The counsel for the defendants objected to the reception of such evidence; first, because the defendants were not parties to the suit in Wales, which as to them was res inter alios acta; and, secondly, because the documents did not come out of the proper custody, namely, that of the plaintiff's clerk in Court.

For the plaintiff. Upon the first point, there is no doubt that these proceedings, if properly proved, are good evidence of the state of Grindley's circumstances at the time of that suit. Upon the other point, this is a supplemental suit, and the documents were placed in the hands of the plaintiff's clerk in Court under an order of this Court. [Alderson, B. That order must have been improperly obtained. It does not appear that the proceedings in the Welch suit have been transferred to this Court under the statute (11 Geo. 4 & 1 Will. 4, c. 70, s. 14). How, then, can they be made evidence, except they come out of the custody of the proper officer of the Welch court?]

In reply it was said that the order had been obtained ex parte, and that the attention of the Court was not called to the circumstances of the case.

ALDERSON, B. The object of this evidence is to pauperize Grindley, and therefore it is immaterial whether **[668]** the defendants are or are not to be considered as parties to the suit in Wales. The fact of a suit being instituted against a party for the purpose of administering to his effects is evidence of his circumstances. In the same manner, in cases of fraudulent preference, you shew that writs have been issued against the party by third persons. It shews the status of the man. Upon the other point I have no doubt, as at present advised, that the order as to these documents was

one which the Court had no right to make. But the question is whether, though the order has been improperly made, the documents, being in the custody of an officer of this Court under an order of the Court, are not in the proper custody. Upon the whole, I think it is not like the case of documents delivered to an indifferent third person. Upon inquiry, I find that under an order properly obtained, they would have been in the custody of the same officer who now produces them; therefore, until the order which has been obtained is rescinded, I shall consider them as coming out of the proper custody.

The cause then proceeded on the merits.

Mr. Boteler and Mr. G. Richards, for the plaintiff. It is clear, upon the evidence, that the incumbrance of which the plaintiff claims the benefit, was subsisting down to Grindley's death; that it is now subsisting, and that they who claim against the plaintiff claim with full notice of it. In the abstract of title and other papers delivered to Mr. Shadwell, there is distinct notice of it, and those papers came from the hands of the Bellamys. The copy of the agreement of 1806, which is also in their hands, expressly refers to it, and it is noticed in the recitals of both the annuity deeds. Those deeds, after reciting the agreement of December, 1806, go on to say that shortly after the agreement Madocks was let into possession, but that no conveyance had been made to him by reason of **[669]** some of the claims remaining unsettled. The claims referred to could only be the debt to Williams's executors, because the others had been paid. Being thus affected with notice of the incumbrance, the legal estate which the defendants have got in for their protection utterly fails them. A legal estate, without notice of an existing incumbrance, is something; but of what value is a legal estate with notice? But then the defendants rely on lapse of time; and they set up that defence, not for the purpose of raising a presumption that the claim has been satisfied, but as an absolute bar. The view, however, which the Courts take of cases of this nature, is this—that after the lapse of twenty years, satisfaction will be presumed in the absence of circumstances tending to rebut the presumption. But insolvency on the part of the debtor destroys the presumption arising from lapse of time. In *Fladong* v. *Winter* (19 Ves. 196, 200) Lord Eldon said that taking that to be a case of presumption, it might be met by evidence to satisfy a jury that the debtor had not the opportunity, or the means of paying; and his Lordship referred to *Wynne* v. *Waring* (id. 197, cited) as an authority for the principle now contended for. Now here it is clear that both Grindley and Madocks were in insolvent or embarrassed circumstances from about 1808 to the time of their respective deaths. In 1810 Grindley makes over all his property to trustees, and no distribution has ever taken place amongst his creditors. Previously to that, a bill of foreclosure had been filed against him, which he was unable to answer. That mortgage was afterwards satisfied by Madocks, but the payment of it, and other matters, involved him in difficulties which ended in his insolvency. It is strongly in the plaintiff's favour that Madocks, by whose hand the money was to be doled to him, never could specifically perform the agreement out of which the money was **[670]** payable. The plaintiff could not proceed personally against the parties, while a decree was pending in the Welch court, nor against the land while there was a mortgage.

Sir Charles Wetherell, Mr. Girdlestone, and Mr. Metcalfe, for the defendants, Girdlestone, John Bellamy, and Metcalfe. A judgment-creditor coming into equity must be able to prove that he has used due diligence to enforce his legal claims. It is for this reason that a judgment-creditor, seeking equitable relief against the personal estate of his debtor, must shew that he has taken out execution under the judgment: *Angell* v. *Draper* (1 Vern. 399), *Shirley* v. *Watts* (3 Atk. 200). In this case there has been a failure both of legal and equitable diligence on the part of the creditor. By his own shewing, this bill ought to have been filed thirty-two years ago; and the long delay which has arisen gives ground for suspicion that the proceedings under the judgment were waived in order to accommodate Madocks. His being allowed to retain part of the purchase-money for payment of the incumbrance is strong to shew that the plaintiff meant to substitute his personal credit for the security of the judgment. Supposing, however, that such was not the case, the subsequent embarrassed circumstances of Madocks would rather be a reason for activity than for laches on the part of the plaintiff, and his failure in that respect would be a sufficient ground for dismissing the bill. We do not decline an issue, but if an issue were directed, it is impossible to distinguish between this case and *Williams* v. *Gorges* (1 Camp. 217),

where, under very similar circumstances, Lord Ellenborough directed the jury to presume that the judgment had been satisfied.

It is submitted, however, that the Court will dismiss this **[671]** bill. The defendants are in the situation of mortgagees, under terms of years antecedent to the plaintiff's judgment. It is said that they are not entitled to the benefit of those terms, because they took the annuities, with notice of the judgment. One ground of defence, however, is entirely distinct from the question of notice; because we say that the plaintiff shews no case to entitle him to stand in a court of equity, and ask to redeem us at all: and therefore, although, directly, we could not sustain our claim by reason of notice, yet we have a right to displace the plaintiff altogether. The questions, in fact, are two: first, whether the plaintiff has established that he, as such a judgment-creditor, had a right to file a bill for redemption; and, secondly, if he had, whether his remedy is not lost.

Upon the first point, it is clear that the plaintiff must shew what creates a lien on the lands sought to be effected. Now there is no evidence that the judgment has been docketed. All that is proved is that the copy of the judgment used in evidence, as compared with the original judgment roll, is correct. But this comparison is no proof of the docketing, for the roll and the docket are distinct things. The judgment debt, therefore, as proved, is not such as to give the plaintiffs a lien. Again, the plaintiff has not taken proper steps to keep alive the judgment so as to bind the heir. The writ of scire facias is directed to Grindley's administratrix only, and calls upon her to shew cause why the plaintiff should not have execution of the goods and chattels of the deceased debtor. How can that be binding Grindley's heir. The authorities establish that the first step, in these cases, is to sue out a writ of scire facias against the personal representatives of the debtor, and upon a return of nihil, then to sue out a writ against the heir or terre tenant: 1 Wms. Saund. 4th ed. p. 6 c., note (4): p. 72 b, note (1), 3; p. 72 m.; 72 n. But nothing of that sort has been done in this case: and, **[672]** therefore, even if the debt was originally a good judgment debt, the plaintiff has done nothing to bind the lands at law. How, then, supposing Roberts's or Casson's mortgage to be in existence, can the plaintiff have a right to redeem them? He has done nothing to shew that he has such a lien as gives a subsequent incumbrancer a right to redeem a prior; and that being so, he can have no claim against the defendants, who are protected by the assignment of the mortgage terms.

Then as to the question of lapse of time. Length of time operates two ways; either as an absolute bar to the party claiming, or as an ingredient in the question whether satisfaction of the claim shall be presumed. The assignment of Roberts's term to the defendants was a mortgage title; and, if so, the defendants cannot be in a worse situation than Roberts himself would have been in. It is clear that undisturbed possession by a mortgagee for twenty years is a bar to the right of redemption. The law upon this point is well laid down by Sir Launcelot Shadwell in *Ashton* v. *Milne* (6 Sim. 378). "A court of equity," he says, "regards more the antiquity of possession by the defendant than the novel accruer of title to the plaintiff; and will not interfere against a person who, claiming by a mortgage title, has been in possession more than twenty years without having recognized the right to redeem." Now, here it is not attempted to be alleged that from the year 1805 to the 30th of December, 1833, the day before the late statute (*b*) came into operation, a single step was taken by the judgment creditor to assert his right. In 1805, when the purchase is made by Madocks, no proceedings are taken to enforce the judgment, but the plaintiff is satisfied with merely giving a notice of his claim to the agent of Madocks. Again, when the creditors' suit **[673]** is instituted in 1810, no advantage is taken of it by the plaintiff. It may be said that, having a judgment, he had no occasion to resort to the suit. But that argument cannot avail a creditor who uses such delay. If, by the decree in that suit, it appears that Grindley's property was not sufficient to pay his debts, and the plaintiff still fails to come in and enforce his claim, that circumstance strengthens the argument arising from lapse of time. Again, as soon as the plaintiff knew of the arrangement between Madocks and Grindley as to the 1300*l*., why did he not make his judgment available at law or in equity, and raise the money, subject to the two mortgages? Besides, by pursuing that course (supposing his claim to be valid) he could not have deprived the defendants of that equity of which he now deprives them,

(*b*) Stat. 3 & 4 Will. 4, c. 27. See ante, vol. 1, p. 436.

namely, a right of contribution from the owners of the other estates. A court of equity would have said, you shall not select any of the estates for the enforcement of your claims, but you shall raise the money pari passu out of all the estates. Reverting, however, to the main question, it is clear that the insolvency of the debtor in this case will not be sufficient to counterbalance the general rule of equity, by which the claims of a creditor, who sleeps upon his rights for more than twenty years, is held to be absolutely barred, or, at least, is presumed to be satisfied. *Campbell* v. *Graham* (1 Russ. & Myl. 453).

Mr. Simpkinson and Mr. Duckworth, for the defendants, the trustees. The case, as opened by the plaintiff's counsel, is different from that which is stated in the bill. The case, as stated in the bill, does not proceed upon the agreement of December, 1806, nor is there any attempt upon the pleadings to follow specifically the money which was set apart for payment of the incumbrances. It is a **[674]** common bill by a judgment creditor to have the money raised out of the purchased lands. The first question then is, as regards the trustees, what possible equity the plaintiff can have in respect of the purchase-monies of the lands sold by the trustees. This demand is, not that the judgment may be satisfied out of monies in the hands of trustees in possession of the land, but out of monies which have in fact been paid to the creditors under the trust-deed, and expended by them in the purchase of other lands. There is no privity between the plaintiff and the trustees. He may have a claim on the purchased lands but not on the monies. The deed of trust only extends to parties who come in under it; and when the trustees have got the monies and paid them to the parties, there is an end of it. But the trustees were not in possession of the estate at the filing of the bill. The plaintiff was no party to the creditors' suit in Wales, and it is impossible to say that he can be made a party, by means of a supplemental bill filed in this Court; though, if the proceedings had been removed here in the first instance, it might have been so.

Again, it is impossible on the framing of this bill, and even independently of that, for the plaintiff to institute a claim under the agreement of December, 1806, to which he was no party. That was a mere private agreement between two other persons, as to how he, the plaintiff, should be paid. So far from being bound or considering himself as bound by that agreement, he has filed a bill inconsistent with it and against it. As between him and the parties to it, he is a mere volunteer; there is no mutuality between them, even supposing the terms of the agreement were more precise.

Lastly, the plaintiff is barred by length of time. Upon this judgment of 1805 no proceeding is had till 1833. It is indeed noticed in 1806, and revived against the personal representative of Grindley in 1821. But how can that **[675]** judgment so revived affect the lands of Grindley? It is wild to contend it. [Alderson, B. It leaves the judgment as of 1805.] Then the question is whether, independently of the doctrine of presumption, a stale demand of this nature can be enforced in a court of equity. The case of *Fladong* v. *Winter* has been cited as having been decided on the ground of presumption, the presumption being there rebutted. That case, however, is distinguishable from the present, in the strong circumstance that the bill was not filed by the bond creditor for the enforcement of the demand, but that a suit having been instituted for the general administration of the testator's assets, he was allowed to come and receive payment of his debt with the other creditors. It is sufficient, however, to say that the true ground on which a court of equity proceeds, in regard to lapse of time, is not that of presumption, but that of delay. Though the claim be ever so valid and good, a court of equity will not interfere after long lapse of time: *Cholmondeley* v. *Clinton* (2 Mer. 171; 4 Bligh, 1), *Cuthbert* v. *Creasy* (4 Bligh, 125), *Baldwin* v. *Peach* (1 Y. & C. 453).

Mr. Koe, Mr. Wilbraham, and Mr. Bellamy, for other parties.

Mr. Boteler, in reply. The filing of the bill by the trustees, in 1815, to compel Madocks to fulfil his contract, is evidence against the trustees that the plaintiff's judgment was outstanding. [Alderson, B. It is evidence as against them that the purchase-money was not wholly paid.] There exists the same sort of evidence against the annuitants. The whole agreement remaining to be performed, the Court will act upon it, as evidence that no money had been paid except what was paid aliunde. The mere acknowledgment that the agreement is unperformed **[676]** is evidence that nothing has been paid, until the contrary be proved. [Alderson, B. It seems to me

that such an acknowledgment is not inconsistent with the supposition, either that the money has been paid or the contrary. I have always thought that if the facts proved are equally consistent with either of two suppositions, there is nothing to go to the jury.] The defendant, Girdlestone, acknowledges that he has papers in his hands belonging to his testator Stone, by which it appears that Casson's mortgage was subsisting between 1813 and 1818. As long, therefore, as the purchase is acknowledged to be incomplete, it must be considered so in every respect, except what is proved to the contrary. There is similar evidence against the Bellamys. As against all the annuitants there is the evidence contained in the recitals of the annuity deeds. They shew that, in 1811 and 1812, Girdlestone and Bellamy admitted that something was due. [Alderson, B. The question is, what is adverse possession in case of a judgment? Non-payment is adverse possession. If I tell you that I owe A. so much, and do not tell him, A.'s laches in not enforcing the judgment is the same, though I tell you of it every day of the week. Either something must be claimed by the creditor, or something must be communicated by the debtor to the creditor on which he proceeds to act.] An acknowledgment by the debtor to a third person takes it out of the statute; as, for instance, an acknowledgment by an acceptor. [Alderson, B. No: that will not do. There must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. Lord Tenterden's Act (9 Geo. 4, c. 14) explains this.] If that be not sufficient evidence of acknowledgment, there will be great difficulty in proving acknowledgments in cases of this nature. But, at all **[677]** events, laying this part of the case out of the question, the bill having been filed before the statute of Will. 4, there is sufficient evidence of insolvency on the part both of Madocks and Grindley to rebut the presumption of satisfaction. It is almost impossible to distinguish *Wynn* v. *Waring* from the present case.

Upon the general question, as to the plaintiff being barred by mere lapse of time, the cases which have been cited are distinguishable from the present. *Cholmondeley* v. *Clinton* was the case of a mortgagee holding adverse possession for more than twenty years; and it was determined that the party coming into equity after that lapse of time should not be assisted to his remedy at law, although, with such assistance, he might have a legal remedy. Other cases have been cited, which were suits for discovery in aid of ejectments; but courts of equity distinguish between cases of that nature and those where a debt is directly sued for. *Fladong* v. *Winter*, and the judgment of the Master of the Rolls in *Hercy* v. *Dinwoody*, support that distinction, although, in the latter case, the creditors, under the circumstances, failed in their suit. The case of *Pickering* v. *Lord Stamford* (2 Ves. 272, 581) is, on the same ground, an authority for the plaintiff, as are also the principles of Lord Brougham's judgment in *Campbell* v. *Graham*. The case of *Ashton* v. *Milne* may be left out of the question, for it can only be supported on the ground that the bill, failing as to one co-plaintiff, failed as to both. No distinction was made in that case between possession under a mortgage title, and possession under any other title. The true doctrine on the subject is laid down by Lord Langdale in *Raffety* v. *King* (1 Keen, 617): "If the mortgagee enters not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and to the validity to **[678]** the conveyance he takes; and he must take the estate subject to the duties which are attached to it." Here it is difficult to see how Stone and Bellamy were holding as mortgagees under Roberts's title. They took an assignment to protect them, but they cannot be considered as holding as mortgagees in possession under the assignment by Roberts: their title is under the annuity deeds. *Christophers* v. *Sparke* (2 Jac. & W. 223).

Dec 15.—ALDERSON, B. I have now to deliver my judgment on the two points which I reserved for further consideration, and which are both of them of importance.

The questions are whether the plaintiff is barred by his laches in not suing earlier for the relief which he now prays by his bill; and whether, if that be not so, the Court, taking all the circumstances into consideration, ought not to presume as a fact that the judgment on which he founds his claim has been satisfied, or direct an issue to try that as a question of fact by a jury.

The circumstances are shortly these: In 1805 the plaintiff recovered a judgment against a person of the name of Grindley for a debt. That judgment having been properly docketed, became a lien on the real property of the debtor; but there being

then, as now, an outstanding term created anterior to the judgment, the plaintiff's remedy was, from the beginning, a remedy in a court of equity alone. Subsequently to this judgment, the real estate in question was sold to Mr. Madocks in 1806, and by Madocks was afterwards conveyed to the defendants; and the term to which I have before alluded was assigned to a trustee for the defendant's protection and benefit. It is conceded that, both when the sale to Madocks took place, and again when the conveyance was afterwards made to the defendants, both Madocks and the defendants had notice of the **[679]** judgment and of its remaining unsatisfied. The present suit was not instituted till 1833, twenty-eight years after the judgment; and with the exception of the notice given in 1806 to Madocks, the plaintiffs do not themselves appear personally to have done any thing in the intermediate period to enforce their rights. Much evidence has been given to shew that, from the embarrassed state of Grindley and of Madocks, it ought to be inferred that neither of them could possibly have satisfied the amount of the judgment; and the plaintiff desires me to infer from this that the judgment has not really been satisfied, but is still outstanding and unpaid. But it is quite clear and undisputed that for twenty-eight years the plaintiff has had the power of enforcing payment out of a sufficient fund by a suit in equity, and that he has taken no steps for that purpose. Upon full consideration, I am of opinion that he is now too late. I adopt the principles laid down by Lord Camden in *Smith* v. *Clay* (3 Bro. C. C. 639): "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court. Therefore, in *Fitter* v. *Lord Macclesfield*, Lord North said rightly that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error. 'Expedit rei publicæ ut sit finis litium' is a maxim that has prevailed in this Court at all times, without the help of an act of Parliament. But as the Court has no legis-**[680]**-lative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year: it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule and appropriated it to similar cases in equity; for, when the Legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, always maintained a limitation, to countenance laches beyond the period that law had been confined to by Parliament; and therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar. Thus, the account of rents and profits in common cases shall not be carried beyond six years, nor shall redemption be allowed after twenty years' possession in a mortgagee: *Jenner* v. *Tracey*, 1731; *Belch* v. *Harvey*: allowance being made for the ten years' disability given by the statute. By the like analogy, the House of Commons, in *Edwards* v. *Carrol*, determined that twenty years should bar a bill of review, because the statute Will. 3 had barred all writs of error after that period." These principles I find to have received the approbation of Lord Alvanley in *Hercy* v. *Dinwoody* (2 Ves. 87) and of Lord Brougham and the House of Lords in *Campbell* v. *Graham* (1 Russ. & M. 453).

Now, then, we are to apply these principles to the present case; and, if so, we ought to adopt in equity the same rule, mutatis mutandis, which prevails at law as to time. The rule at law is that a bond or judgment cannot be enforced if nothing be done upon it for twenty years, and no circumstances can be shewn to explain the apparent laches of the party. By parity of reasoning, then, if more than twenty years have elapsed, and nothing has been done in equity, and no circumstances can be shewn to ex-**[681]**-plain that neglect, it seems to me that in equity, also, the party ought not to be allowed to succeed.

Now that is the present case. Whatever may have been the circumstances which the plaintiff relies on to explain his not suing at law, or to shew that the judgment is still due, there is no reason at all for his not having proceeded in equity. It is clear that, for twenty-eight years, he has had an estate competent to the payment of this debt, against which he could have proceeded. Why has he not done so? Can he be

said to have used that reasonable diligence, without which, as Lord Camden says, a court of equity will not help him? I think not, and the consequence must follow. The Court, as Lord Camden says, "will be passive, and do nothing:" it will not act to dispossess the defendants of their better title at law. The same principle, as it seems to me, governed Lord Eldon in *Cholmondeley* v. *Clinton*. There, the plaintiffs were, it was said, not barred by lapse of time from bringing their ejectment; but their right had existed complete for relief in equity for more than twenty years, and they had not pursued it. Lord Eldon held that though they might perhaps not be barred at law, they were barred in equity.

Even, therefore, if I were of opinion here that the plaintiff had a remedy still open at law, notwithstanding this lapse of time upon the judgment, I should think the doctrine of Lord Eldon would fully warrant me in holding that the unexplained laches in equity would bar the plaintiff in this Court.

It would be sufficient for me to stop here; but I may as well add that, on the second point also, I think the defendants right. There are, undoubtedly, circumstances which have a tendency to shew that it is not probable that either Grindley or Madocks were ever in funds so as to pay off this debt; but I think that after a lapse of so long a period, without any attempt to enforce it by the plaintiff, the plaintiff ought to shew to demonstration that the judg-**[682]**-ment has not been satisfied. The case cited from Campbell (see ante, p. 670) is fully as strong as this, and yet there Lord Ellenborough directed a verdict. The inference from lapse of time should as much as possible be treated as founded on a rule analogous to the Statute of Limitations, rather than as leading to a conclusion of mere fact. Few persons believed, I apprehend, in the cases of rights of way, or of lights, before the recent statute, that any such grants as used to be suggested in pleading ever were actually made; and yet every judge directed, after twenty years' usage, and every jury used to find, the fact of a grant in conformity to the usage. It is far better that it should be so treated. Undoubtedly, where very cogent evidence exists to the contrary, there are authorities which warrant a decision that a specialty, after a lapse of twenty years, may be treated as still unsatisfied. *Fladong* v. *Winter* (see ante, p. 670) was put as one of such cases. As a question of fact, I should have drawn a different conclusion from the Master in that case; but the Master having so decided, I should have concurred with Lord Eldon in confirming that report, on the ground of the parties refusing to try the fact at law, which was the case there. In *Wynne* v. *Waring* (19 Ves. 197, cited) I think the evidence amounted to demonstration. Here that is not so. The unexplained fact of no attempt to fix the land with the debt is the strongest fact in the whole case to shew that the judgment was satisfied, and appears to me infinitely stronger than the facts of the embarrassments of Grindley and Madocks to the contrary.

I think, therefore, that on the whole the bill must be dismissed with costs.

Decree accordingly.

[683] ATTORNEY-GENERAL *v.* HOLLAND. Dec. 11th, 21st, 1837.—Testator devised an estate to trustees and their successors, upon trust that all such decayed gentlemen as could make it appear to the trustees that they were of the testator's name and family, and of the age of 40 years, or else so impotent as not otherwise able to get a living, should be allowed out of the yearly rents and profits of the lands 10*l.* each by the year for their lives, so far as the rents would extend. At the time of making the will the annual rental of the estate was about 50*l.*, but at the time of filing the information it amounted to about 500*l.*: Held, that this was a proper case for a scheme for the future management of the charity; and that in preparing such a scheme the Master was to consider of the expediency of increasing the allowance and diminishing the number of the future objects of the charity, and also to define more accurately what class of persons (excluding all minors) the testator intended to benefit.—Where upon an information filed for the administration of a charity estate, the case proved by the relators was sufficient to induce the Court to direct a scheme, and to order the legal estate of the charity lands to be got in, but the information contained false charges against the existing trustees of culpable mismanagement and breaches of trust, the Court dismissed the latter part of the information, with costs, and gave the relators no costs up

to the hearing as to that part of the information which was not dismissed.—Semble, that where the relief obtained on an information relative to a charity might have been obtained on petition, the Court will give no costs to the relators up to the hearing.—A., B., C., and D., were co-trustees of a charity under a will, which directed that one trustee in rotation should be the acting trustee for the current year and keep the accounts. A. being the acting trustee in a particular year, without the knowledge of the other trustees, applied some of the charity funds to his own use. At the expiration of the year A. delivered his accounts to B., who succeeded him as acting trustee, and at the expiration of that year B. delivered his accounts to C., who succeeded him in like manner: Held, that D. was not answerable for the breach of trust committed by A.

[S. C. 7 L. J. Ex. Eq. 51.]

Edward Hunstone, of Leake, in the parts of Holland and county of Lincoln, gentleman, by his will dated the 3rd November, 1655, gave and devised all his lands and hereditaments in Leake aforesaid, after the death of Elizabeth his wife, to four trustees named in the will, and their successors for ever, to be by them, as trustees, from time to time disposed of according to the intents and purposes thereinafter mentioned and declared, and to no other use, intent, or purpose whatsoever. The trusts then declared were as follows:—"First, that all such decayed gentlemen as can make it appear unto my trustees before named or their successors, that they are of my name and family, and of the age of forty years, or else so impotent as not otherwise able to get a living, shall be allowed by my said trustees or their successors, out of the rents and clear yearly profits arising out of the said lands, the sum of 10l. by the year, so far as the rents of the said lands will extend, and for and during their natural lives, the contrary not being occasioned by any extravagancy in their persons. Also my will is that in case it happens there be not so many of my name and family as being qualified as aforesaid, so as to be made capable of receiving the yearly **[684]** pension as aforesaid, that then such gentlemen as shall make it appear to my trustees or their successors to be of the family of the Godneys, late of Bagenderby, in the county of Lincoln, and so qualified as before mentioned, shall be made capable in like manner of receiving the said allowance as aforesaid for the term before-mentioned, if the rents of the lands will extend so far. Also my will is that in case that the two families of the Hunstones and Godneys before-mentioned should happen to be extinct or reduced to some few persons, not so many as the estate will afford allowance unto as aforesaid, that then such person or persons that can derive themselves and make it appear to my trustees or their successors is of the family of Robert Smith of Saltfleetby, in the county of Lincoln, gentleman, or of the family of Woodliffes, late of Toft Grange, in the said county of Lincoln, and of the qualification before-mentioned, that then every such person or persons have the allowance afore-mentioned paid as aforesaid, so far as the estate will extend. Also my will is that if there be not so many persons, both by affinity and consanguinity to be found, as may have allowance out of my estate as aforesaid, that then such person or persons living within the county of Lincoln, as can make themselves appear to my trustees aforesaid, or their successors, to be gentlemen, or persons of quality and merit, and so qualified as aforesaid, shall have the same allowance before-mentioned, so far as the said estate will extend. Also, my will is that if any of the person or persons before-mentioned being admitted to the yearly allowance or stipend of 10l. as aforesaid, shall, by his or their imprudence, not keep themselves in such habit as in some sort is agreeable to the quality, that then my trustees and their successors, or the major part of them, shall have power to default so much annually out of his or their allowance or stipend as aforesaid as will buy him or them doublet, coat, breeches, hose, and shoes in some sort suitable for their quality and **[685]** condition. Also my will is that if any of the person or persons before mentioned, being admitted to their yearly allowance or stipend of 10l. as aforesaid, shall, after the same received, grow debauched and profane, and live in any notorious crime and drunkenness, whoredom, or the like, and being thereof admonished by the said trustees or their successors, shall make little or no reformation, that then it shall be lawful for my said trustees or their successors to detain the said stipend or allowance, and absolutely for ever to discharge him thereof, and the same to bestow upon some of better merit, and as shall be qualified as the persons before-mentioned are to be. And because my trustees

or their successors may be the better enabled faithfully to discharge that reposed in them for the uses, intents, and purposes before-mentioned and declared, &c., it is my will that when the before-mentioned trustees or the survivor or survivors of them, shall, after the death of my said wife, enter upon the before-mentioned lands for the intents before-mentioned, that such of my surviving trustee or trustees shall have power to choose to him or themselves, such or so many person or persons in the room and stead of the before-mentioned trustees then dead, as will make up the after-appointed number of four. provided the person or persons so to be made choice of as aforesaid be men of good families, in good esteem of the countrymen of considerable estates, men pious and religious in their lives and conversations, ministers as well as others, living and inhabiting within the county of Lincoln, and the same person or persons so duly elected as aforesaid shall have the same power and trust reposed in him or them to all intents and purposes, as if he had been one of my trustees named in this my will; and that I may not be frustrated in this my intention, my will is that if it happen my said wife survive all my trustees nominated and appointed by this my said will, that the four ministers of Leake, Erangle, Lenorton, and Bennington, then being at the time of my [686] wife's death, shall be my trustees to all intents and purposes, for the disposing of my estate as fully as the persons before-named, and as if they had been particularly nominated in this my will; and if any of the said parishes of Leake, Erangle, Lenorton, or Bennington, should be destitute of a minister at the time of the death of my said wife, or that any of the said ministers within the said parishes should refuse to act according to this my will, then my will is that those of the said ministers as are willing to act, shall have power, in like manner, to choose to themselves any other minister or ministers within the said part of Holland as my trustees above named have power of election in case of vacancies and default amongst them, and so successively to choose ministers out of the said towns or parts of Holland in like manner as my trustees before named are empowered in like cases to do. Also my will is that upon my trustees' entrance upon my estate as aforesaid (being first made up by election as aforesaid, the number of four in case of death or other default amongst them), the senior by election amongst them shall, for the first year, be both receiver and expenditor of the profits of my said lands for the uses and behoofs before-mentioned, allowing him yearly such reasonable charges as he shall expend in discharge of the said trust, and 5l. for his pains: provided that within one month after the expiration of the said year he pass his account for the said year unto the residue of the trustees or the major part of them, who are hereby desired, upon reasonable notice and warning given unto them by the said receiver and expenditor, to attend at some convenient place for the taking up of the same, and to have allowed them out of the said accounts at the taking up of them, a dinner not exceeding 20s. And so the next trustee, according to seniority of election, to take upon him the same trust of receiver and expenditor for the following year, in manner and form and to the intents before-mentioned, and [687] so successively for ever. And, further, my will is that, if any of the trustees shall, by any means whatsoever, perfidiously betray the trust hereby reposed in them, or convert the same to any bye-end whatsoever, upon due proof thereof to be made unto the rest of my trustees or the major part of them, it shall and may be lawful to and for the residue of my said trustees to expel and eject the said trustee from his trust, and to elect and choose another in his stead, of the same qualifications before-mentioned, in like manner as they ought to have done in case he had died; and the said trustee so elected in his stead to have the same power and trust committed to him as the several trustees have, which are by this my will nominated, viz. Joseph Whyting, Charles Rushworth, Francis Empson, and William Ross."

The present information, after stating the will, the death of the testator, the acceptance of the trusts by the trustees, and that certain lands had at different times been allotted to and purchased by the charity, contained the following statements:— That the lands at Leake, devised by the said will to the said charity purposes, and the lands and hereditaments comprised in the said allotment, and purchased as aforesaid, have, by the change of times and the advance of prices, become of considerable value; and that the same consist principally of a farm-house and buildings, and between 300 and 400 acres of arable and pasture land, and that the said lands are worth to let the sum of 30s. per acre, or thereabouts; and that the said charity estate and premises now produce, or the same, if properly let, would produce an

income of from 600l. to 700l. per annum. That the defendants, George Holland, John Holland the younger, Richard Simpson, and William Cook, now are, or claim to be the trustees of the aforesaid charity estates and premises, but no conveyances or conveyance of the said charity estates have, or has ever been made to the defendants, or any of them; and the legal [688] estate in the said premises is now outstanding in some person or persons unknown to his Majesty's Attorney-General. That the said George Holland, John Holland, jun., Richard Simpson, and William Cook, are now, and have for a great number of years, by themselves or their solicitor or agent (who is a relation both of the said William Cook and of the said John Holland), been in the receipt of the rents and profits thereof for some such charitable purposes as in the said will mentioned. That between the years of 1814 and 1823 Edward Hunnings, one of the then trustees of the said charity, with the consent or through the negligence of the said George Holland, who was then a trustee of the said charity, applied a sum of 156l. 17s. 9d. part of the funds of the said charity to his own use; and his Majesty's Attorney-General has not been enabled to ascertain in what way the remainder of such rents and profits have been applied and disposed of. That for a great number of years there have been few or no persons of the family of the testator, or of the other families hereinbefore named, who are proper objects of the said charity; and it is alleged that there has been considerable difficulty in ascertaining what persons, not being of the aforesaid families, but resident in the county of Lincoln, are proper objects of the said testator's bounty; and that in fact no attempt has been made to devote any part of the said income for the benefit of gentlemen, or persons of quality and merit, being in the county of Lincoln, and qualified as in the said will mentioned; and the said rents and profits have remained unemployed, or have been accumulated by the trustees, and laid out on different securities; and that few persons now receive any benefit from the said charity, and his Majesty's Attorney-General has not been enabled to discover the particular qualifications of such persons that entitled them to the said charitable relief; and there is now a considerable yearly surplus of the said charity income, after making such few [689] allowances as aforesaid. That it will be beneficial that a proper scheme should be formed for the due application of the said charity income for the time to come, and that proper accounts should be taken of the rents and profits of the said charity estates, and that inquiry should be made into the circumstances under which the said charity estate has become vested in the present trustees, or in whom the same now is vested, or in whom the legal estate of the said premises is; and that, if necessary, new and additional trustees should be appointed, and the said premises conveyed to them accordingly; and that the said charity should be regulated in general by a decree of this Court.

The information then, after charging various acts of mismanagement of the estate by the trustees, by taking premiums from the tenants, cutting down timber, &c., and misapplying the monies derived from these sources, prayed that the charity might be regulated under the decree of the Court, and that a scheme for that purpose, and for the future application of the rents and profits thereof might be formed; that an account might be taken of past rents; that an inquiry might be directed into the circumstances under which the estate became vested in the defendants, and in whom the legal estate is now vested; that if necessary additional trustees might be appointed, and the estates duly conveyed to the continuing or new trustees; and that the defendant George Holland might be compelled to repay the said sum of 156l. 17s. 9d. so lost to the charity, &c.

The defendants by their answer admitted that in consequence of the good management of the trustees for the time being, the charity lands had greatly improved in value; and that the lands in Leake, which in the year 1667 were let at a rental of 56l., are now let at the annual rent of 500l.; but the defendants stated their belief that this was the utmost value that could be obtained for them. [690] They stated that the charity estate consisted of a farmhouse and buildings, and about 397 acres of arable and pasture land. They admitted that they were the existing trustees of the charity, and that George Holland had become a trustee in 1815, Simpson in 1823, Cook in 1824, and John Holland, jun., in 1832. They stated that, upon the death or retirement of a trustee, it had been the invariable custom for the surviving or continuing trustees to appoint a new trustee in the room of the trustee so dying or retiring, and to enter such appointment in the books of the charity; and that they,

the defendants, had been appointed trustees in such and no other manner; and that no other conveyance of the premises than by means of such appointment had been made to them. They admitted that they were in the receipt of the rents and profits of the charity, and had occasionally employed the party named in the bill as their solicitor.

With respect to the breach of trust committed by Edward Hunnings, the defendants stated as follows:—That Edward Hunnings was a trustee and secretary of the charity, from the year 1814 to the year 1823; and that in or about the year 1818 he sold out a sum of 200l. 3 per cent. consolidated annuities, which were then standing in his name as the survivor of the trustees in whose names the same had been originally invested, and that he received the proceeds of such sale amounting to the sum of 159l. 17s. 6d. That George Holland was a trustee of the charity at the time of such sale, but that the said Edward Hunnings was at that time the secretary of the said charity, and that all the funds passed through his hands alone. That George Holland had not any notice of such sale at the time thereof; but at the next general meeting of the trustees, after the sale, he ascertained that such sale had been made; and that after such sale had been made, the same also became known to the other trustees of the charity for the time being. That as Edward Hun-**[691]**-nings had continued duly to pay the interest on the said stock, and was a man of great respectability and reputed wealth, the trustees for the time being did not compel the said Edward Hunnings to replace the said stock. That, in the month of November, 1820, it was ascertained that Edward Hunnings was then insolvent, that at the time of his insolvency, he had in his hands other monies belonging to the charity, which, together with the produce of the sale of the said sum of 200l. stock, amounted to the sum of 470l. 13s. 3d. That the dividend upon his estate produced the sum of 313l. 15s. 6d., which was received by the trustees for the time being, so that the loss to the said charity, by the insolvency of the said Edward Hunnings, amounted to the sum of 156l. 17s. 9d. That these defendants know not, nor can set forth, as to their belief or otherwise, how Edward Hunnings applied the said sum of 470l. 13s. 3d.; but that he did not apply the same, or any part, to his own use with the consent or through the negligence of the defendant George Holland. That, up to the time of the insolvency of the said Edward Hunnings, the defendant, George Holland, always believed that the said Edward Hunnings was ready, and willing, and competent to pay and apply for the purposes of the said charity whatever he had in his hands belonging to the said charity.

With respect to the allegations contained in the information, relative to the objects of charity selected by the trustees, the defendants stated as follows:—That as such trustees as aforesaid, they have paid the whole of the rents and profits of the charity estates to persons who, at the time of election, and also by their subsequent conduct, were considered proper objects of the charity, with the exceptions after-mentioned. [Here followed as exceptions the expences allowed by the testator's will, and 700l. for repairs.] That, for a great number of years, persons of the name of Hunstone, claiming to be relations of the said **[692]** testator, received the donations given to them by the said will; that other persons, who also claimed to be relations of the said testator, but who were not of the name of Hunstone, did, for a considerable number of years, receive such donations; and that other persons of the name of Godney, and Smith, and Woodliffe also, for some time, received such donations. That, for several years last past, the families of Hunstone, Godney, and Smith, have become extinct, and there is now only one person of the name of Woodliffe, known to these defendants, who is entitled to and receives such donation; and that, for several years last past, but not for a great number of years, there have only been a few persons of the family of the said testator, or of the other families, who were proper objects of the said charity. That there has not been any difficulty in ascertaining what persons, not being of the aforesaid families, resident in the county of Lincoln, were proper objects of the said charity. That the defendants have, from time to time, as such trustees as aforesaid, according to their judgment, appointed such persons to receive the said donations as were, in the opinion of the defendants, qualified in manner in the said will mentioned to receive the same; and that, in manner aforesaid, the whole of the income arising from the said charity estates have been applied for the benefit of such persons.

The allegations contained in the information relative to mismanagement and misapplication of the charity monies by the trustees were wholly denied by the answer.

At the hearing, the relators did not attempt to fix the existing trustees with any fraudulent breach of trust, except so far as related to the fraud of Hunnings. Upon that point, however, it appeared from the books that Hunnings was succeeded in his situation, as acting trustee, by John Holland, senior, who adopted Hunnings' accounts, and thereby, as it should seem, made himself responsible for the balance due from Hunnings. The circumstances connected **[693]** with this part of the case are noticed by the Court in the course of the argument for the relators. As to the general management of the charity in regard to the selection of objects, it was difficult to say, upon the whole evidence, whether, since the decrease in the members of the testator's own family, the trustees had or had not in general fulfilled the intentions of the testator. In particular instances, however, it was evident that they had acted in opposition to the words of the will, as by applying the funds of the charity in binding out children as apprentices, &c.

Mr. Cooper and Mr. Spurrier, for the relators. With respect to the point suggested by the information relative to the outstanding legal estate, it might fairly be questioned whether, as there has been no conveyance of the legal estate since the testator's death, the power of appointment of new trustees has ever been legally exercised; and, in short, what acts of the several persons who have successively filled the character of trustees are valid. The relators, however, have no intention to press those questions, and merely ask for a reference to the Master for the purpose of ascertaining what has become of the legal estate, and whether the trustees have been duly appointed for the purpose of an equitable administration of the trusts of the will. On the Master's report the Court will have no difficulty in dealing with the case under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 23.

The main object of the present proceeding is the formation of a scheme for the future government of the charity. The founder has laid down no rules or provisions for that purpose. It rarely happens that a founder omits to give to some party or other the power of framing rules for the management of his charity; but in this instance he has. The Court, therefore, of necessity, will provide a scheme for that purpose, on the ground of the **[694]** increased income of the charity—no mode pointed out for ascertaining proper objects of relief—no provision for appointing an additional officer, supposing it necessary—and no power in the trustees to increase the allowances. It is sufficient to mention two cases, which shew that a court of equity is the proper tribunal for administering a charity where there is no general statute, and where, from a change of circumstances through a long lapse of time, a different administration of the funds is necessary: *Attorney-General* v. *Clarendon* (17 Ves. 491, 500), *Attorney-General* v. *Mercers' Company* (2 M. & K. 654). In the latter case it was held that, in consequence of the change in the value of money, and in the circumstances of the times since the charity was founded, and also of the great increase of the fund, the sums appropriated to the purposes of the charity should be augmented; and, in regard to particular sums, an increase was made from 200l. to 500l. That decision is applicable to the present case. Here, not only the former, but the existing trustees, have, without any authority, increased the allowances from 10l. to 15l. They have likewise appointed an additional officer, which they had no right to do; the will providing only for a receiver or expenditor. The secretary whom they have appointed is one of their own body and receives a salary for his trouble. They have laid out 700l. in repairs. They have employed a solicitor in the investigation of claims, that solicitor being brother of one of the trustees. All these may be proper acts, and they are not mentioned as matters of blame to the trustees; but the mere fact that recourse has been had to such proceedings shews that some regulation on the subject is necessary.

There are, however, some very serious charges against the trustees of this charity, which ought to be adverted to. It is conceded that those charges affect the former trus-**[695]**-tees rather than the present, but they serve, nevertheless, as ground for an application for a scheme. The alleged misconduct of the trustees consists in the allowance of the benefits of the charity to persons under forty years of age, and even to infants—the lending the funds of the charity to the trustees—the borrowing of the money by the trustees while they had money out on loan—the trustees themselves becoming objects of the charity—and the sale of stock and conversion of it to the use of a trustee, who has become insolvent. [Alderson, B. The misconduct of former trustees is not of much importance. The evils committed by them seem, generally speaking, to have been corrected of late years.] Confining ourselves to the charges against the

present trustees, they have not taken sufficient care to find out proper objects of the charity. They ought to have taken active steps by means of advertisements, or otherwise, to encourage applications. In a case like the present, courts of equity hold that trustees should be active. Generally speaking, the primary object of the founder of a charity is to provide a general maintenance for deserving persons, and then a preference is given to the founder's kin; but here the primary object is to provide for those of the founder's name and family, and then for others, who, though of his name, might not be of his family. The testator's intentions, therefore, could not be followed up without active care and management on the part of the trustees; and in that they have been grossly deficient. They are likewise accountable for the conduct of Edward Hunnings. There is a clear admission that from 1814 to 1823 he was acting trustee and secretary, and had all the funds in his hands, although the will expressly directs that the election of the expenditor shall be annual. In 1817 a sum of 200l. stock which had been placed in the funds at different times was standing in the name of Hunnings, as the survivor of those persons, in whose joint names it had originally been invested. When [696] the trustees found that this sum was under the control of one, when it ought to have been under the controul of four, they should have interfered. They omitted however so to do, and in 1817 or 1818 Hunnings sold out the stock. The defendant, George Holland, says that when this took place he was not aware of the circumstance, though he admits he was a trustee at that time. He was, however, made aware of the circumstance at the next general meeting, which took place after the sale of the stock, which was in 1818. The accounts were then audited, and he and the other trustees were informed of the breach of trust which had taken place. It was, therefore, his duty, as it was also that of the other trustees for the time being, to take immediate steps to have the money called in. He, however, does not do that, but permits Hunnings to go on paying interest on the stock, and receiving all the monies of the charity during the years 1818-19 and 20. In 1820 Hunnings became insolvent, whereby a loss occurred to the estate of 156l. 17s. 9d. Notwithstanding this, he was suffered to remain a trustee till 1823, when he retired, and to continue secretary at 5l. per annum till 1828, when he died. The conduct of the trustees in retaining this man as their co-trustee under these circumstances was not merely a constructive but an actual breach of trust, being a positive violation of that clause in the will which directs the removal of trustees in such cases. The circumstance that George Holland and the other trustees derived no benefit from the conduct of their co-trustee is immaterial, their acquiescence in his acts being sufficient to make them responsible: *Brice* v. *Stokes* (11 Ves. 319), *Adair* v. *Shaw* (1 Sch. & L. 243), *Caffrey* v. *Darby* (6 Ves. 488). [Alderson, B. It appears that Edward Hunnings in the account of 1819 charges himself with a balance of 326l. 14s. With this balance, John Holland, jun., in the [697] following year charges himself. Therefore it should seem that John Holland, jun., became responsible for it. In the next year, 1821, the account is taken in by William Holland; and he, in stating his account, leaves himself a debtor to the estate in the sum of 470l. 13s. 3d. That includes the sum which William Holland must have left in Hunnings' hands. How is that a breach of trust in George Holland?] The trustees were all equally liable. The breach of trust was acquiesced in by the others, although William Holland was the principal party concerned. That being so, George Holland is separately liable for the consequences: *Ex parte Angle* (Barnard. 452), *Walker* v. *Symonds* (3 Swanst. 75). In a case like the present, it is not necessary that all the parties implicated should be before the Court. The party wronged may recover against the less guilty, who may afterwards proceed against the more guilty.

Mr. Simpkinson and Mr. Koe, for the defendants. Admitting that in former times the charity was improperly administered, and the funds wrongly applied, what has that to do with the present case? The information contains no charge of misapplication of the present funds, except with regard to George Holland. The argument for the plaintiff is that because former trustees have irregularly dealt with the charity, therefore it is to be put to the enormous expense of a scheme to be approved of by the Master from time to time. But how is the Master to act as judge in such a case? If a party comes before the trustees, claiming as a relation of the founder, is that to be dealt with before the Master? The scheme is not proposed in order to dispose of a lumping sum, but to regulate annual rents and profits. By the terms of the will, the trustees are to judge whether the parties apply-[698]-ing are proper

objects. The testator expressly says that such persons are to partake of the charity "as can make it appear before my trustees" that they are entitled. Cui bono, then, direct a scheme? It is only in the case of charities which urgently require regulation that a scheme is necessary; and unless it appears that trustees have exercised their judgment improperly, the Court will not interfere. In *Waldo* v. *Caley* (16 Ves. 206), where a fund was directed by the testator to be applied by his widow to charitable purposes generally, the distribution to be at her discretion, with the advice and assistance, though not under the controul, of the trustees of the will, Sir William Grant declined to direct any scheme for the charity, and decided that the disposition of the fund was at the absolute discretion of the widow. That decision was confirmed by Lord Eldon on appeal, and approved of and acted upon by Sir John Leach in *Horde* v. *Earl of Suffolk* (2 M. & K. 59). [Alderson, B. In those cases there was a temporary interest in the party who was to distribute: here there is a permanent trust throughout all time. Your better line of argument is that the will itself containing a scheme, it is unnecessary for the Court to direct one. On the other hand, the question is whether a scheme is not desirable, for the purpose of defining what sort of persons come within the description of "gentlemen."] Whatever advantage might arise from a scheme, if the prayer of the information is founded on a wrong statement of facts, the plaintiff can have no relief; he must stand or fall by his own information. Now, the only allegation in the information which points to a scheme is that which states a difficulty in procuring, in the county of Lincoln, proper objects of charity. That allegation, however, has been met by the answer, and there is no other upon which the relief sought for can be granted. In *Attorney-General* v. *Grocers' Com-*[699]*-pany* (1 Keen, 506) an information which had been framed improperly, in the same respect as the present, was dismissed with costs, although it was a case in which some relief might have been granted, if it had been properly brought before the Court. As to that part of the information which seeks to have the legal estate recovered, if this were at all necessary, the proper proceeding would be by petition in a summary way, and not by information or bill (see 11 Geo. 4 & 1 Will. 4, c. 60, s. 23).

Then comes the question as to the alleged breach of trust in the sale of the 200l. stock. Upon this point your Lordship is called upon to say that George Holland, who knew nothing of the sale till afterwards, and who took no benefit from it, is alone to be made liable. Even if this information had been filed at an earlier period, and all the proper parties had been brought before the Court, it is quite clear that the mere circumstance of his being a trustee at the time the sale took place would not be sufficient to charge him with this sum of money. [Alderson, B. It must be wilful negligence on his part.] They have shewn, from his answer, no wilful negligence. [Alderson, B. He becomes acquainted with the fact in 1819, but takes no steps till 1820.] By the testator's will the acting trustee was to account to the succeeding; and therefore the trustee who, on taking that account, adopted the breach of trust, was the party liable. In the case in Barnadiston the trustees had actually received the money. It was not a liability in consequence of not taking steps, but for money received. Besides, the correctness of the report of that case is very questionable, for it is difficult to see how Lord Hardwicke could have decided the point on petition. In *Walker* v. *Symonds* the parties representing the deceased trustee were actually before the Court, and therefore what Lord Eldon is reported to have said as [700] to charging trustees separately for a breach of trust committed by their co-trustees is only an obiter dictum. Assuming the correctness of the report in that case, it is a dictum which has never been followed, and was expressly disapproved of by Sir John Leach; and in a late case, Sir Launcelot Shadwell, upon a review of all the authorities, came to the conclusion that there was some mistake on this point in the report of *Walker* v. *Symonds;* and that, at all events, the dictum of Lord Eldon was not to be acted upon. If it were acted upon in this instance, and George Holland were made liable, how could he obtain contribution from the other trustees? Upon the whole, we submit that there is no evidence that the trustees have violated their duty, but, on the contrary, that for many years past the charity has been properly administered; that unless improper management be shewn, the Court will not direct a scheme; and that, at all events, it will not direct any scheme which is not final and conclusive in its nature, so as to prevent any further application to the Court. *Attorney-General* v. *Haberdashers' Company* (1 Ves. 295).

Mr. Cooper, in reply. Admitting that the specific relief sought for by the information is improper, the Court will give the proper relief under the prayer for general relief: *Attorney-General* v. *Jeanes* (1 Atk. 355), *Attorney-General* v. *Scott* (1 Ves. sen. 413), *Attorney-General* v. *Mayor of Stamford* (2 Swanst. 599), *Attorney-General* v. *Foyster* (1 Anstr. 116), *Attorney-General* v. *Whitely* (11 Ves. 247), *Attorney-General* v. *Brook* (18 Ves. 324). [Alderson, B. The question is not whether the Court will give relief only according to the prayer of the information, but whether, if no facts are established as averred, the **[701]** Court will give relief under the prayer for general relief.] In *Attorney-General* v. *St. Paul's School* (not reported) it was held upon appeal that the Court could give relief under such circumstances. It is not necessary that the facts should be specified and particularized in the information, but supposing facts are alleged, and there is a failure in the proof of them, yet, if it turn out by accident and contrary to all expectation, that the charity requires to be regulated, relief will be given. It is said that in *Attorney-General* v. *Grocers' Company* the information was dismissed, because the facts as averred were not proved; but the Court could do no otherwise than dismiss the information, because the defendants insisted on a decree of the Commissioners of Sewers, and the Master of the Rolls had no jurisdiction to vary the decree: *Rockley* v. *Kelly* (Pre. Cha. 111). It may be admitted that, if upon a bill filed, you seek to fix the defendants with the loss of a particular sum of money, or with particular misconduct, you ought to put that fact in issue, and if necessary to amend your bill. But, in the case of an information, it is not necessary to amend for the purpose of stating circumstances which in a bill ought to be introduced by amendments; more especially where the circumstances only tend to shew generally the necessity for a scheme. This observation extends to cases where the defendants might be taken by surprise; but, in a case like the present, they cannot be taken by surprise. The allegations that improper persons have been made objects of the charity, and that a scheme would be beneficial, are quite sufficient to sustain this information. Suppose even the pleadings contained nothing more than a statement of the devise, and of the alteration in the value of money, it is submitted that the Court, upon proof of those matters alone, would make a decree. The case of Morden College (*Attorney-General* v. *Lubbock* C. P. Cooper, 15), in which **[702]** the charity was established for the benefit of decayed Turkish merchants, shews how far the alteration in the value of money will weigh with the Court in increasing the allowances to the objects of the charity. [Alderson, B. In that case there was a definite body to be provided for. Is there any case where there being an indefinite number of objects but a definite allowance, the Court of Chancery has ordered the surplus funds to be applied in increasing the allowances?] In the case just cited, the number of the objects was indefinite. The charity was founded under the will of Sir John Morden for the benefit of so many poor merchants as the rents of his estates would maintain. By the will each poor merchant was to have 20*l.*, but that sum was reduced by the codicil to 15*l.* The trustees had the power of framing statutes, and were also visitors, and had the whole of the internal management. In addition to the general powers given to them by the will, they obtained an act of Parliament (11 Geo. 3, c. 10, s. 96) enabling them to increase the allowance to 40*l.* per annum. The income of the charity having, of late years, considerably increased, the trustees thought it desirable to increase the number of objects, and for that purpose they proposed to add a wing to the college. They contended they had authority to do that under the will and the act of Parliament. The question came before the Master of the Rolls who directed a reference to the Master not to approve of a scheme generally, but to inquire whether it was fit and proper to increase the allowances. The Master, amongst many other things, reported that, in his opinion, the allowance to each merchant should be increased to 60*l.* per annum, rather than there should be any increase in the number of objects; and his report was confirmed. The trustees, however, being dissatisfied with the Master's report in other particulars, appealed to the Lord Chancellor, **[703]** when his Lordship, in considering this particular part of the case, observed that he only differed from the Master of the Rolls in this—that, looking at the whole state of the case, and the change of laws and circumstances, he thought full justice could not be done unless there were a general scheme. The case, however, afterwards stood over, in order, if possible, to obtain the consent of the trustees to some private arrangement.

Dec. 21st.—ALDERSON, B. This was an information filed against the defendants,

who are the trustees of a charity in the county of Lincoln, originally founded by the will of Edward Hunstone, in the year 1655.

The information, after setting out the will of the founder, proceeds—first, to charge the defendants with mismanagement of the charity estate in various particulars, to which it is not necessary that I should now advert; secondly, with having suffered the legal estate in the premises to be outstanding; and, thirdly, with mismanagement of the charity generally; and it charges one of the defendants, Edward Holland in particular, with a breach of trust in respect of a sum of money, amounting to upwards of 150l. lost to the charity, by the failure of one of the existing trustees of the name of Hunnings.

The information prays that George Holland may be directed to repay this money; and that the Court will direct the matter to be referred to the Master, to consider of a scheme for the future management of the charity, together with such relief as may be proper under all the circumstances.

The first charge was given up; it appearing quite clear on the evidence that the charity estate had been managed greatly to the advantage of the charity. And as to the mismanagement of the charity itself, there is nothing before the Court to support that allegation against the **[704]** present trustees. They appear to me to have conducted themselves with great propriety, and, so far as the evidence goes, to have appointed proper objects to receive the bounty of the founder.

I see no reason to charge Mr. Holland with any breach of trust as to the money lost by the failure of Hunnings. The utmost that could be urged against him was that he was not so prompt as he might have been to compel Hunnings to replace the money arising from the stock sold out. But it is clear that as soon as he became the acting trustee in rotation, the money, as much at least as could be recovered, was replaced; and that Hunnings previously had been considered a man in perfectly good credit. If any complaint could fairly be made at all, it would apply to the trustee who preceded George Holland in office, and who is no party to the present record.

On the whole, I am quite satisfied that all these which are the most important charges against the defendants have totally failed. But then it is, I think, made out that the legal estate is outstanding, and that some inconvenience may possibly result to the charity if that were suffered to continue; though, I own, I think the inconvenience is not likely to be very great, since no instance of it has occurred from the time of the death of the original trustees (which must have taken place more than a century ago) to the present day.

But there is another circumstance in this case. The information prays a reference to the Master to consider of a scheme for the future management of this charity.

It appears that, by the will of Mr. Hunstone, he directed his charity to be for the benefit of such decayed gentlemen as can make it appear unto his trustees that they are of his name and family, and of the age of forty years; or else so impotent as not to be otherwise able to get a living. Such persons as these (and they are afterwards **[705]** extended on failure of his own family, to the families of Godney of Bagenderby, Smith of Saltflete, and Wordliff of Toft Grange, successively; and, lastly, on failure of all these, to such persons being inhabitants of the county of Lincoln at large) are to have each an allowance of 10l. a year for life, in case of good conduct. And the number is to depend on the amount to be derived from the estate.

Now, from the evidence, it clearly appears that the estate has increased from an annual rental of about 50l. to that of 500l.; and it is obvious that the amount mentioned in the will, 10l., although at that time a decent allowance for a decayed gentleman, is now, from the change in the value of money, a totally inadequate sum for that purpose; and that the retaining the present amount, will, in truth, violate the spirit, whilst it is an adherence to the letter of the will.

It appears, moreover, that in former times, though not of late, an improper interpretation has been given to the word "impotent" in the will, which seems to have been construed so as to allow the admission of minors, until they attained their majority, to the benefits of the charity. This interpretation is clearly erroneous, and was admitted to be so. The word "gentlemen," also, is a word of somewhat vague meaning; and it will be well, therefore, to give some more accurate description of it; at all events enumerating some classes, so as to make the objects of the charity more definite and the duties of the trustees more easy in future.

Although, therefore, I am not insensible to the argument which was urged, as to

the expense of a scheme, yet, I think on the whole, it would clearly be more for the benefit of the charity that a reference to the Master should take place.

The case of *Morden College*, before Lord Cottenham, **[706]** is an authority for my doing this. But neither this, nor the getting in the legal estate, required the present information to be filed, containing grave charges which turn out to be wholly without foundation. Both these objects might have been obtained by petition.

I propose, therefore, to adopt the decree, which, under very similar circumstances, Lord Langdale made in *The Attorney-General* v. *Cullum* (1 Keen, 118), "Thinking," as he said in that case, "that the suit has been instituted and conducted in a manner to create a great deal of unnecessary expense, I think it right to frame my decree in terms to save the charity estate from costs to which I think it ought not to be subjected."

I dismiss, with costs, so much of the information as relates to the mismanagement of the estate and of the charity, by the present trustees, and of the breach of trust alleged against George Holland.

I direct a reference to the Master as to the legal estate, to inquire whether it be outstanding, and to take proper measures for getting it in. I direct a reference to him to consider a scheme for the future management of the charity, in which, amongst other things, he is to consider whether the amount paid to each of the objects of the charity should not be increased, and their number diminished, without, however, disturbing any of the present possessors. The Master is also to consider the expediency of increasing the number of the trustees by introducing one or two of the incumbents mentioned in the testator's will, and the propriety of prohibiting, in future, the election of trustees in the same family. He will also consider how to define the word "gentleman" more clearly—as, for instance, by stating that magistrates, esquires, members of the three learned professions, gra-**[707]**-duates of the universities, attornies, surgeons, apothecaries, and the like shall be considered, if otherwise eligible, objects of this charity. He will also define the age at which eligibility is to begin, so as to exclude minors in future. I mention these circumstances as some of those which are proper to be considered. Upon the exclusion of minors, and upon the not disturbing the present trustees, and the present objects of the charity, I wish to be considered as giving a direction to the Master.

And as to the costs of the parts of the information not dismissed, I give none to the relators up to the present time.

The defendant's extra costs as to the parts dismissed, and their own costs up to the present time, they are to have out of the charity estates. The subsequent costs I reserve, intimating, however, my wish that the Master (if there be any improper delay or vexatious proceeding before him, which, however, I do not anticipate) will report the same, for my government as to the award of these costs on further directions.

Decree accordingly.

[708] POLLEY *v.* SEYMOUR. Dec. 8th, 21st, 1837.—Testatrix devised the residue of her real and personal estate to W. S., his heirs, executors, and administrators, according to the different natures and qualities thereof, upon the trusts following, that is to say, upon trust to retain and keep the same in the state it should be in at the time of her decease as long as he should think proper, or to sell and dispose of the whole, or such part thereof as and when he or they should from time to time think expedient, either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers; and then upon trust to invest the money to be produced by such sale or sales, together with all ready monies of the testatrix, in his or their own name or names, and in that of two of the residuary legatees thereinafter named, in the public funds, or upon real or government securities; and then the testatrix directed that the said W. S., his heirs, executors, or administrators, should stand possessed of and interested in all such the general residue of her real and personal estate, and from and after such sale, then of the stocks, funds, and securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay several life annuities: and from and after full payment and satisfaction thereof,

the testatrix directed that the said W. S., his heirs, executors, and administrators, should stand possessed of all the said residue of her said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof should have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for five of the said annuitants (including the said W. S.), in equal shares and proportions, as tenants in common, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities thereof: Held, that, upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out, but that W. S. had a discretion to sell the whole or any part of it when and as he might think expedient, and that until he exercised that discretion the property must be considered to remain in the state it was in at the time of the death of the testatrix.—A trustee having discretion to sell the trust property submitted to a decree for sale in a suit instituted in relation to the trust: Held, that the Court was not therefore bound to carry the sale into execution.

[S. C. 7 L. J. Ex. Eq. 12; 1 Jur. 958.]

Salome Turst, spinster, being seised and possessed of considerable real and personal estates, amongst which were an estate in fee simple in the greater part and a long term of years in the remaining part of the Pantheon in Oxford Street, by her will, dated in September, 1803, after bequeathing various legacies, devised and bequeathed as follows:—"And as to all the rest, residue, and remainder of my real and personal estate, whatsoever and wheresoever, after payment of my debts, the above mentioned legacies, my funeral expenses, and the charges of proving this my will, I give, devise, and bequeath the same unto and to the use of William Seymour, of Margaret Street, in the parish of Marylebone and county of Middlesex, gentleman, his heirs, executors, and administrators, for ever, according to the different natures and qualities thereof respectively; upon the several trusts nevertheless, and for the several ends, intents, and purposes hereinafter expressed and declared of and concerning the same; that is to say, upon trust to retain and keep the same in the state it shall be in at the time of my de-[709]-cease as long as he shall think proper, or to sell and dispose of the whole or such part thereof as and when he or they shall from time to time think expedient, either by public auction or private contract, and in such lots and parcels as he or they shall think best and most advisable, unto any person or persons who shall be willing to become the purchaser or purchasers thereof, or of any part thereof, for the most money and best price or prices that can or may, at the time or times of such sale or sales, or disposition, be reasonably had or gotten for the same; and then upon trust to place out and invest the money to arise and be produced from or by such sale or sales, together with all ready money which I shall leave at the time of my decease, and all sum and sums of money which shall be collected or got in by him or them, and which shall be due and owing to me at the time of my decease, in his or their own name or names, and in the name of some two of the residuary legatees hereinafter named, in the public stocks or funds, or upon real or government securities in Great Britain, at interest. And then I will and direct that the said William Seymour, his heirs, executors, or administrators, shall and do stand and be possessed of and interested in all such the general residue of my real and personal estate, and from and after any such sale, then of the stocks, funds, or securities whereon the same or any part thereof shall have been laid out or invested, in trust, by and out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay the several annuities following; that is to say," [then followed several life annuities to William Polley, Mary Polley, his daughter, Sarah Crode, Rebecca Harvey, the said William Seymour, and several other persons]. "And from and after full and entire payment and satisfaction of the several annuities, and all arrears thereof, then I will and direct that the said William Seymour, his heirs, executors, and administrators, shall stand possessed of all the said rest, residue, and remainder [710] of my said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof shall have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for the said William Polley, Mary Polley his daughter, Sarah Crode, Rebecca Harvey, and himself the said William Seymour, in equal shares and proportions, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities."

The testatrix then, for promoting and facilitating such sale and sales as were by her thereinbefore authorized to be made of her real and personal estate, declared that the receipt and receipts of the said William Seymour, his heirs, executors, and administrators, should, from time to time, be a good and sufficient discharge, and good and sufficient discharges, to the purchaser or purchasers thereof, or of any part thereof respectively, for so much money as in such receipt or receipts should be acknowledged or expressed to be received, &c.; and that it should be lawful for the said William Seymour, his executors and administrators, when, and as he should from time to time see proper, to alter, change, and transfer any funds or securities which should be purchased or taken in pursuance of her will, to any other funds or securities of the same or a similar nature, in his name, and the names of some two of such residuary legatees. The testatrix then provided that if, at any time or times after her decease, the rents, issues, and profits, interest, dividends, and annual produce of the said general residue of her estates and effects, or of the stocks, funds, and securities whereon the same or any part thereof should have been laid out or invested, should not extend to or be sufficient to answer and pay all the said annuities in full, then, and in such case, and so often as the same should prove insufficient, all and every the said annuities or yearly sums thereinbefore by her directed to be paid, should **[711]** abate proportionably one with the other. And the testatrix nominated and appointed the said William Seymour sole executor of her will.

The testatrix died in March, 1805, leaving the several annuitants, except Sarah Crode, surviving her. Sarah Crode died in the lifetime of the testatrix, leaving no heirs. William Seymour proved the will, and entered into possession of the real and personal estate of the testatrix.

The original bill was filed in 1820 by William Polley and the other annuitants, against Seymour and the Attorney-General, praying the usual accounts and payment of their annuities, and that the real estates might be sold. The cause came on for hearing, and various proceedings were had in the suit. In June, 1832, an order was made for the sale of the real and leasehold estates. These were accordingly, on several occasions, offered for sale, but for various sufficient reasons the sales could not be proceeded with. The property was then let upon a repairing lease for sixty-one years, from Lady-day, 1834, at a rent of 800l. The Master having, under these circumstances, reported that a sale would not be beneficial to the parties, an order was made in July, 1837, that the surplus rents, after payment of costs, should be applied in liquidation of the annuities.

During the progress of the suit considerable changes had taken place, by death or marriage, in regard to the parties. Of these changes, which were provided for by bills of revivor and supplement, it is only necessary to notice that which took place by the death of William Polley, intestate, in December, 1830. He left a widow and several children surviving him, amongst whom was William Polley, one of the present plaintiffs, his heir-at-law and personal representative.

The principal question now to be decided on further directions was whether, consistently with the will of the testatrix, the property could be permitted to remain as real property, in which case William Polley and the other **[712]** plaintiffs, as heirs of the residuary devisees, would be entitled to so much of it as was freehold, or whether the testatrix intended that this property should be converted out and out into personalty, in which case the next of kin or legatees of the residuary devisees would be entitled.

Mr. Stuart and Mr. Bellasis, for the plaintiffs. The first question is whether, when this suit was first instituted, the residuary property devised by the will was to be deemed real estate or to have been converted out and out into personalty; and, secondly, whether, if it were not then converted, the subsequent proceedings in the suit make any difference in that respect. Upon the first point it is clear that, where a testator devises real property to be sold and converted into money, and the money to be paid to a particular individual, there is a conversion out and out. The party who takes under such a gift takes it as personal estate, on the principle that there is impressed on it by the testator the character of personal estate. But though the direction be to convert the property out and out, and to give it to the individual as money, yet the individual dying before the conversion takes place may exercise a right of election, and may demonstrate his intention, by will or otherwise, that the property shall go to his real and not his personal representatives. If, however, he

makes no such election, then, in order to entitle his personal representative to take it as personalty, he must shew that, by the terms of the will, the real property was converted out and out. Now he cannot shew that if the will merely gives the trustee an option to lay the money out on land. [Alderson, B. The other parties will contend that the option given to the trustee in this case is only as to time; and that the conversion must take place some time or other.] Here the discretion given to the trustee extends over the whole period of his life. He is to retain and keep the property in the state in which it may be found at the tes-**[713]**-tator's death, "as long as he shall think proper." There is no where, on the face of this will, an imperative direction given to him to convert the property at some specific time. [Alderson, B. The trustee is to retain and keep the property so long as he shall think proper; but the property is to be sold when he or his representatives may think proper. In *Thornton* v. *Hawley* (10 Ves. 138) the option was given to the representatives of certain persons, as well as to the persons themselves, and Sir William Grant relied on that circumstance as shewing that the option was only as to time. You may suppose a person to leave to an individual whom he knows, and on whose sagacity he depends, a particular sort of option, but you cannot extend that to his representatives.] *Thornton* v. *Hawley* was the case of a settlement. [Alderson, B. Suppose the property had been devised to a trustee upon trust, to convert it into personal estate as soon as he should find it convenient, would not that be a conversion out and out?] It might be so; but whether a limited or unlimited time is given to the trustee is not absolutely material in this case. Suppose the time to be limited; we represent the heir of Polley, who was the first person to take the property, whether converted or unconverted. Polley is dead, and the conversion has not yet taken place; why, then, should the Court be called upon to say that the property, which was real at the time of his death, passed to his personal representative and not to his heir? Besides, here, by the terms of the will, the trustee is to stand possessed in trust for the "respective heirs" as well as executors of the parties named. It is only in cases like that of *Kennall* v. *Abbott* (4 Ves. 802), where the testator's declarations are of the most clear and explicit nature, that the Court will declare a conversion out and out. If the conversion was intended for a particular purpose, and that **[714]** purpose fail, the Court says there is no conversion at all: *Ackroyd* v. *Smithson* (1 Bro. C. C. 503). In *Walker* v. *Denne* (2 Ves. 170) the money was not laid out, and it was sought to compel the trustees to take the gift as if it had been laid out; but the Court decided against the conversion of the property, on the ground that a discretion was vested in the trustee. The Court always leans towards keeping the property in the state in which it is found. [Alderson, B. It is entirely a question of construction. If the property is left to the trustee to convert at any time he pleases (which he would have a right to do without that direction), then it is a conversion out and out.] Upon the second point it seems unnecessary to contend that the proceedings which have taken place in this suit cannot affect the general question.

Mr. Turner, for the defendant W. Seymour. The question which may possibly arise between Seymour and the Crown, relative to the interest of Sarah Crode, who has died without heirs, need not now be argued. It will be time enough to advert to that point, which depends on the case of *Burgess* v. *Wheate* (1 W. Bl. 123; 1 Eden, 177), when the question of conversion has been decided. The point now to be determined is whether any option to convert is given to the trustee, the law being clear that if there is an option there cannot be an absolute conversion. Now, by the first part of the residuary clause, the trustee is to retain and keep the property in its original state as long as he shall think proper, or to sell and dispose of the whole or such part thereof as and when he shall think expedient. If the will had stopped there, it could not have been contended that this was a conversion out and out. By that clause the trustee has a clear option to sell or not to sell. [Alderson, B. If the words had **[715]** been "if" he shall think proper, there would have been a clear option; but the words are "as long" as he shall think proper. Has he any discretion given him except as to time? Does the absolute discretion you contend for extend to the personalty, as, for instance, books, jewels, &c.] The trustee had, by this clause, an absolute discretion to sell the entire property, although, probably, the testatrix might intend that he should keep the personalty in its original state. The power of sale gives him a complete option to sell the whole or part. That option is not affected by any of the subsequent clauses. The words "upon trust to place out and invest, &c." do not imply a necessity of

selling the whole; they only refer to an investment of such part as might be sold: and the clause in which the testatrix refers to the sales thereinbefore "authorized" shews clearly that she did not intend that a sale should take place at all events. How, then, can the Court say that there is an absolute direction to sell out and out, when, in no part of the will, is any expression of that sort to be found? The result is that an absolute discretion to sell being given to the trustee, if that discretion be not exercised, the parties interested must take the fund as they find it. In *Cole* v. *Wade* (16 Ves. 27) a discretion having been vested in trustees, both as to the conversion and distribution of the fund comprised in the testator's will, and the trustees having omitted to exercise that discretion, the Court exercised it so far as to declare who were the parties entitled to take, namely, the testator's next of kin; but it was held by Lord Eldon, in *Walter* v. *Maunde* (19 Ves. 424), which was an appeal from part of the decree in *Cole* v. *Wade*, that such part of the fund as consisted of real estate should be distributed amongst the next of kin as real estate, so as to descend to their heirs-at-law. "The question," said his lordship, "is whether, if the **[716]** testator has given both his real and personal estates to trustees, with a direction to distribute them in such manner and proportions, and subject to such annuities and mortgages as they may think proper, it follows that as they could convert, or forbear to convert, this Court is therefore to say it will distribute the whole as personal property, as that is more convenient, though not the mode of distribution directed. The effect of all the cases is this: that the will, if it is to be construed as giving to the next of kin the real estate, gives it as real estate; the devisees taking the property in the quality in which they receive it, and, where there is both real and personal estate, taking each, transmissible as such." In the present case, therefore, it being impossible to assign any limit to the trustee's discretion, and the ultimate limitations in the will giving the property to the parties both as real and personal, they must take it as it is. The principle on which this result is founded is apparent in other legal proceedings. Upon a sale of estates under a bankruptcy, the property paying twenty shillings in the pound, and the bankrupt being dead, a question arises as to the disposal of the surplus; and the decree is that so much of the real property as was converted in the lifetime of the bankrupt is personal, and so much as was converted after his death is real: *Banks* v. *Scott* (5 Mad. 493). So upon a mortgage with a power of sale reserving the residue to the mortgagor, his executors, and administrators, if the sale takes place in the lifetime of the mortgagor the surplus is personal estate, if after his death, it is real estate: *Wright* v. *Rose* (2 S. & S. 323). The general principle is that where an option of sale and conversion is given to a third person, it depends on the exercise or non-exercise of that option, or on the period at which it is exercised, what are the rights of the parties claiming the benefit of the sale.

[717] Upon the question how far the trustee's discretion has been affected by the proceedings in this suit, the case of *Jessopp* v. *Watson* (1 M. & K. 670) is in point. There the Master had reported against the sale of the real estate; yet it was not considered that that report in any way affected the question of conversion; on the contrary, the Court ultimately held that the real estate descended to the heir as personalty. It is clear, therefore, that Seymour, by submitting to the order in this cause, has not renounced the option which has been given to him by the testatrix. It may be admitted that this is a trust which ought to be looked at with jealousy; and, perhaps, the Court may determine this case upon that view of the subject. It is not, however, for the Court to control the exercise of discretion by a trustee who had the confidence of the testatrix, unless any thing which appears in the cause gives strong reason for altering that discretion.

Mr. Wray, for the Crown. The option here given to the trustee was only as to the time and occasion of selling; he has not an arbitrary power given him to deal with the property as he pleases. In a case in which leaseholds had been bequeathed to trustees with power to renew, and the trustees, having neglected to renew, rested their justification on the discretion which had been given them by the will, Sir John Leach held that they were bound to exercise a sound and not a capricious discretion on the subject. The decree of discretion is to be measured with reference to the purpose, and perhaps with reference to the property concerned.

Mr. Temple and Mr. H. E. Sharpe, for the legatees and personal representatives of some of the residuary devisees. It is not disputed that where the option of converting **[718]** property is left to the personal discretion of the trustee, if he does not

exercise that option, the Court will not exercise it for him; but this is not that case. No one can read the will and say that Seymour has the right to continue the property as real estate, and that it depends on his will and pleasure whether it shall be converted into personalty or not. The testatrix only meant to say that as there were circumstances affecting its value with reference to the time of sale, she left the time of sale to the trustee's discretion. If she had not done so, the property must have been sold immediately; the rule being that where lands are devised to be sold and the money divided among several persons, none of them can elect to take the land instead of money, if one desires a sale: *Deeth* v. *Hale* (2 Molloy, 317).

It is said, however, that the trustee had a complete discretion to sell or not to sell. The question now raised has often been discussed. In *Walker* v. *Denne* (2 Ves. 170) the trustee had an option to constitute the property either real or personal. He was to lay out the money either in freehold or leasehold lands. It did not appear that this option, which was strictly a personal authority, had ever been exercised either one way or the other. The time arrived at which something was to be done, and the Court said that as there was nothing to shew that if the option had been exercised, the property would have been made realty, it must remain as it was. That case likewise turned upon other points, which were alone sufficient to support the decision. No doubt, where the purpose for which the testator directs the sale fails altogether, the property results to the heir-at-law as realty; but where the purpose only partially fails, there, notwithstanding express words of option given by the will, the conversion must take place. *Cole* v. *Wade* (16 Ves. 27) was, upon the terms of the will, a case of **[719]** absolute option. There was no occasion, for any thing that appeared on the will, for the trustee to sell at all; yet the object of the testator having only partially failed, the Court directed a sale. The Court, in these cases, acts upon the principle of convenience stated by Sir John Leach in *Smith* v. *Claxton* (4 Madd. 484), namely, that where the obvious purpose is that there should be a sale for convenience of division amongst the devisees, there, unless that purpose entirely fail, a sale must take place. Here, the purpose of the testator was to divide the property, when sold, amongst a number of individuals; and although one has died, and his share has consequently lapsed, the other parties are entitled. The purposes of the testator have only partially failed, and the case comes within the principle laid down by Sir John Leach. *Wright* v. *Wright* (16 Ves. 188), *Doughty* v. *Bull* (2 P. W. 320), *Fletcher* v. *Ashburner* (1 Bro. C. C. 497), *Kirkman* v. *Miles* (13 Ves. 338). Another circumstance is that the Court has already decided in what state the property ought to be, by making the order for sale of 1831. If the property had been actually sold, the present discussion could not have arisen; and will the mere circumstance that the vendor could not make a good title affect the ultimate judgment of the Court? [Alderson, B. The sale by the Court, if it had taken place, would have been a sale by the trustee. Suppose there was an imperfect attempt at a sale, was it any thing more than an imperfect attempt by the trustee himself? You use the authority of the Court as construing the will itself, but you do not know that it was before the Court.] At all events, *Kirkman* v. *Miles*, and other cases, are authorities to shew that, primâ facie, the property in these cases is to be declared in the state in which it ought to be, and not in the state in which it **[720]** was at the time of the testator's death. At this moment, in order to do what the testatrix intended, the property should be converted; and your Lordship is called upon to hold it vested, as it ought to be, for the purposes of the will. It is clear that she could not have intended to give the trustee the unreasonable power contended for on the other side. If such was her intention, she should have expressed it in unequivocal terms. She could not have intended to give him power to say that a part only of the individuals named in the will should have the benefit of it. On the ground of hardship alone, it is almost conclusive that she could not mean this.

Mr. Stuart, in reply. The plaintiff does not rely merely on the discretion given to the trustee to sell or not to sell: the testatrix gives him a general power of control over the whole estate, using apt words of disposition, as well for the property unsold, as for that which is sold. To deprive the plaintiff of his right as heir-at-law of Polley, the character of personal estate must be absolutely and decisively impressed upon the property. He contends that it is not so, and that the trustee had, by the terms of this will, discretion either to sell part or all of the estate, or to retain part of it or not as he might think convenient, when the rights of the parties happened to accrue

Cowley v. *Hartstonge* (1 Dow. 361). It is not necessary to enter into the question whether the trustee has waived his option, by submitting to the order for sale, because the plaintiff's ancestor died before that period.

Dec. 21st.—ALDERSON, B. In this case I have looked at the authorities, and examined with care the will of the testatrix, Salome Turst. The only question is whether the Pantheon, which is of freehold tenure, and the other pro-**[721]**-perty mentioned in her will, must be considered as converted into personal estate by the residuary clause.

The principles on which the Court is to proceed are quite clear. We are to examine the whole will and to see whether the expressed intention of the testatrix to be collected therefrom was that this property should be converted out and out, as it is called; or whether it was given to the trustee upon a trust, either to sell or not to sell, according as he in his discretion might judge best.

The testatrix, after giving some trifling legacies, included all her residuary property, real and personal, in one general devise. She devises it to a trustee in trust to keep, &c. Now, on looking at this clause, it is to be observed that the simple and natural meaning of the words is in favour of a discretion vested in the trustee. For he is, first, to keep and retain the estate in the state it shall be in at her decease; secondly, if he does not do that, he is to sell the whole, or any part thereof (which seems strongly to point to a discretionary power) as he shall think expedient, and when he shall think expedient, in such lots as he shall think best. The will then provides that the proceeds of what is sold, together with the personalty, shall be vested in the trustee's name, jointly with those of two of the residuary legatees, and gives the trustee the power of changing the stocks in which the money should be invested; but still confining such power to stocks of a similar description. The will then—after providing that out of the fund (consisting both of the rents of so much of the property as should remain actually unconverted and the then annual profits of the personal estate and parts of the real estates converted) certain annuities should be paid, which, in case of insufficiency, were to abate proportionally—gives the whole residuary fund to certain persons, amongst whom the trustee is included, in equal shares. This clause contains words applicable both to the **[722]** property in its converted and unconverted state, and speaks of the "respective heirs" as well as the personal representatives of the residuary legatees—in fact, directing that the residuary property in the hands of the trustees shall go to them, their heirs or executors, according to the different natures and qualities thereof. This, therefore, very materially increases the probability of the conclusion that the testatrix intended the trustee to have a discretion, for she seems here to contemplate the probability that he would use it, and to have employed apt words to provide for such a contingency. There is an additional expression in the will which leads to the same result. The testatrix, speaking of the trust, uses these words: "And for facilitating such sale and sales as are by me hereinbefore authorized to be made of my real and personal estate," &c. The word "authorized" is more applicable to a discretionary power than to an order and direction on her part.

There are difficulties, no doubt, on the other side, but they rather arise out of the nature of the devise being of portions of one general residuary fund, consisting both of real and personal estate, and of the double situation of Mr. Seymour as trustee and one of the legatees, than out of the words of the will, as used by the testatrix. It is safer in such cases to be governed by the words of the will, and, if possible, to give to each and to all of them their natural and simple meaning. Indeed, I think that the decision of Sir William Grant in *Brown* v. *Bigg* (7 Ves. 279), on words not very dissimilar, is in point on the present occasion. There the testator ordered and empowered his wife, in case she chose so to do, with the advice of W. R., to sell the Gransden estates, stating that she would probably not desire to live there. It was contended that this amounted to a conversion out and out; but Sir **[723]** William Grant held the contrary, deciding that the property only became personal estate upon the sale by the widow under the powers contained in the will. That is the view I take of this will. It seems to me that here the testatrix has bequeathed her real estates to the trustee, with a discretion to sell or not to sell the whole or any part of it; and, consequently, that until he exercises that discretion the property remains in the state it was at the time of her death.

Then have the subsequent proceedings in this Court made any difference? In 1820 the bill was filed. The trustee then submitted to act as directed by the Court.

After various references, the Court directed a sale, but no such sale has taken place; and the last report of the Master is against any sale, it being in his judgment expedient for all parties that the property should remain in its present state. I think this leaves the case as it stood under the will.

Decree accordingly.

DOMVILLE *v.* BERRINGTON. Nov. 18th, 1837.—Biddings ordered to be opened on an advance of 365l. on 7300l.; but a mortgagee of the estate, on whose application the order was made, not allowed to conduct the sale.

[S. C. 7 L. J. Ex. Eq. 58. See 4 Y. & C. Ex. 580.]

This was a suit of foreclosure, and the estate had been sold before the Master in lots.

Mr. Coleridge, on behalf of the mortgagee, now moved to open the biddings for one of the lots, and that the mortgagee might be at liberty to bid at the sale. He stated that the lot had been sold for 7300l., and that the proposed advance was 365l., being 5l. per cent. upon the original purchase-money. He likewise submitted that as the lot had been purchased by a person who was under an incapacity to buy, namely, the solicitor of one of the parties, the sale was thereby vacated, and this was consequently a motion of course.

[724] Mr. Whitworth, for the purchaser, said that the proposed advance was not sufficient to authorize the Court to open the biddings: *Garstone* v. *Edwards* (1 Sim. & Stu. 20). Besides, the mortgagee ought to have obtained leave to bid in the first instance, and if the Court now allowed him to open the biddings, he ought, at all events, not to have the conduct of the sale.

Mr. Girdlestone, for a subsequent incumbrancer, made no objection to the biddings being opened, but objected to the mortgagee having the conduct of the sale, inasmuch as he had no interest in making the most of the estate for the rest of the creditors.

Mr. Stinton, for other parties.

Mr. Coleridge, in reply, said that the sale being before the Master was a sufficient protection to the creditors. Upon the objection as to the amount of the proposed advance, he cited *Lawrence* v. *Halliday* (6 Sim. 296).

THE LORD CHIEF BARON. The estate having been sold, the mortgagee now comes here for a re-sale, and for leave to bid. In opposition to this it is said that he ought not to be both buyer and seller. I think there is reason in that; for his interest as mortgagee is safe, although the estate may not fetch more than a certain sum. Therefore, let the biddings be opened, but let the Master direct how the sale should be conducted, and by what solicitor.

Order accordingly.

[725] HALL *v.* CLEE. Nov. 21st, 1837.—In the Court of Exchequer, commissioners for the examination of witnesses in aid of the proceedings before the Master after decree are not sworn to secrecy.

[S. C. 1 Jur. 918.]

In this case it had been referred to the Master to take an account of the titheable matters and things mentioned in the bill, and a commission had issued to examine witnesses for the purpose of taking the account. The defendants had declined to examine witnesses, but a commissioner had been appointed on their behalf to watch the proceedings.

A motion was now made on the part of the defendants that the depositions taken under the commission might be suppressed. The motion was supported by affidavits alleging various acts of impropriety against the commissioners, and stating, amongst other things, that, according to the practice of the Court, the commissioners had not been sworn to secrecy; that the defendants had been misled by their ignorance of the practice in that respect, and that their interest had been greatly prejudiced thereby.

Mr. Younge, for the motion, admitted that it is the practice, in the Exchequer, not to swear commissioners to secrecy after a decree, and he referred to Fowl. Prac.

vol. 2, p. 240, where the form of the commission is given; but he contended against the propriety of the practice.

Mr. Simpkinson and Mr. Bethell, contrà, relied on the practice of the Court.

THE LORD CHIEF BARON, in the course of his judgment on the motion said that if, before the decree had passed or the commission had issued, a motion had been made with a view to alter the practice of the Court in this particular, it might have been ground for making a general order upon the subject; but, under existing circumstances, he could not accede to the application.

Motion refused.

[726] WILKINSON *v.* TORKINGTON. Dec. 12th, 1837.—Where a bill had been filed for the specific performance of an agreement to grant a lease, and for an account of arrears of rent on the footing of the agreement, and the term for which the lease was to be granted, had expired before the hearing of the cause: Held, that the plaintiff, having a substantial right to relief, was entitled to a decree for an account of the arrears, although, under the circumstances, specific performance of the agreement could not be granted.

[S. C. 7 L. J. Ex. Eq. 30. Applied, *De Brassac* v. *Martyn*, 1863, 9 L. T. 287; 11 W. R. 1020.]

In May, 1828, J. C. Wilkinson, as rector of the united parishes of All Saints and St. Peter's, Stamford, in the county of Lincoln, by means of William Banks, his authorized agent, entered into an agreement in writing with the defendants for a lease to them of all the tithes and compositions for tithes within those parishes, for the term of nine years, commencing from the 5th of April, 1828, at and under the yearly rent of 370l. Under this agreement the defendants entered into possession of the tithes, and paid the stipulated rent for several successive years, till it was abated by the deduction of an annual sum of 30l. The rent, notwithstanding this deduction, having afterwards become in arrear, Wilkinson, in July, 1834, brought his action upon the agreement against the defendants, to which they pleaded that it was not under seal, and therefore void of law. Wilkinson then, in February, 1836, filed the present bill, praying for a specific performance of the agreement, and for an account and payment of the arrears of rent.

The defendants, by their answer, did not deny that arrears of rent were due, but insisted that, according to the true intent and meaning of the agreement, certain deductions and abatements were to be made to them, which Wilkinson had refused to make. It did not, however, appear upon the face of the agreement that they had any authority for this statement. They also insisted generally that Wilkinson had no remedy in equity, and was not entitled to have the agreement specifically performed.

In November, 1836, Wilkinson died, having by his will appointed the present plaintiff his sole executor. The suit was revived by the present plaintiff in January, 1837, but the cause did not come on for hearing till the term granted by the agreement had expired.

[727] Mr. Simpkinson and Mr. Ellison, for the plaintiffs. The defendants mean to insist that because the term originally stipulated for under the agreement has expired before the hearing, the Court has no jurisdiction to decree payment of the arrears, or a specific performance of the agreement. It is clear, however that where the Court would originally have had jurisdiction to decree the specific performance of an agreement, if any portion of it remains unperformed at the hearing, the Court has also jurisdiction to decree what remains unperformed. Even where the original subject-matter has been destroyed by the act of God, the Court has decreed a specific performance: *Cass* v. *Rudele* (2 Vern. 280), *Payne* v. *Mellor* (6 Ves. 349), *Mortimer* v. *Capper* (1 Bro. C. C. 156), *Jackson* v. *Lever* (3 Bro. C. C. 604). These cases were all cited and commented upon by Sir John Leach in *Kenney* v. *Wexham* (6 Madd. 355). There the annuity, which was the consideration of the contract, had expired, and yet a specific performance of the contract was decreed. The case of *Nesbitt* v. *Meyer* (1 Swanst. 223), which will be cited on the other side, is not, when examined, at variance with these authorities. In fact, notwithstanding the language of Sir Thomas Plumer in that case, he avoided deciding the express point now in issue.

Mr. Twiss and Mr. Hayter, for the defendants. The defendants rely on *Nesbitt* v.

Meyer (1 Swanst. 223) and a series of decisions which have been pronounced in conformity with that case. The authorities which have been cited for the plaintiff are all cases of accident, the loss having been occasioned by fire, earthquake, &c. This is simply a case of efflux of time. The original plaintiff should have come here earlier, knowing as he did the extent of his lease. **[728]** It is said that the point now raised was not specifically decided by Sir Thomas Plumer. Admitting that to be so, the language of his Honour is sufficiently explicit, and he refers to a case of *Weston* v. *Pimm* (1 Swanst. 225; 3 Ves. & B. 197), where it was held clearly that in a suit instituted for the specific execution of an agreement to grant a lease, the determination of the term before the hearing was a bar to the relief. [Alderson, B. In that case the party put an end to the agreement before he brought his bill. How then could he afterwards ask for the specific performance of it?] In *Hoyle* v. *Livesey* (1 Mer. 381) the Master of the Rolls advanced a cause out of its turn in order to prevent such a result. That shews that he thought the objection tenable. [Alderson, B. That must have been done pro majori cautelâ, though I cannot see how the delay of the Court should operate in such a case. The moment the bill is filed the rights of the parties remain fixed, or ought so to do. I cannot accede to the doctrine in *Nesbitt* v. *Meyer*. How can the constitution of the Court alter the rights of the parties?] The term having expired, the only grounds for coming into a court of equity are at an end. The plaintiff's right is already as complete at law as the decree of a court of equity could make it. He had originally no absolute and abstract right in equity, but only a right to have his absolute right enforced at law. He has no right of that sort now, but he still has his remedy by assumpsit. Besides, independently of all other considerations, the plaintiff omitted to use due diligence in his application to the extraordinary jurisdiction of the Court. The time which elapsed between the agreement and the filing of the bill is in itself sufficient ground for refusing this relief: *Watson* v. *Reid* (1 Russ. & M. 236), *Heath* v. *Henley* (1 Ca. Ch. 20). [Alderson, B. It is laid down in *Crofton* v. **[729]** *Ormsby* (2 Sch. & Lef. 603) that resting on a mere equitable title does not make a party guilty of laches so as to bar him of relief.] The party here has his remedy at law.

Mr. Simpkinson, in reply, was stopped by the Court.

ALDERSON, B. It appears to me that the plaintiff is entitled to a decree. The question is whether, at the time this suit was commenced, the original plaintiff had a substantial right to have the agreement specifically performed; and, if he had, whether the consequences arising from lapse of time in this case ought to prevent the Court from granting him such part of the relief which he seeks as is capable of being granted. The cases which have been cited on behalf of the defendants are distinguishable from the present. In *Weston* v. *Pimm* the party, by his own act, deprived the Court of the possibility of granting him substantial relief, and the Court therefore held that it would be nugatory to make any decree in his favour. *Nesbitt* v. *Meyer* may, perhaps, be supported upon similar grounds. Here, when the party came into Court, he came entitled to the specific performance of his agreement for the residue of the term, and to an account on the footing of the agreement. It is true that lapse of time has taken away part of the subject-matter of the agreement, namely, the lease, but not the substantial part, which is the account. Therefore, seeing that the party was entitled to the specific performance of his agreement when he came into Court, and that his subsequent acts and lapse of time have taken away no ground of substantial relief, it appears to me that the plaintiff is entitled to a decree for an account.

Decree accordingly.

[730] THORPE *v.* GARTSIDE. Dec. 11th, 1837.—In a suit instituted by an equitable mortgagee for the enforcement of his security, the mortgagor will be allowed by the decree six months to redeem.

[S. C. 7 L. J. Ex. Eq. 30.]

The bill was filed by certain equitable mortgagees of the estates of John Gartside, deceased, against the trustees, who were also executors, under his will, his heir-at-law, and his younger children, who were interested in his real estates under the will, praying an account and payment of what might be found due under the mortgage securities, or that the estates might be sold. The question was whether the estates

should be sold immediately, or six months should be given to the representatives of the mortgagor to redeem.

Mr. Simpkinson and Mr. Bacon, for the plaintiff, observed that the authorities upon this point were conflicting. In *Bailey* v. *Gould* (in Exchcq., June, 1830) and *Pain* v. *Smith* (2 M. & K. 417) an immediate sale was decreed. In *Brocklehurst* v. *Jessop* (7 Sim. 438) it did not appear from the report what direction was given upon this head. On the other hand, in *Parker* v. *Housefield* (2 M. & K. 419) and *Miller* v. *Woods* (1 Keen, 16), six months were given to the mortgagee to redeem. All the authorities go to the extent that if the equitable mortgagee proceeds against the representatives of the mortgagor he is entitled to a sale. The only question is as to the time of sale.

ALDERSON, B. I think the weight of authority is in favour of giving the six months.

Decree accordingly.

[731] GARNER *v.* HUGHES.(*a*) Dom. Proc., May 1st, 1838.

The decree in the case of *Hughes* v. *Garner*, reported ante, p. 328, having been appealed from, upon the appeal coming on for hearing in the House of Lords, the counsel on both sides, on the suggestion of the Lord Chancellor, agreed to an issue to try whether Henry Rumsey Williams did, in July, 1815, shew to John Evans the settlement of June, 1795, mentioned in the pleadings, &c. &c., in the words of Williams's depositions.

With an alteration to that effect in the decree, the cause was remitted to the Court below.

(*a*) From Mr. Finnelly's note.

REPORTS of CASES ARGUED and DETERMINED in the COURT of EXCHEQUER in EQUITY; from Hilary Term, 1 VICT., to Michaelmas Term, 3 VICT., both inclusive. By EDWARD YOUNGE, Esq., of the Middle Temple, Barrister-at-Law, and JOHN COLLYER, Esq., of Lincoln's Inn, Barrister-at-Law. Vol. III. London, 1840.

[Pages i. to vi. contain General Orders in Equity.]

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER IN EQUITY.

SKEFFINGTON *v.* WHITEHURST AND OTHERS. Dec. 18th, 20th, 21st, 22nd, 1837; Jan. 1st, Feb. 7th, 1838.—T. H., who was in partnership with A. H., died in August, 1790, intestate, and a batchelor, leaving Lady S., wife of Sir W. S., and Mrs. D., wife of Mr. D., his next of kin. Soon after the death of T. H., upon a full investigation of the partnership affairs, they were found to be insolvent. The creditors then, by a composition deed, dated the 31st December, 1790, agreed to accept a composition of 15s. in the pound, payable by instalments by A. H. and one T. R., who had joined A. H. as partner, and to allow A. H. to take out letters of administration of the estate of T. H. At the time of this transaction, the intestate's estate had a doubtful claim upon Sir W. S. in respect of an unsettled account; and, on the other hand, D. had a claim upon the intestate's estate, the amount of which was not ascertained. On the day previous to the execution of the composition deed, Lady S. and Mrs. D., in the presence of their respective husbands, executed a proxy of renunciation of their right to administer the estate of the intestate; and on the same day, by an indenture made between Sir W. and Lady S. of the first part, A. H. of the second part, and T. R. of the third part, Sir W. S. covenanted with A. H. that he would release all claims on the part of himself and wife on the personal estate of the intestate, in consideration that A. H. should, within one month after obtaining letters of administration of the intestate's estate, release the claim of that estate against Sir W. S. Except as appeared from an attorney's bill of costs, there was no evidence of any release being executed either by Sir W. S. or A. H. in pursuance of this deed. In January, 1791, D., by a deed poll, reciting the insolvency of the late partnership, and that he had taken the joint bond of A. H. and T. R. in satisfaction of his demand on the same, in consideration of that bond, released all claims whatsoever which he had upon the partnership estate, and upon the estate and effects of T. H. Immediately after these arrangements, A. H. took out letters of administration of the intestate's effects; and in order, as appeared, to pay the composition, raised sums of money, by way of annuity and mortgage, on certain leaseholds of the intestate; T. R. being a party to, and joining in, the annuity and mortgage deeds. In 1793 a further arrangement was made between A. H., T. R., and the creditors; and soon afterwards, A. H. and T. R. dissolved partnership, T. R. remaining in exclusive possession of the leasehold premises.

T. R. subsequently purchased the fee simple of the premises, and, after exercising various acts of ownership, sold them in 1820. After the dissolution of the partnership of A. H. and T. R., the former took no further steps in any of these transactions, and died in 1806. After the year 1791, when D. executed his deed poll, neither Sir W. S. nor D., who both survived their wives, ever took any steps in reference to the foregoing transactions, although D. did not die till 1806, nor Sir W. till 1815: Held, under all the foregoing circumstances, that Sir W. S. must be presumed to have executed a release, in pursuance of the deed of the 30th December, 1790, of all interest in right of his wife in the residue of the personal estate of the intestate.—The entries in the bill of costs of a deceased attorney held to be good secondary evidence of the execution of mutual releases. —The wife of a partnership creditor of an intestate, being one of the intestate's next of kin, duly executed a proxy of renunciation of the administration of the intestate's effects. A few days afterwards the creditor executed a deed poll, by which, after reciting the insolvency of the intestate's estate, and that a composition deed had been executed by the creditors, in which they had agreed that A. should have administration of the intestate's effects, and reciting that A. had executed to the creditor a bond, which the latter had agreed to accept in satisfaction of the debt, it was declared that the same, when paid, should be accepted by him, the creditor, in full payment and satisfaction of all and every sum and sums of money due or owing by or from the said intestate to him, the said creditor, on account of the partnership or any other account whatsoever, and of all claims and demands whatsoever of him, the said creditor, on the estate and effects of the said intestate: Held, that this amounted to a release by the creditor of his wife's distributive share in the residue of intestate's personal estate, although such residue was not mentioned or referred to in the deed poll.—Upon the death of administrator, who has mortgaged the leasehold estate of his intestate, reserving the equity of redemption to himself, his executors, administrators and assigns, the equity of redemption vests in the personal representative of the administrator, and not in the administrator de bonis non of the intestate; the rule being that the persons entitled to redeem in equity are those who, within the time limited by the mortgage deed, would have been entitled to redeem at law.

[S. C. 7 L. J. Ex. Eq. 65: affirmed nomine *Skeffington* v. *Budd*, 1842, 9 Cl. & F. 219.]

Thomas Hubbert, of Mark-Lane, in the city of London, being in partnership with his natural son, Alex-**[2]**-ander Hubbert, in the business of ship and insurance brokers at London and Ostend, and being possessed of certain leasehold property at Bermondsey, under a lease dated the 23rd of June, 1788, and under an agreement for a lease, dated the 21st of January, 1790, made with one Thomas Carter (all of which premises, together with others, were subject to a lease granted to Carter, dated the 11th of October, 1785), died in the month of August, 1790, a batchelor and intestate, leaving Lady Skeffington, the wife of Sir William Skeffington, and Mrs. Donovan, the wife of Cornelius Donovan, Esquire, his sisters and only next of kin; and also leaving the above-named Alexander Hubbert and another natural son, named Thomas Rowcroft, surviving him. All these parties having been long since deceased, the present bill was filed by Sir Lumley St. George Skeffington, eldest son of Sir William Skeffington, as administrator de bonis non, and also as representing the next of kin of Thomas Hubbert living at his decease, claiming a right to redeem the leasehold premises as against the defendants, who derived their title to **[3]** those premises as purchasers from Thomas Rowcroft, under the circumstances which will appear in this report.

Upon the death of Thomas Hubbert, the partnership of Thomas and Alexander Hubbert was found to be in embarrassed, and, as it appeared from the defendants' evidence, in insolvent circumstances; and by an indenture dated the 31st of December, 1790, and made between Alexander Hubbert of the first part, the several persons executing that indenture, creditors of the partnership, of the second part, and Thomas Rowcroft of the third part, reciting that in consequence of an investigation which had taken place of the affairs of the partnership, both at London and at Ostend, by a committee of creditors appointed for that purpose, the creditors were of opinion that it would be for their interest to accept a composition of 15s. in the pound in full for

their respective debts, payable by instalments, in six, twelve, and twenty-four months; and that the said Alexander Hubbert and Thomas Rowcroft having proposed to give their promissory notes to the creditors for the payment of the above composition, upon the sole disposition and management of the estate being committed to them, and they being permitted to take out letters of administration to the estate and effects of the said Thomas Hubbert, the committee were of opinion that it would be for the general benefit of the creditors at large to accede to such propositions, and upon their giving their notes for the above composition, to give up to them the sole disposition and management of the whole of the estate and effects of the said late partnership, and of the separate estate of the said Thomas Hubbert, the said Alexander Hubbert and Thomas Rowcroft engaging to satisfy all claims and demands whatsoever which might be made on the separate estate of the said Thomas Hubbert; and that the creditors present at the said meeting, having taken the said report of the committee into consideration, had agreed thereto, and to accept the said com-[4]-position of 15s. in the pound on the terms proposed thereby, so soon as all the creditors, whose debts exceeded 100l., should have signed the said resolution; and that upon receiving the notes of the said Alexander Hubbert and Thomas Rowcroft for the above composition, the creditors would execute to them a release of all demands on the said late partnership, and on the estate and effects of the said Thomas Hubbert, and give up all securities they held in respect thereof: and further reciting that the several creditors of the said partnership had signed or acceded to the said last-mentioned resolution, except two persons, one of whom was bond creditor, entitled to full payment of his debt out of the separate estate of the said Thomas Hubbert, and also except such other of the said joint creditors as the said Alexander Hubbert and Thomas Rowcroft had taken upon themselves the risk of obtaining the assent to the said composition: and further reciting that the said Alexander Hubbert and Thomas Rowcroft had delivered to the said several persons, parties thereto of the second part, their joint promissory notes for the payment of the said composition by the aforesaid instalments in full satisfaction of the debts due to them, and that the said parties had given up the several securities held by them in respect thereof, on which the said Alexander Hubbert was liable to pay on having survived the said Thomas Hubbert: It was witnessed that in pursuance of the said resolutions and agreements, the said Alexander Hubbert and Thomas Rowcroft did covenant to discharge the said promissory notes, and the said parties of the second part did covenant to accept the same in full discharge of their aforesaid several debts, and in consideration of their said notes, and upon condition of the due payment thereof, they, the said several parties, did release the said Alexander Hubbert from all manner of action, claim, and demand whatsoever which they might have against him, as surviving partner of the said late partnership, or against the heirs, executors, or adminis-[5]-trators of the said Thomas Hubbert deceased, or the separate estate of the said Thomas Hubbert deceased; and they, the aforesaid parties, did thereby, as far as they could, renounce respectively to the said Alexander Hubbert and Thomas Rowcroft, and to each of them, all their right and claim to the administration of the effects of the said Thomas Hubbert deceased, to the intent that they, the said Alexander Hubbert and Thomas Rowcroft, or one of them, might apply for the same as should be found expedient; and that the said Alexander Hubbert and Thomas Rowcroft, or such one of them as should obtain administration as aforesaid, should get in the estate of the said Thomas Hubbert, and apply the same in due course of administration without interruption on their part.

On the day preceding the execution of this deed, namely, on the 30th of December, 1790, Lady Skeffington and Mrs. Donovan executed a proxy of renunciation of administration of the effects of Thomas Hubbert. The terms and understanding upon which this renunciation took place was one of the principal matters in dispute in this cause.

By an indenture dated the same 30th of December, and executed by Sir William and Lady Skeffington of the first part, Alexander Hubbert of the second part, and Thomas Rowcroft of the third part, after reciting (amongst other things) the death of the said Thomas Hubbert, and that Lady Skeffington and Mrs. Donovan were his sole next of kin, and that upon looking into the affairs and concerns of the said Thomas Hubbert and Alexander Hubbert, it appeared that their estate and effects were not sufficient to pay the several creditors of the said co-partnership by a very large sum of money; and that the said Alexander Hubbert and Thomas Rowcroft had undertaken

and agreed to settle with the said several creditors of the said co-partnership, by composition or otherwise, but the same could not be effected without letters of [6] administration being first granted of the personal estate of the said Thomas Hubbert; and further reciting that there had been several money transactions between the said Sir William Skeffington and the said Thomas Hubbert, in his life-time, but that no account thereof had been kept by either party: It was witnessed that they, the said Sir William and Lady Skeffington, in part performance of the agreement to that effect thereinbefore set forth, and at the special instance and request of the said Thomas Rowcroft, remised, released, and renounced unto the said A. Hubbert all the right, interest, property, profit, benefit, claim, and demand whatsoever or howsoever of them, the said Sir William and Lady Skeffington, or either of them, of, in, and to letters of administration of the personal estate of the said Thomas Hubbert. And it was by the now reciting indenture further witnessed, that they, the said Sir William and Lady Skeffington, in further pursuance of the said recited agreement, and at the like nomination and direction of the said Thomas Rowcroft, did, and each of them did, by the now reciting indenture, as far as in them lay, authorize and empower the said A. Hubbert, immediately after the execution of the now reciting indenture, to take out of the proper Ecclesiastical Court letters of administration of all and singular the goods, chattels, and credits of the said Thomas Hubbert deceased. And it was, by the now reciting indenture, further witnessed that he, the said A. Hubbert, in pursuance and performance of his part of the said agreement, and in consideration of the said release and renunciation as aforesaid, and of his having such letters of administration granted to him as aforesaid, did thereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Sir William Skeffington, that he, the said A. Hubbert, would, immediately after such letters of administration should be granted to him as aforesaid, or within one month thereafter, seal, execute [7] and deliver unto or to the use of the said Sir William Skeffington, a good, sufficient, general release and discharge of all claims and demands whatsoever which he should or might have upon the said Sir William Skeffington, his executors, or administrators, as administrators, or administrators of the said Thomas Hubbert, or otherwise howsoever. And it was by the now reciting indenture further witnessed that he, the said Sir William Skeffington, in further performance of his part of the said agreement, and in consideration of such release so to be sealed, executed, and delivered to him as aforesaid, did, by the now reciting indenture, for himself, his heirs, executors, and administrators, and for his said wife, covenant, promise, and agree, to and with the said A. Hubbert, his executors and administrators, that they, the said Sir William and Lady Skeffington would, immediately after such letters of administration should be granted to the said A. Hubbert as aforesaid, or within one month thereafter, duly seal, and execute, and deliver unto the said A. Hubbert, his executors or administrators, a good and sufficient release and discharge of all claims and demands whatsoever, which they, the said Sir William and Lady Skeffington, or either of them, or their or either of their executors or administrators, should or might have upon the said Alexander Hubbert, as administrator of the said Thomas Hubbert, or otherwise howsoever.

In consequence of certain claims by Mr. Donovan upon the separate estate of Thomas Hubbert, which had not been satisfactorily adjusted, he declined to execute any deed for the purpose of releasing that estate, until the 11th of January, 1791. By a deed poll, however, of that date, duly executed by him, reciting, amongst other things, that the said Thomas Hubbert and the said Cornelius Donovan had carried on business together, in partnership, as merchants for several years previous, and up to the year 1780, when their said partnership was dissolved, and that at [8] the time of the dissolution of their said partnership no accounts were stated or made out between them, and that the said Cornelius Donovan had, some time in the year 1787, delivered to the said Thomas Hubbert an account of his payments and receipts in respect of their said partnership, in which it was stated that the said Thomas Hubbert stood indebted in respect thereof to the said Cornelius Donovan in the sum of 2300l. or thereabouts, and that the balance or sum of 2300l. had not been settled or agreed to by the said Thomas Hubbert up to the time of his death; and further reciting that the said Thomas Hubbert had for several years previously, and up to the time of his death, carried on business in partnership with the said Alexander Hubbert, and that upon a statement of the affairs of the said last-mentioned partnership, at the death of

the said Thomas Hubbert, it was found that the property and effects of the said last-mentioned partnership, together with the private effects of the said Thomas Hubbert, were insufficient to discharge the whole of the debts due from the said last-mentioned partnership; and reciting the proposal of the said Alexander Hubbert and Thomas Rowcrowft to pay the aforesaid composition of 15s. in the pound, to be secured by their joint and several promissory notes as before mentioned; and reciting, that in pursuance of the said proposal the said Alexander Hubbert and Thomas Rowcroft had given their notes to all or most of the creditors of the said then late partnership of Thomas and Alexander Hubbert, and that such creditors had thereupon executed a release to the said Alexander Hubbert, and had also released the estate and effects of the said Thomas Hubbert in respect of their several debts, and had consented and agreed that the said Alexander Hubbert should in his own name take out letters of administration of the estate and effects of the said Thomas Hubbert; and further reciting that the said Cornelius Donovan had claimed to be a creditor on the **[9]** private estate of the said Thomas Hubbert, for the said sum of 2300l., but the same having been objected to by the said Alexander Hubbert, and the estate of the said Thomas Hubbert being insufficient to pay the debts due and owing by the said Thomas Hubbert at the time of his decease, as aforesaid, he the said Cornelius Donovan had proposed to the said Alexander Hubbert to accept the sum of 1000l. payable by instalments of 100l. per annum, in full payment and satisfaction of the said sum of 2300l., and of all other claims and demands which the said Cornelius Donovan had, or which his executors or administrators should or might have, against the estate and effects of the said Thomas Hubbert, upon any account or pretence whatsoever, on the said Alexander Hubbert and Thomas Rowcroft executing a bond to him, to secure the payment of the said sum of 1000l.; and further reciting that the said Alexander Hubbert and Thomas Rowcroft, having agreed to accede to such proposal, had in pursuance of such agreement executed such bond of even date with the now reciting deed poll: It was declared by the said Cornelius Donovan that the said bond was, and that the same, when paid pursuant to the condition thereof, should be accepted by him in full payment, discharge, and satisfaction of all and every sum and sums of money due or owing by, or from the said Thomas Hubbert deceased, to him the said Cornelius Donovan, on account of the said partnership, trade or business, so by them carried on as aforesaid, or any other account whatsoever, and of all claims and demands whatsoever of him the said Cornelius Donovan, on the estate and effects of the said Thomas Hubbert deceased.

In February, 1791, letters of administration of the goods, chattels, and credits of Thomas Hubbert, were granted to Alexander Hubbert, out of the Prerogative Court of Canterbury. In March following the agreement which Thomas Hubbert had entered into with Thomas **[10]** Carter for a lease of part of the premises at Bermondsey was carried into execution by Alexander Hubbert, by means of an indenture bearing date the 7th of that month, and made between Thomas Carter on the one part, and Alexander Hubbert, therein described as administrator of the goods of Thomas Hubbert, of the other part. By that indenture Alexander Hubbert entered into covenants (in execution of former covenants entered into by Thomas Carter for that purpose) to lay out certain sums (amounting to about 2000l.) in building upon the premises.

The partnership business of Alexander and Thomas Hubbert was continued after Thomas Hubbert's death by Alexander Hubbert and Rowcroft, who took possession of the partnership effects, including the leasehold premises in question.

In order, as alleged by the defendants, to pay off part of the composition agreed upon by the indenture of the 31st December, 1790, Alexander Hubbert and Rowcroft borrowed a sum of 4000l. of a Mrs. Spriggs, by way of annuity payable to her for the term of her life. The repayment of that sum was secured by an indenture dated the 16th of July, 1791, and made between Alexander Hubbert of the first part, Thomas Rowcroft of the second part, Amelia Spriggs of the third part, and Sir John Lubbock of the fourth part, whereby, after reciting certain leases and other instruments affecting divers leasehold properties belonging to Thomas Hubbert, and reciting the death of Thomas Hubbert intestate, and that letters of administration of his goods and chattels, &c., were soon afterwards granted by the Prerogative Court of Canterbury to Alexander Hubbert, as a creditor of Thomas Hubbert, whereby the several leasehold premises before mentioned became and then were legally vested in

the said Alexander Hubbert in possession as administrator as aforesaid, for all the residue of the several terms of years for which the said leaseholds were respectively holden; and reciting the indenture of lease [11] of the 7th of March, 1791; and reciting that Arabella Spriggs had contracted with Alexander Hubbert and Rowcroft for the purchase of an annuity of 420l. for her life, at the price of 4000l., which sum had been accordingly paid her, and had been secured by the joint bond and warrant of attorney of Alexander Hubbert and Rowcroft: It was witnessed that for more effectually securing the regular payment of the said annuity, the said Alexander Hubbert and T. Rowcroft did grant and confirm the said annuity of 420l. to the said A. Spriggs for her life, to be chargeable on the premises comprised in the said indenture of March, 1791. And it was further witnessed that the said Alexander Hubbert did assign the said premises to Sir John Lubbock, for the residue of the term existing in the premises, in trust for securing the annuity, and subject thereto; in trust for Alexander Hubbert, his executors, administrators, and assigns. This deed contained a power of sale by Sir John Lubbock, his executors, &c., in case default should be made in payment of the annuity for the space of twelve calendar months next after any of the days appointed for payment.

In the course of the same year (1791) Alexander Hubbert, for the same purpose, according to the defendants' statement, as before mentioned, borrowed of a Mrs. Smith the sum of 1500l. Accordingly, by an indenture dated the 2nd of December, 1791, and made between Alexander Hubbert of the first part, Thomas Rowcroft of the second part, and Margaret Smith of the third part, reciting the indenture of lease of the 23rd day of June, 1788, and the death of Thomas Hubbert in August, 1790, and that letters of administration of his effects had been duly granted to Alexander Hubbert; and that Alexander Hubbert had paid sundry debts, and given security for a composition in satisfaction of divers other debts of Thomas Hubbert, to a very large amount; and that having immediate occasion for the sum of 1500l., the better to answer [12] the purposes of the said administration, he, the said Alexander Hubbert, together with his partner in trade, the said Thomas Rowcroft as his surety, had applied to the said Margaret Smith to lend to the said Alexander Hubbert such sum, for which the said Alexander Hubbert and Thomas Rowcroft had given their joint bond of even date with those presents: It was witnessed that in consideration of the said sum of 1500l. (being the consideration money for the said bond) paid to the said Alexander Hubbert by the said Margaret Smith, &c., the said Alexander Hubbert did assign unto the said Margaret Smith all the premises comprised in the said lease of the 23rd day of June, 1788, to hold to her, her executors, administrators, and assigns, for the residue of the term comprised in the said indenture, upon trust for securing payment of principal and interest according to the condition of the bond; and in default thereof, in trust for sale and satisfaction, subject nevertheless to a proviso for redemption on payment by the said Alexander Hubbert and Thomas Rowcroft, their heirs, executors, or administrators, or any of them, to the said Margaret Smith, her executors, &c., of the said sum of 1500l. and interest, at the days and times and in the manner mentioned in the condition of the bond.

By an indenture dated the 27th day of March, 1793, and made between Alexander Hubbert of the first part, the several persons executing that indenture, and therein mentioned to be creditors of the said Thomas Hubbert and Alexander Hubbert of the second part, and the said Thomas Rowcroft of the third part, reciting the indenture of the 31st day of December, 1790, and that all or the greater part of the creditors of the said Thomas Hubbert had executed the said indenture; and that the estate and effects of the late partnership, then received, had not produced sufficient to pay to the several creditors of the said partnership the several instalments stipulated to be paid [13] to them by the said indenture, and that the said Alexander Hubbert and Thomas Rowcroft had paid to the several creditors 11s. 3d. in the pound, in part of the said composition of 15s. in the pound, on the amount of their debts, and which sum of 11s. 3d. in the pound, it was therein mentioned, exceeded the sum which had been received from the estate and effects of the said late partnership by the sum of 2500l. and upwards; and that the said Alexander Hubbert and Thomas Rowcroft having been unable to pay the remaining 3s. 9d. in the pound, in discharge of their said promissory notes, had convened a meeting of the said creditors, and laid before the creditors present at such meeting a particular account of the monies received from the estate and effects of the said late partnership, and of the said Thomas Hubbert, and also a particular

account of the outstanding debts and effects due and belonging to the same, and that the said Alexander Hubbert and Thomas Rowcroft proposed to the said creditors to pay them the remaining 3s. 9d. in the pound, with two years' interest by equal annual instalments in six years, from the 1st day of January then last (1793), in case the outstanding debts and effects, and the sum of 2000l. which they proposed to add thereto out of their own proper monies, would extend to pay the same, and if not, then so much of the said sum of 3s. 9d. in the pound, and of the said two years' interest, as the said outstanding debts and effects and as the said sum of 2000l. would extend to pay, and that the said creditors should then give up the said promissory notes for payment of the said composition of 15s. in the pound, and release the said Alexander Hubbert and Thomas Rowcroft from their covenant for the payment thereof; and reciting that the creditors present at the said meeting had agreed to the said propositions, and that the said several parties to the said indenture in recital had delivered up their several promissory notes accordingly: It was witnessed, &c. [Then follow covenants by Alex-**[14]**-ander Hubbert and Rowcroft with the creditors, to carry the proposed arrangements into execution (following the words of the recitals), and a covenant by the creditors to accept that arrangement, and a declaration that on due performance of the said covenants by Alexander Hubbert and Rowcroft, they, the creditors, did thereby release the joint estate of Thomas and Alexander Hubbert, and, the separate estate of Thomas Hubbert from all actions and demands whatsoever.]

Shortly after the completion of the arrangement effected by this deed, Alexander Hubbert and Rowcroft dissolved partnership; the former returning to Ostend (where he generally resided) for the purpose of winding up the partnership affairs there, and the latter remaining in possession of the leaseholds and other partnership property in England. It did not appear by any direct evidence that Rowcroft ever paid the instalments covenanted to be paid to the creditors of the old firm by the deed of March, 1793, but the circumstances of the case were favourable to the presumption that he had done so. After the dissolution of the partnership, Alexander Hubbert did no further act to affect the premises; not even executing any assignment of the leases to Rowcroft; and in 1806 he died intestate and insolvent.

It is now necessary to state the acts of Rowcroft in relation to the premises.

In the year 1795 Mrs. Smith called in and required payment of the sum of 1500l. advanced by her on mortgage of the premises comprised in the lease of 23rd of June, 1788. The same was accordingly paid off by Rowcroft, and by his direction Mrs. Smith assigned the mortgaged premises to the defendant Davis, in trust for Rowcroft, by an indenture dated 2nd of December, 1795. By deed of even date with that indenture Davis declared the trusts of such assignment in favour of Rowcroft.

In the year 1797 Rowcroft and Carter purchased from **[15]** Lord Salisbury the freehold and inheritance of the premises comprised in the original lease of the 11th of October, 1785, together with a small piece of ground not included therein, and the same were accordingly conveyed to a trustee for them in equal moieties. Carter and Rowcroft having afterwards agreed to make partition of the purchased premises, that agreement was carried into effect by certain indentures of lease and release of August, 1797, under which so much of the purchased property as was comprised in the lease of 23rd of June, 1788, and 7th of March, 1791, was conveyed to the use of Rowcroft, his appointees, heirs, and assigns.

In the year 1805 Rowcroft, being indebted to his bankers, Messrs. Smith, Payne & Smith, in the sum of 15,000l., deposited with them the title-deeds of the freehold premises so vested in him, and executed to them a deed-poll, dated the 31st of January, 1805, by which, after reciting the indenture of August, 1797, and that Rowcroft had laid out a large sum of money in making erections and improvements on the premises, and that the said premises or part thereof, were subject to the indentures of lease of the 11th day of October, 1785, and the 23rd day of June, 1788; and reciting the death of Thomas Hubbert, and that Alexander Hubbert had taken out administration to his effects, and that he was justly indebted to Rowcroft in the sum of 7878l. and upwards; and reciting that Rowcroft was indebted to the firm of Smith, Payne & Smith, in the sum of 15,000l., and that Rowcroft had deposited with them the title-deeds, &c., as a security for the repayment of the said sum of 15,000l., and had also agreed, as a further security, to assign to them the said debt so owing to him by the said Alexander Hubbert; the said Thomas Rowcroft did by the said deed-poll covenant, and also direct and appoint that all the hereditaments comprised

in the said indenture of lease above mentioned should be charged with the payment of the said sum of [16] 15,000l. And he did thereby also assign unto the said Smith, Payne & Smith, all sums of money owing to him by the said Alexander Hubbert, whether in his own right or as administrator of the effects of the said deceased Thomas Hubbert. This debt of 15,000l. was afterwards paid off by Rowcroft, and the deed-poll of the 31st of January, 1805, was delivered up to him and cancelled.

In the years 1802 and 1805 Rowcroft charged the hereditaments comprised in the lease of the 23rd of June, 1788, with two annuities, payable to a Mrs. Logie, for the term of her life.

In 1807, while the annuities to Mrs. Spriggs and Mrs. Logie were still subsisting, Rowcroft, being indebted to the defendants, Davis, Shaw and others (hereafter called Davis & Co.) in a very large sum of money, for the purpose of securing the repayment thereof, deposited with them the title-deeds relating to the freehold of the premises, and also the lease of the 23rd of June, 1788, and an attested copy of the original lease of the 11th of October, 1785, and executed to them a deed of charge, dated 13th of August 1807.

In the year 1815 the debts due from Rowcroft to Davis & Co. still remaining unpaid, the latter, under a covenant contained in the deed of charge for that purpose, called upon Rowcroft for better security; and accordingly, by indentures of lease and release, dated respectively the 18th and 19th of January, 1815, Rowcroft conveyed the premises vested in him, under the partition deeds of August 1797, to Davis & Co. upon trust for sale, subject to the annuities of Mrs. Logie and Mrs. Sprigg, and to the leases of 11th of October, 1785, and 23rd of June, 1788.

Soon after the execution of these deeds, the premises in question were put up to public sale, but were bought in by reason of no sale having been effected under the deed of trust. Rowcroft, in 1818, released his equity of redemption in the premises to Davis & Co. [17] and the same were duly conveyed to them by indentures of lease and release, dated the 22nd and 23rd of June, 1818, such conveyances being declared to be subject to the annuities and the leases of the 11th of October, 1785, and 23rd of June, 1788, and to the several terms thereby demised.

The annuitants, Mrs. Spriggs and Mrs. Logie, died in 1821.

Thomas Rowcroft died in 1824, having appointed the defendant Whitehurst his executor.

The defendants Davis & Co., having obtained from Rowcroft a conveyance of the fee simple of the premises, under the circumstances before mentioned, sold and conveyed part of them in 1822 to the defendant Farrand. In 1825 they sold the remainder of the premises to the defendant Thompson.

In the course of the investigation to which the title was subjected, on the occasion of this latter purchase, the conveyancer to whom it was submitted on Thompson's behalf, objected that the terms created by the lease of 1788 and 1791 had never been assigned to Rowcroft, and were still outstanding, and he required that letters of administration de bonis non to Thomas Hubbert, the original lessee, should be taken out, for the purpose of curing this defect by a proper assignment. This requisition led to a negociation and correspondence between Mr. Atcheson, the solicitor for Thompson, and the plaintiff and his solicitor, the result of which was that the plaintiff refused to concur in the request made to him by Atcheson, that he should renounce any right he might have to administration as the nearest of kin to Thomas Hubbert. Application was then made to the Prerogative Court for a grant of administration to a nominee of the defendants, to which the Court acceded upon a full statement of the facts of the case, but without citation of the plaintiff, and accordingly administration, limited to Thomas Hubbert's inter-[18]-est in the terms in question, was decreed to Henry John White, a nominee of the defendants, by whom, in such his character of administrator, these terms were duly assigned to the purchasers.

After the purchase had been thus completed, the plaintiff obtained a revocation of the letters of administration so granted to White, and procured letters of administration de bonis non of Thomas Hubbert to be granted to himself; and in May, 1831, he filed the present bill, whereby, as such administrator, and as representing his mother, Lady Skeffington, and his aunt, Mrs. Donovan, he claimed both the legal and beneficial interest in the leases of the 23rd of June, 1788, and the 7th of March, 1791, on payment of what was due to Rowcroft or his assigns, on the security thereof; charging that Rowcroft was not the absolute owner of the leases, but a mere incum-

brancer thereon, having a lien for the debts which he had paid; that he so treated and considered himself, particularly in the transactions with Smith, Payne & Smith, in 1805, and with the defendants, Davis & Co., in 1807; that he kept accounts as mortgagee, down to the sale to Davis and others in 1818, and within twenty years; and that in such sale he expressly, and in terms, excepted the leases; that he did not, and could not acquire or confer any title thereto, especially as there was a suspension of all representation to Thomas Hubbert from the death of Alexander until long after the sale to Davis & Co.; and that in the proceedings in the Ecclesiastical Court, the latter put their title not on the footing of adverse possession, but on the ground of more debts having been paid than the whole value of the leases.

To this bill the defendants, Davis & Co., put in a general demurrer for want of equity, which was argued before Lord Lyndhurst, C. B., at the sittings after Michaelmas Term, 1831. His Lordship overruled the demurrer on the ground that the renunciation by Lady Skeffington and **[19]** Mrs. Donovan did not necessarily raise an inference that they meant to abandon all claim to the residue of Thomas Hubbert's estate, and also that there were allegations on the bill, admitted by the demurrer, shewing that the title of Thomas Rowcroft had been treated within twenty years as that of an incumbrancer merely.

The plaintiff, in his bill, omitted all allusion to the deeds of the 30th of December, 1790 (ante, p. 5), and 11th of January, 1791 (ante, p. 7), although a duplicate of the former deed was in his own possession. That duplicate (which was the deed used in evidence in this cause, the other having been lost) was produced by him in answer to a cross bill of discovery filed against him by Thompson and Farrand.(*c*) Having **[20]** thus omitted to state the deed of the 30th of December, 1790, the plaintiff accounted for the renunciation of administration by Lady Skeffington and Mrs. Donovan in the following manner:—"That the affairs of the said Thomas Hubbert and Alexander Hubbert being, at the time of the death of the said Thomas Hubbert, in a very complicated state, Lady Skeffington and Mrs. Donovan, the better to enable Alexander Hubbert to settle and arrange the mercantile affairs of the said Thomas Hubbert, deceased, did, at the particular request of the said Alexander Hubbert, renounce their right to the letters of administration of the goods, chattels, and credits of the said Thomas Hubbert, deceased."

The grounds on which the principal defendants resisted the claim of the plaintiff were mainly these:—

1. That this was not a redeemable interest, inasmuch as the estate of Thomas Hubbert being insolvent, his creditors and next of kin (between which next of kin

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(*c*) The cross bill was filed in consequence of certain observations which fell from Lord Lyndhurst on a motion by the plaintiff for the production of deeds and documents, which was heard by his Lordship on 21st of January, 1833. His Lordship, after stating the facts of the case as they then appeared upon the pleadings, proceeded as follows:—"It appears to me, therefore, upon this state of facts, that Thomas Rowcroft was a mere incumbrancer, and that the persons taking under him could not be in a better situation than Thomas Rowcroft himself. But then there are certain facts insisted upon to which I shall also advert. Mrs. Donovan and Lady Skeffington were the two next of kin of Thomas Hubbert; they renounced the administration of her effects. It is said that they not only renounced the administration, but that they released the residue. If they released the residue, it appears to me, as far as the rights of the parties are concerned, there would be an end of the question; but when I look at the release executed by Mr. Donovan, I incline strongly to come to the conclusion that he did not intend to release the residue. The object of the release was not, as it appears to me at present, to release the residue; it was to release all debts and all claims he had in respect of debts upon the estates, but it did not point to the residue, nor was it intended to have that effect.

"Then, with respect to the release supposed to have been executed by Sir William and Lady Skeffington, after the best consideration I can give to the case, as it at present presents itself for my attention, it does not appear to me that there is evidence sufficient of the execution of that instrument. I think, upon the case as it at present stands, not giving any opinion as to what may turn out upon the hearing, there is not sufficient evidence of the execution of that instrument; therefore, I think those releases, or supposed releases, do not vary the state of the case."

and Thomas Hubbert there were mutual accounts) had released all beneficial interest in the property in question to Alexander Hubbert and Thomas Rowcroft, in consideration of the latter parties undertaking to discharge the claims upon the insolvent estate.

2. That if this were now a redeemable interest, the plaintiff was not the party entitled to redeem.

3. That supposing this interest to be redeemable, and that the plaintiff had originally a right to redeem, that right was lost by long lapse of time and the acquiescence of the next of kin in the possession of Rowcroft and his assigns.

In support of the first ground of defence, the defend-**[21]**-ants relied on the deeds of composition, the deeds of the 30th of December, 1790, and the 11th of January, 1791, the secondary evidence, hereafter adverted to, of a release executed in pursuance of the deeds of December, 1790, and the parol evidence of Mr. Kaye, who was the solicitor for several of the creditors, and was present at most of the meetings which took place in reference to the composition. It appeared that all the transactions relative to the composition took place with the full knowledge of Sir William and Lady Skeffington, their interest being attended to by Mr. Donovan, who took an active part in the proceedings.

In support of the last ground of defence, the defendants gave evidence that from the time of the dissolution of the partnership between Alexander Hubbert and Rowcroft in 1793, until the sale of the premises to Davis in 1815, Rowcroft was in the exclusive possession of the property, and acted as absolute owner of it, particularly by expending large sums of money in building upon it. They likewise relied upon the want of evidence of interference of the next of kin; and proved the deaths of the next of kin and their husbands as follows: namely, that of Sir William in 1815, of Lady Skeffington in 1813, of Mr. Donovan in 1806, and of Mrs. Donovan in 1803.

The defendants being unable to produce any deed of release, executed in pursuance of the covenants contained in the deeds of the 30th of December, 1790, but having proved the loss, by accident, of many of the deeds and documents in the possession of Thomas Rowcroft, proceeded to give secondary evidence to shew that Sir William and Lady Skeffington and Alexander Hubbert had executed mutual releases to each other pursuant to the covenants above referred to. The proposed secondary evidence consisted of a bill of costs delivered to Mr. Do-**[22]**-novan by Mr. Trundle, deceased, his solicitor, who had prepared the deed of December, 1790. The defendants had stated by their answer that they believed that it appeared by the bill of costs in question that mutual releases between Sir William and Lady Skeffington of the one part, and Alexander Hubbert, as administrator of the said Thomas Hubbert, of the other part, were duly prepared and executed. The document proposed to be read in evidence was as follows:—

Cornelius Donovan, Esq., Dr. to Thomas Trundle.

1790.				
Dec.	Attending you, consulting and advising on the affairs of Thomas Hubbert, deceased, and taking instructions for special deed of renunciation, of letters of administration from Sir William Skeffington, and Dame Catherine his wife, in favour of Alexander Hubbert, and for covenants between the parties to execute general releases to each other . . .	£0	6	8
	Drawing deed accordingly (16 folios) . . .	0	16	0
	Fair copy for the perusal of the parties . .	0	5	4
	Attending, reading over, and settling same . .	0	6	8
	The like on Mr. Hubbert, and filling up the blanks .	0	6	8
	Engrossing two parts thereof	1	0	0
	Duty, &c.	0	13	0
	Attending, reading over, and the execution of deeds, by Mr. Hubbert and Mr. Rowcroft, and afterwards to leave with you to forward to Sir William **[23]** Skeffington for execution, and instructions thereon .	0	6	8
	Carry forward . . .	£4	1	0

	Brought forward . . .	£4	1	0
1791. Jan.	You having returned me one part of the deeds, executed by all parties, with directions to prepare the releases, and attending Mr. Hubbert in Mark Lane, to inquire if letters of administration granted to him, &c. &c. .	0	6	8
Feb.	Perusing letter of administration and deed, and taking instructions for general releases between said parties pursuant to their covenants	0	6	8
	Drawing and engrossing release from Mr. Hubbert to Sir William Skeffington	0	7	6
	Duty, &c.	0	6	4
	Attending Mr. Hubbert, reading over release, and the execution thereof	0	6	8
	Drawing and engrossing release from Sir William Skeffington and Dame Catherine his wife to Mr. Hubbert	0	7	6
	Duty, &c.	0	6	4
	Attending you with releases, and instructions thereon .	0	0	0
	Letters and porters	0	2	0
		£6	10	8
1792.	Brought from folio 301	0	16	10
May 5.	Received	£7	7	6
		T.	T.	

This bill of costs, as far as the sum of 6l. 10s. 8d., was in the handwriting of Trundle's clerk. The remaining two entries, with the initials T. T., were in Trundle's **[24]** handwriting. Trundle died in 1821 and the clerk a few years afterwards.

Upon the defendant's counsel tendering this bill in evidence for the purpose before mentioned, the plaintiff's counsel contended against its admissibility, and cited *Barker* v. *Ray* (2 Russ. 63). Amongst other objections, they urged that the bill was not in the handwriting of the attorney. The attorney's admission of payment of the amount was therefore not so clearly made out in this case as it was in *Warren* v. *Greenville* (2 Str. 1128).

Alderson, B. What does the word "received" mean? Suppose it had been "received the amount of the above bill," would it have signified in whose handwriting the bill was? In *Lord Lorton* v. *Gore* (1 Dow & Clarke, 190) certain marriage articles were lost, and it was held that the recital of them in a case submitted to counsel and charged for and entered as paid for by the attorney was admissible in evidence. It is very improbable that the entry was in the handwriting of the attorney. The rule is that what a man authenticates against his interest is, after his death, to be considered as equivalent to his oath. What then is he to be considered to have sworn to here? Why, that he has received 7l. 7s. 6d., the amount of his bill.

It was then contended for the plaintiff that the evidence, if received, ought only to be applied to the strict allegation in the answer, namely, that according to the defendants' belief, it *appeared* by the bill of costs that mutual releases had been executed; not that they had actually been executed. It was urged that the evidence now produced was quite consistent with the belief of the defendants, that the release never was executed.

[25] Alderson, B. If there be any allegation in the answer to which the evidence is applicable, it appears to me that I ought to receive it.

The cause then proceeded on the merits.

Mr. Swanston, Mr. Lovat, and Mr. James Russell, for the plaintiff, in the course of a long argument, addressed principally to the facts of the case, contended—First, that there was no evidence of the existence of any such arrangement as that upon which the defendants relied; that there were no grounds for alleging that the estate of Thomas Hubbert was insolvent at his death, and consequently that there was no consideration moving to the next of kin for giving up their shares of the residue; that their renunciation was merely for the purpose of enabling Alexander Hubbert to disentangle the affairs of the partnership; that, in regard to Sir William and Lady

Skeffington, there was no evidence of their having executed any release, in pursuance of the deed of covenant of the 30th of December, 1790, even supposing that deed to be valid; but that that deed in itself was nugatory, having never been acted upon, but, on the contrary, having continued, throughout all their transactions, in the custody of the grantor; that the release by Mr. Donovan was not intended as a release of the residue, but only of particular debts, and that Lord Lyndhurst was of that opinion on the motion of the production of deeds and documents. Secondly, that the plaintiff, in his character of administrator de bonis non of Thomas Hubbert, was entitled to sue as plaintiff in the present bill, and that Lord Lyndhurst had so ruled on the hearing of the demurrer; that, on the other hand, White had no title as administrator de bonis non of Thomas Hubbert, and could therefore make no valid assignment of the premises to the defendants for the purpose of strengthening their title; that White's bill had **[26]** been adjudged bad on appeal in the Ecclesiastical Court: *Skeffington* v. *White* (1 Hagg. Ecc. R. 699; 2 Ejusd. 626). Lastly, that the defendants could not in this case have any benefit from the lapse of time, inasmuch as although Alexander Hubbert had died in 1806, no administration de bonis non of Thomas Hubbert was taken out until 1827; and the rule of law is that time does not run in such a case while the estate remains unrepresented: *Murray* v. *The East India Company* (5 Barn. & Ald. 204); that if, however, lapse of time was allowed to operate in this case, the recitals contained in the deeds of the 31st of January, 1805, the 18th and 19th of January, 1815, and the 22nd and 23rd of June, 1818, which described the premises as being subject to the leases and annuities, were conclusive evidence of Rowcroft's title having been treated as a mortgage title within twenty years before the filing of the bill.

Sir William Follett, Mr. Turner, and Mr. W. H. Busk, for the defendants, Davis & Co. Upon an investigation of the accounts, no one can doubt that the estate of Thomas Hubbert was insolvent, and that the creditors thought that the best bargain they could make was to take the guarantee of Alexander Hubbert and Rowcroft, and give up the whole of the debts. As far as the creditors are concerned, their admission of the insolvency and renunciation of administration as creditors, is complete by the deed of the 31st of December, 1790. Then the whole of that arrangement was sanctioned and adopted by the next of kin. It is clear that Donovan, who took an active part in the proceedings, and was present at the meetings, acted for Sir William and Lady Skeffington, as well as for himself and Mr. Donovan. The deed of the 30th of December, 1791, formed part of these arrangements. It recites, amongst other things, that upon looking into the concerns **[27]** of the partnership of Alexander and Thomas Hubbert, it appeared that their estate and effects were not sufficient to pay the creditors. That shews that the nature of the meetings and affairs had been communicated to Sir William Skeffington. It is difficult for the plaintiff to contend, even in the face of this deed alone, without any other evidence, that the estate was not insolvent. The deed, then, after reciting that no account had been taken of the money transactions between Thomas Hubbert and Sir William Skeffington, contains mutual covenants between Alexander Hubbert and Sir William Skeffington; namely, that Hubbert on the one hand shall release Sir William from all claims which the former might have against him as administrator; and that Sir William and Lady Skeffington, on the other hand, shall within a month execute to Hubbert a release of all demands which they or either of them might have upon him as administrator. This, then, is a covenant by Sir William, on the part of himself and his wife, for a release of all claims; his wife by no possibility having any claim, except as next of kin. No doubt a general release may be cut down by a recital; but so far from the recitals in this deed cutting down or qualifying the release, they are of such a nature, when considered with reference to the position of the parties and the circumstance of the making the wife join in the covenant, that it is clear that the deed could only have been executed for the purpose of giving a power of entire disposition to the parties who were to take out administration. They were entirely to be incumbered by the claims of the next of kin. Suppose no actual release to have been executed; yet Alexander Hubbert having taken out administration which was part of the consideration for the intended release, the instrument of December, 1790, would operate as a release in equity. In this Court any part of the transaction being completed, the covenants on both sides would be tantamount to an actual release. To **[28]** any action brought by the adminis-

trator, this instrument would have been a defence in equity; and probably at law also. [Alderson, B. As a covenant not to sue.] It cannot be argued that this deed was merely voluntary; it is obvious that a perfectly good and valuable consideration was moving to Sir William Skeffington. [Alderson, B. There was a release of a doubtful claim against him. Besides, there is a recital under Sir William and Lady Skeffington's own hand, that the estate was insolvent.] It is to be supposed that it was intended that Alexander Hubbert and Rowcroft were to remain open to the claims of the next of kin? What was Rowcroft to gain by it? He was originally under no liabilities; can it be supposed that he intended to contract 30,000l. worth of debt, in order to have the whole matter taken from him, and to have the estate administered in a court of equity for the benefit of the next of kin?

But it is said that the deed remained in the hands of the covenantor, and was not acted upon. The mere fact of a deed being executed and delivered, remaining in the hands of the party who executes it, does not make it less a deed; *Doe d. Garnons* v. *Knight* (5 B. & C. 671), *Exton* v. *Scott* (6 Sim. 31). [Alderson B. Trundle's evidence is that he engrossed two deeds. One must have been in the hands of Alexander Hubbert, the other in those of Sir William Skeffington.] At all events, the deed was acted upon as far as Alexander Hubbert, and Rowcroft, and the creditors, were concerned. Is there not strong evidence also that it was acted upon by the Skeffingtons? It appears clear, from the bill of costs, that not only the deeds were executed, but the releases. The plaintiff has been sufficiently slow in producing the deed, and he has not produced the release: but can there be the slightest doubt that both deed and release were executed? Unquestion-**[29]**-ably, a release ought to have been executed by Sir William Skeffington; and we say that where a covenant has been entered into for valuable consideration, and it has been carried into effect on the part of one of the parties—if it be necessary that a release should be executed by the other party, the Court, after so long a period of time as has occurred in this case, is bound to presume it.

The deed of the 11th of January, 1791, executed by Donovan, is to be considered as forming part of the general arrangement. It was not drawn by Mr. Trundle, who prepared the deed of December, 1790, but by Mr. Kaye; a circumstance which may in some degree account for some difference in its language from that of the other deed. Both deeds, however, expressly refer to the circumstances of the partnership, and the administration to be taken out by Alexander Hubbert. It is true that this deed does not recite that Mrs. Donovan was one of the next of kin; but that circumstance is not alone sufficient to curtail the effect of the general words of the release contained in the deed. Looking at all the circumstances of the transaction, can it be argued that it was the intention of the parties that Donovan should release only the debt of 2300l.? Suppose he had immediately afterwards filed a bill against Hubbert and Rowcroft for some matter independent of the 2300l.? Would that have been consistent with the intention of the parties? From the part which Donovan took in the whole transaction, it is clear that it could not be so; and *Collier* v. *Squire* (3 Russ. 467) is a direct authority to shew that, under such circumstances, the words of this release are sufficient to pass Donovan's whole interest.

Such being the nature of this arrangement, and the bill containing not a single allegation to impeach it on the ground of fraud, concealment, or surprise, is there any evidence of its having been altered or destroyed by the **[30]** subsequent acts of the parties? Is there not evidence, on the contrary, that the next of kin have acquiesced in the arrangement? It is true that in *Chalmer* v. *Bradley* (1 J. & W. 51) inquiries were directed after a long lapse of time, in favour of one of the children of the testator against a trustee in possession of the estates, but even that was done with great reluctance on the part of the Court. Here we are called upon to give an account of a transaction which occurred in 1791, for the benefit of a party claiming under persons who were the next of kin of Thomas Hubbert at that time. Since that period, until the filing of the bill, the next of kin have done no act whatever to enforce their claims. Indeed the circumstance that Rowcroft was, for a series of years exercising uncontrolled disposition of the property, and that the property was becoming valuable in his hands, and that the next of kin were lying by all that time, allowing him to treat the property in this manner without any interference, is in itself conclusive evidence in a Court of equity against the claim now set up.

But the case does not rest there. The whole proceedings of the parties rest upon

the assumption that the next of kin had no interest. Now the first instrument executed after the grant of the letters of administration was the lease of the 7th of March, 1791. That lease, in pursuance of a stipulation in the previous agreement, contained covenants to erect certain buildings, and to lay out specific sums for that purpose. But if the estate of Thomas Hubbert was insolvent, as unquestionably it was, is it credible that Alexander entered into these covenants merely as administrator, and for the benefit of the next of kin? It is clear that an administrator who has an insolvent estate to deal with cannot be compelled to enter into personal covenants to build; and therefore it was that in *Phillips* v. *Everard* (5 Sim. 102) the plaintiff only sought a qualified **[31]** performance of covenants against the executor: yet here, your lordship is asked to infer that Alexander Hubbert took upon himself the personal responsibility of doing these things for the benefit of the next of kin.

Again, by the deed of July, 1791, Alexander Hubbert grants an annuity, secured on part of the leaseholds, to Mr. Spriggs. In what character was he dealing with the estate? No administrator acting for the next of kin would have been justified in granting an annuity on it; and it is clear, from the deed itself, that he was not acting for their benefit, but for his own. It is clear, by Rowcroft's joining in the deed, that the object of it was to raise money to meet the liabilities upon the estate. Rowcroft, it is true, could not be a party to charging the annuity on the estate, but he joined in the grant, the covenant to pay the money, and the warrant of attorney. The same arguments apply to the mortgage deed executed to Mrs. Smith in December, 1791.

Again, the second creditor's deed, that of March, 1793, is strong to shew that so far as concerned the next of kin, the original arrangement remained fixed. In fact it is conclusive proof, if any were wanting, of that insolvency which was the foundation of the arrangement. It shews that a large sum of money had been expended by Alexander Hubbert and Rowcroft out of their own monies, and yet that they were obliged to ask for further time for payment. The whole deed proceeds on the supposition that the estate was insolvent. For whose benefit then, except his own, should Rowcroft, who was not liable to any of these debts, become a party to these arrangements? He entered into the matters on the faith of having the whole property assigned to him. It is argued that his taking upon him these liabilities was a proof that the estate was solvent; but every part of the evidence contradicts that proposition.

From about the period of the execution of this deed, **[32]** we have no trace of Alexander Hubbert in connexion with the property, but it appears that Rowcroft remained in full possession. Is there then any evidence of admissions on his part of the claims of the next of kin, or of his holding simply in the character of a mortgagee under the assignment of Smith's mortgage? None; unless the recitals in the deeds subsequently executed by him can be construed in that light. But in those deeds Rowcroft is treated as the owner of the fee in possession, subject to such certain outstanding terms and annuities. There is nothing in the manner in which the terms are maintained, shewing any title in the next of kin. The recital of a term existing, or at all events, the recital of a term being excepted, does not in itself raise any inference of its being a mortgage term. In fact, however, if Rowcroft was mortgagee at all, he was mortgagee not of the next of kin, but of Alexander Hubbert. Beyond the money repaid by him to Mrs. Smith, he had an equitable lien on the lease of 1788, which was in his trustee's possession, for the other monies advanced by him to Alexander Hubbert. Upon the whole it is submitted that these deeds afford strong and pregnant evidence of an absolute assertion of title by Rowcroft and also by Alexander Hubbert, so long as he had any interest; but if they shew any mortgage title in Rowcroft, it was as mortgagee of Alexander Hubbert only.

But, secondly, if this interest was ever redeemable by Alexander Hubbert, for the benefit of the next of kin of Thomas, the plaintiff is not the party entitled to redeem. In the deed of December, 1791, on which the plaintiff rests his title, the proviso is for a re-assignment to Alexander Hubbert, his executors, administrators and assigns. But as the plaintiff fulfils none of those characters, how can he found his right upon the language of that proviso? That deed, in truth, altered the devolution of the property. The law upon this subject is very clearly laid **[33]** down by a learned writer (Williams on Executors, vol. 1,) p. 651): "If the property in any of the effects of the deceased has been changed by the original executor or administrator,

and has vested in him in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator de bonis non." Upon this principle Lord Nottingham decided the case of *Butler* v. *Bernard.*(*b*) There, an administrator mortgaged a term of the intestate's and made A. his executor and died. B. then took out administration de bonis non to the first intestate, and prayed redemption of the term. But it was decreed to A., executor of the first administrator, who had aliened the whole estate in law of the term, and was not possessed in auter droit, nor of any part of the interest thereof, but in his own right. This case is very accurately reported in Freeman, as appears from Lord Nottingham's own note.(*c*) It is clear that the mortgage of a term by the administrator of an intestate is a total alienation of the term quà the intestate's estate, and if the whole term is alienated, the equity of redemption which is inseparable from the estate **[34]** is alienated also. The new right accruing to the administrator passes upon his death to his executor, subject to the account to be taken between the estate of the deceased administrator and that of the intestate: *Hosier* v. *Lord Arundell* (3 B. & P. 7). If it were otherwise, an administrator who has paid the debts of the intestate, on the faith of being repaid out of the equity of redemption, might be defeated of his lien on the intestate's estates.

But lastly, supposing every other objection to the plaintiff's claim to have been removed, there remains that which arises from length of time. The case of *Murray* v. *East India Company* (5 B. & Ald. 204) has no application to the present case; because there the intestate never had a right of action. But it is clear that, if the right of action has at any time accrued, the mere fact of there being an interval in which there was no administrator will not prevent the statute from running. The cases turn upon this—that if at any time any party could have brought an action or instituted a suit, the statute shall run from that time. The lapse of time ought to be applied to the persons beneficially interested, and not merely to the administrator. [Alderson, B. There was no adverse holding as between Alexander Hubbert and Rowcroft; and therefore time, as between them, must be put out of the question. That being so—and supposing Alexander Hubbert to be an administrator in the ordinary way, can you contend that time was any bar as between him and the next of kin, for whom, in that view of the case, he would be a trustee? I think, if you rely on lapse of time, you must use it only as evidence of that arrangement for which you contend.] It is evident that Rowcroft treated himself while in possession, in no other character than absolute owner. His possession, therefore, was adverse to Alexander Hubbert; and the legal estate being outstanding will not affect the **[35]** question: *Cholmondeley* v. *Clinton* (2 J. & W. 1; 2 Mer. 171; 4 Bligh, 1); *Cuthbert* v. *Creasy* (4 Bligh, 125), *Pim* v. *Goodwin* (id. 133). Considering him, however, to hold simply as a mortgagee, the equity of redemption is barred by twenty years' adverse possession, and when once the time begins to run, nothing will stop it: *Doe d. Duroure* v. *Jones* (4 T. R. 300), *Cotterell* v. *Dutton* (4 Taunt. 826), *Anon.* (2 Atk. 332), *St. John* v. *Turner* (2 Vern. 418), *Lomax* v. *Hide* (id. 185), *Beckford* v. *Wade* (17 Ves. 97). Besides, is impossible to allow the plaintiff's claim after the long acquiescence of his ancestors in the acts of Rowcroft; the parties standing by and permitting him to expend large sums of money, which cannot now be recalled, in the improvement of

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(*b*) Freem. Ch. C. 139, pl. 176; S. C. 11 Vin. Abr. Executors (M. 6), pl. 7, p. 108; 1 Ca. Ch. 224.

(*c*) The following note of Lord Nottingham was referred to in argument:—

"24th Feb., 26 Car. 2.—Administrator of lessee for years mortgages the term and dies. Administrator de bonis non sues for the redemption, supposing the equity of redemption to be a part of the first intestate's estate, and liable to his debts. The defendant demurs, for that the plaintiff, of his own shewing, hath no title; because the mortgage made by the administrator was an alteration of the property, and a devastavit in the administrator, if there were not enough left to pay debts, for which the executor of the administrator may be sued in equity, though not at law. Therefore, the administrator had this equity of redemption in his own right, as the fruit of the altered property. For it is impossible that the equity of redemption should subsist apart from the estate and remain to the first intestate when the term to be redeemed belonged to another. *Butler* v. *Vincent.* I allowed the demurrer."

the premises: *Chalmer* v. *Bradley* (1 J. & W. 51), *Hickes* v. *Cooke* (4 Dow. 16), *East India Company* v. *Vincent*,(*m*) *Govet* v. *Richmond* (7 Sim. 1).

Mr. Simpkinson and Mr. G. Richards, for the defendants, Thompson and Farrand. After the arguments which have been offered to the Court on behalf of the other defendants, it will be unnecessary to dwell on that part of the case which relates to the evidence establishing the general arrangement. Under that, it is clear that the next of kin of Thomas Hubbert absolutely released all their right and interest in the property in question. Upon that point it is sufficient to say that a court of equity will not give relief to a party claiming against the holder of an equitable interest after twenty years' adverse possession: *Cholmondeley* v. *Clinton* (2 J. & W. 1; 4 Bligh, 1), *Grenfell* v. *Girdlestone* (2 Y. & C. 662). And even if there be an admission of the legal right, yet **[36]** if there be none of the equitable interest, the twenty years' adverse possession will be a sufficient bar. Now by what recital or on what occasion was there any admission of the equitable interest of Skeffington or Donovan? The conveyancers have, no doubt, introduced recitals which serve to mystify the case, but they are all sufficiently accounted for on other grounds than those for which the plaintiff contends.

The point on which these defendants more particularly rely is equally conclusive against the plaintiff. The defendant Thompson was not a willing purchaser. He required an unexceptional title which he could compel a purchaser from himself to accept. The title was laid before an eminent conveyancer and examined with minuteness; and the result was a recommendation that limited administration de bonis non of the goods and chattels of Thomas Hubbert should be taken out, and that the administrator should join in the assignment of the terms in trust for Thompson. The vendors, Davis & Company, applied to the Prerogative Court for the proper letters of administration, which were accordingly granted to White, and bear date 1827. Upon that occasion, the judge of the Prerogative Court did not think it necessary to cite the plaintiff being satisfied that he had no interest. After these letters of administration were obtained, and before the plaintiff instituted the present proceedings, the conveyance was made to Thompson and Farrand; White, who was at that time both de facto and de jure administrator, joining in the conveyance. The question then is, whether against these bonâ fide purchasers (for there is no suggestion of fraud against them) the subsequent letters of repeal can be of any avail? The granting the letters of administration to White was a judicial act of the Court, and the proceedings by the plaintiff to revoke them cannot be considered as an appeal from that decree. It is clear that, under such circumstances, the intermediate acts of the prior administrator **[37]** are binding on the subsequent administrator, even though the previous letters of administration may be revoked: Bro. Administrators: pl. 33, *Packman's case* (6 Rep. 18 b.; Cro. Eliz. 459), *Syms* v. *Syms* (Sir T. Raym. 224; S. C. nom. *Semine* v. *Semine*, 2 Lev. 90), *Philips* v. *Biron* (1 Str. 509), *Blackborough* v. *Davis* (1 P. W. 43; 1 Lord Raym. 685), *Allen* v. *Dundas* (3 T. R. 125). [Alderson, B. Generally, where a person does an act in pursuance of the order of a Court of judicature, that act will, upon principles of convenience, be supported in all its consequences. There is an instance of this in *Foster* v. *Alvez* (3 Bing. N. C. 896).] Upon that general principle, it is clear that the acts of the party to whom the ordinary has committed administration are good till his administration is revoked; unless, indeed, it be revoked upon appeal. If the revocation take place by citation merely, the Court holds the party who has acted under the prior administration as acting under the jurisdiction of the Court; and therefore his mesne acts are protected. It is otherwise on appeal, because in such case no credence is given to the Ecclesiastical Court; and by the statute (24 Hen. 8, c. 12) the appeal must be brought within fifteen days. The effect of revocation by citation is simply that the letters are recalled, not that the proceedings are avoided from the beginning. If it were otherwise, the consequences would be very unjust to parties dealing with leasehold properties.

But it is clear, independently of the special circumstances of this purchase, that the plaintiff has no right to sue these defendants. First, if, as he represents himself, he is beneficially interested in the leases, he must make out his title, not through Lady Skeffington and Mrs. Donovan, but through their respective husbands, both of whom survived their wives. He has not however taken out letters of administration to

(*m*) 2 Atk. 83; and see *Lord Cawdor* v. *Lewis*, 1 Y. & C. 427.

Sir William, nor has he made **[38]** both the executors of Donovan parties to this suit. Secondly, he cannot claim as administrator de bonis non of Thomas Hubbert, because he shews that the property has been already administered, part by Alexander Hubbert, and the remainder by White. Thirdly, if he has any right, as administrator de bonis non of Hubbert, he cannot, on the authorities already referred to, and that of *Barker* v. *Talcot* (1 Vern. 473), redeem a mortgage made by the prior administrator. Lastly, he is barred by lapse of time: *Hercy* v. *Dinwoody* (4 Bro. C. C. 257), *Hillary* v. *Waller* (12 Ves. 239), *Parkes* v. *White* (11 Ves. 226), *Campbell* v. *Graham* (1 Russ. & M. 453). If it be said that, by the recitals in the deeds, we have admitted the mortgage within the last twenty years, still the admission is immaterial, unless it can be shewn that it has been made to the party who now claims. If the admission has been made to Alexander Hubbert, the account must be settled with his representatives, not with the plaintiff. Such an admission (if it existed) would not prevent the lapse of time from operating as a bar to the plaintiff's claim: *Cholmondeley* v. *Clinton*. [Alderson, B. They say you admit that the equity of redemption was in Alexander Hubbert within twenty years. Alexander Hubbert was the administrator of Thomas; and therefore, they say, you admit there were assets of the intestate. They then say that the goods of Thomas Hubbert, which Alexander Hubbert had in his possession as administrator, went, on Alexander's death, to the person representing Thomas Hubbert—that is, his administrator de bonis non.] Alexander mortgages the goods, and the circumstances of the case shew that the equity of redemption was reserved to him, his executors, administrators, and assigns, in his private and not in his representative character. [Alderson, B. If you prove that, then, if the case in Freeman **[39]** is right, Alexander's assigns were holding adversely to the plaintiff.]

Mr. Ellison, Mr. Rogers, and Mr. Ombler, for other parties.

Jan. 1st, 1838.—Mr. Swanston, in reply. The plaintiff sues as administrator de bonis non to redeem the estate of an intestate which has been mortgaged by a prior administrator, and he shews acknowledgments by the defendants, within twenty years, of its being a mortgage. In answer to this, it was contended, first, that he cannot, as administrator de bonis non, maintain this bill because the equity of redemption is reserved to the original administrator and his assigns, and to support that position the authority of Lord Nottingham is cited. But notwithstanding that high authority, it is evident that the decision in that case proceeded on the mistake of considering the equity of redemption as inseparably connected with the right to the reconveyance of the legal estate. The report of this case in the Cases in Chancery contains a note denying it to be law. The only question in equity is, who is entitled to the estate? *Jones* v. *Waller* (2 Ca. Ch. 129). Here the reservation to the assigns of Alexander Hubbert would be a breach of trust on his part. On the authority of *Cubbidge* v. *Boatwright* (1 Russ. 549) the Court has a right to require that the legal estate should be reconveyed to the administrator of Thomas Hubbert, in order that, being in his hands, it may be the property of the intestate unadministered. The reasoning which has been advanced to the contrary will not bear scrutiny: *Hosier* v. *Lord Arundell* (3 Bos. & P. 7), *Partridge* v. *Court* (5 Price, 412), *Catherwood* v. *Chabaud* (1 Barn. & Cr. 150). Besides, **[40]** this objection was overruled by Lord Lyndhurst on the hearing of the demurrer.(*a*)

With respect to the defendants, Thompson and Farrand, their taking an assignment of the terms from White was altogether a nullity. The act of White was illegal, being

(*a*) The passage in Lord Lyndhurst's judgment on the demurrer, to which allusion is here made, was as follows:—"It appears to me that upon payment of the sum for which this property is pledged to Thomas Rowcroft (which now is stated as 7800l.), with the accumulating interest, all right upon the part of Thomas Rowcroft to retain this property will be at an end; and then the question will be, who will be entitled to the property? Now as to that a case was cited; but the question is open to consideration upon this bill. The present claimant is the person beneficially interested in any surplus of the property of Thomas Hubbert. If, therefore, upon the settlement of the account of the estate of Alexander Hubbert as administrator, there is no charge remaining against that estate, then it follows, as a matter of course, that the present plaintiff is entitled to the property. But I apprehend he would not be entitled to the property unless that estate, that is, the persons representing the estate, be a party to this record."

done with full notice of the plaintiff's rights. He could convey to these defendants no legal estate; and the question as to a bonâ fide purchaser turns on his having the legal estate. Neither are they in a better situation by taking the conveyance from White of the equity of redemption, if White himself was not equitably entitled. *Anon.* (Com. Rep. 150).

Upon the general merits of the case, it is observable that the defendants make no denial of the acknowledgments of the mortgages, but they meet the plaintiff's claim by a suggestion of a contract with the next of kin, which was never set up till after the commencement of this suit. Moreover, they rely on that mode of defence by their answer only, which is contrary to all practice. In order to meet the plaintiff's claim by setting up a title in a third person, they ought to have filed a cross bill. With-**[41]**-out, however, further insisting on this irregularity in practice, there is no reasonable evidence of any such contract with the next of kin. What consideration had the next of kin for giving up their right? Undoubtedly there is an appearance of entanglement in the affairs of Thomas Hubbert; but there is nothing in the whole of the transactions inconsistent with a large surplus ultimately accruing to the estate. Under these circumstances, why is the Court to be called upon to presume the execution of the release by Sir William Skeffington? Not one of the defendants venture to swear that such a release was ever executed. Yet if it had been executed, Rowcroft must have known it: and if he had the release, why did he not put it forward as part of his title deeds? Why is not Kaye examined to that point? He was the solicitor of the creditors, and of Rowcroft and Alexander Hubbert, and he had possession of the release executed by Donovan. The truth is, however, that Donovan's release was a release of a particular debt only, and not of general claims, as suggested by the defendants. It is not a release by Donovan of Mrs. Donovan's distributive share in the intestate's estate, nor is Mrs. Donovan a party to it. If she had been, it would at least have been strong evidence of the intention of the parties, though it might have had no legal operation in any other respect.

Then how have Rowcroft and the defendants dealt with the property? Not as holding adversely to the next of kin. The breach of trust committed in granting of the annuities ought not to operate against the plaintiff. If the arrangement for which the defendants contend ever existed, why was it not recited on the occasion of the purchase by Rowcroft in 1797? The recitals in the purchase deed are much to the disadvantage of Rowcroft, if the hypothesis of the defendants be correct. Then all the evidence to be gathered from the recitals in the later deeds is against the existence of such an arrangement, and point **[42]** clearly to a subsisting mortgage title in Alexander Hubbert and his assigns. The deed of 1815 is strongly in favour of the plaintiff, being a conveyance of Rowcroft's absolute interest in the premises, subject to the annuities and leases. The cases which have been cited on the other side in reference to the lapse of time, are all cases of adverse possession; and are, therefore, inapplicable on the present occasion.

Feb. 7th.—ALDERSON, B. This was a bill filed by the plaintiff as administrator de bonis non of Thomas Hubbert deceased, who died intestate in 1790, leaving two sisters his sole next of kin; and the plaintiff also claims as a party beneficially entitled to the estate, being the son of one of Thomas Hubbert's sisters. On this latter part of the case, however, I think he is not entitled to my judgment, from the circumstance pointed out in the argument (*a*) as to the want of proper parties to the bill.

The bill sets forth two leases—one granted in 1788, to the intestate, and another granted after his death in 1791, to Alexander Hubbert, his administrator, but in consequence of an agreement made with the intestate in his lifetime. It then sets forth a deed of composition with the creditors of the intestate (and to which Thomas Rowcroft was also a party) by which Rowcroft and Alexander Hubbert undertook to pay 15s. in the pound, and the creditors renounced administration in favour of Alexander Hubbert. It then states that Thomas Hubbert's affairs being in a complicated state, the next of kin also renounced administration in favour of Alexander Hubbert, to whom, in consequence, letters of administration were, in 1791, granted. The bill then proceeds to trace the dealings of Alexander Hubbert with the two leases in question. It appears that the lease of 1791 was assigned to Sir John Lubbock, as

(*a*) Ante, p. 37.

trustee, as a security for an an-**[43]**-nuity of 420l. to a person named Spriggs, who died in 1821, and is now outstanding in him or his assignee.

As to the lease of 1788, the bill states that it was mortgaged by Alexander Hubbert, at first to a person named Smith, for 1500l., and that mortgagee afterwards assigned to Thomas Rowcroft.

The defendants are stated by the bill to claim the interest in these leases by mesne conveyances; and the bill also prays that the plaintiff may be declared to be entitled to redeem, and that a proper account of what is due on both sides may be taken for that purpose.

The defendants set up in answer to this an agreement, in substance this—that Thomas Hubbert's estate being insolvent, all parties, both the creditors and the next of kin, agreed to give up to Alexander Hubbert and Thomas Rowcroft all interest in that estate for valuable consideration, which agreement was fully carried into effect; and that, consequently, the plaintiff neither as administrator de bonis non, nor as the person beneficially interested as the representative of the next of kin, is entitled to the relief he now prays.

There are two questions which alone I propose to consider in this case. The first is whether, supposing the case in other respects satisfactorily established, the plaintiff, who, upon the bill as at present framed, cannot rest upon his case as the party beneficially interested, is nevertheless, as administrator de bonis non of Thomas Hubbert, entitled to the relief he now prays; which is to have an account taken, and to be allowed to redeem (on paying what shall be found to be due) the two leases of 1788 and 1791 mentioned in these proceedings. These leases were conveyed by Alexander Hubbert to those under whom the respective defendants now claim, with a power of redemption reserved in the deeds of conveyance to Alexander Hubbert and his representatives. Alexander Hubbert, at the time of the conveyance was, and the **[44]** deeds so express it, the administrator of Thomas Hubbert, to whose estate the leases originally belonged.

On the part of the defendants it is contended that even if the facts stated by the bill are assumed to be correct, still the plaintiff as administrator de bonis non has no right to sustain the present bill; and for this they cite *Butler* v. *Bernard* (Freem. Ch. C. 139), which is undoubtedly in point. In that case, Lord Nottingham, no inconsiderable authority in such cases, determined that the right of redemption was not in the administrator de bonis non, but in the representative of the original administrator.

It was at one time contended that the report in Freeman was incorrect, but I think that has altogether failed. The same case is reported, and to the same effect, in *Cases in Chancery* (1 Ca. Ch. 224), though with a query in a note annexed as to the soundness of the decision. It is cited in Viner's Abridgment, and in other books of authority; and, lastly, on consulting Lord Nottingham's MSS., it turns out to have been in all respects correctly reported by Freeman. It is, therefore, a clear decision, and properly reported, of a most eminent equity lawyer, profoundly acquainted with the theory and principles of equity: and undoubtedly it is precisely in point. On the other hand, it is contended that it ought upon principle and authority to be overruled. No case actually overruling it has been produced, nor, after looking at Lord Lyndhurst's judgment on the demurrer in this case, do I find that he has overruled it here. If he had done so, I should probably have acquiesced in his judgment, whatever might have been my own opinion, leaving the parties, if they thought proper, to resort to their appeal to the House of Lords. But Lord Lyndhurst seems to me to have come to a conclusion that it was not necessary for him to decide the question. The point could not, I conceive, have been so fully raised before him as before me, for I think that the learned counsel **[45]** have taken the correct view that it was really necessary to his decision to have considered this question. If he had adverted to the difficulty of sustaining the suit by the plaintiff as the party interested, arising from the omission of proper parties on the record, he would probably not have stated, as he did, that it was sufficient to distinguish this case from that in Freeman by the circumstance that here the plaintiff was entitled to relief as the party beneficially interested. But that was the ground of his decision; and if the facts had warranted it, there can be no doubt that the decision was right. Even supposing that the learned counsel are right in saying that they did not, they must fail in convincing me that Lord Lyndhurst's decision was intended to be at variance with the authority in Freeman.

Then is there any other authority at variance with it? For this purpose *Cubbidge* v. *Boatwright* (1 Russ. 549) was cited. There Sir John Leach held that the administrator de bonis non was entitled to sue. A testatrix had directed a leasehold to be sold, and the money to be divided among five persons, and the administrator committed a breach of trust and sold it for his own use; Sir John Leach held that it had not been administered at all. The rule is that equity treats a thing so done as not having been done at all; and the sale, therefore, being one which ought to be set aside in equity, the administrator de bonis non (who would have taken it, if there had been no sale, as a chattel assigned to his administration by the Ecclesiastical Court) was entitled to sue in equity in order to place himself in that situation. But it does not follow from thence necessarily, that if the legal act done by the administrator be affirmed, the equity which arises out of that legal act must not be in the persons by whom the legal act was done; and that the administrator de bonis non is entitled to make such a claim as this. If the contract made be affirmed, **[46]** must it not be affirmed altogether? And part of the contract which the mortgagee makes is that he will reconvey to the representatives of the mortgagor. What is an equity of redemption? It is but the power to redeem, reserved in equity after the legal power to redeem has been lost by the lapse of the time given by the deed. A court of equity does but carry into effect the real bargain, which is a pledge of land on a loan of money, by holding that the time for redeeming is not of the essence of the contract. But the persons who are to avail themselves of this equity must be the same as those who, during the time fixed, could have redeemed at law. For otherwise equity would alter the bargain. That seems to me to have been the ground on which Lord Nottingham proceeded. There are undoubtedly cases where the power to redeem is reserved to special persons, and, those failing, the general representatives of the mortgagor, although not named, have been allowed to redeem. But these cases are plainly distinguishable from the present. Here there is no such failure of the persons designated by the deed. There may be very different equities between the original administrator's representatives and the mortgagee, and between him and the administrator de bonis non. Again, if this right passes to the administrator de bonis non, it may place the representative of the original administrator in a very unfair situation. For if such an act as this makes the estate of the administrator who does it liable as for a devastavit, his representative ought at least to have the equity of redemption in order that he may discharge his testator's personal liabilities thereout. If, however, the party interested sue, as no doubt he may do, making the representatives of the first administrator parties, neither of these difficulties will arise. That in fact was Lord Lyndhurst's view of the case. Upon the whole, therefore, I do not see sufficient reasons for overruling the distinct authority of the case in Freeman; and on the contrary, **[47]** after considering it, I think it well decided. On this ground, therefore, the defendants would be entitled to my judgment.

But I shall proceed to deliver my opinion also on the second question of importance discussed in this case: as I should be very sorry to leave the case here. For even if, on appeal, my judgment on this point should be confirmed, the dispute between these parties would not be at an end, inasmuch as the plaintiff, by amending his bill, and bringing other parties before the Court, would ultimately be entitled to have a decision on the real merits of the case.

It is, however, quite clear that if the mortgage was made under such circumstances as entitled Alexander Hubbert and Thomas Rowcroft to dispose absolutely of these leases as their own property, the plaintiff can have no claim at all in any view of this case. I shall therefore examine that proposition upon the evidence brought before the Court.

In the first place, I am quite satisfied that the estate of Thomas Hubbert was, at his death, wholly insolvent. That was the result at which all parties interested arrived in 1790, and it would be a strange thing if, with much more imperfect means of knowledge, I should come to an opposite conclusion.

The estate being thus insolvent, and not merely in a complicated state, as suggested in the plaintiff's bill, had, however, a claim on Sir William Skeffington, the husband of one of the intestate's sisters, in respect of an unsettled account between him and the intestate. It was doubtful which way the balance inclined. On the other hand, Mr. Donovan, the husband of the other sister, had a claim on the estate, the amount of which was not ascertained.

Under these circumstances, Thomas Rowcroft, a natural son of Thomas Hubbert, a young man well acquainted with business, and probably possessed of some capital, **[48]** proposed to join Alexander Hubbert as partner; to make himself responsible for 15s. in the pound to the creditors, jointly with Alexander Hubbert, upon condition that Alexander Hubbert (on behalf of both) should be allowed by all parties to become the administrator, and to take possession of all Thomas Hubbert's estate; and upon the further condition, as the defendants contend, that the whole beneficial interest in the estate should (in case they complied with their part of the agreement) ultimately vest in Alexander Hubbert, on behalf of himself and Thomas Rowcroft.

Now the conditions as to the creditors were, as before stated, that they should be paid 15s. in the pound. As to Sir William Skeffington, the agreement was that Alexander Hubbert should release him absolutely from all claims on the part of the estate of Thomas Hubbert; as to Mr. Donovan, that Alexander Hubbert and Thomas Rowcroft should give him a bond of 1000l., payable by instalments, in full satisfaction of his debt, and of all his claims on the estate.

The defendants contend that all this has been actually carried into effect. Some of these facts are very distinctly proved. The examinations by the creditors and Mr. Donovan into Thomas Hubbert's affairs are deposed to by Mr. Kaye, who has, remarkably enough, been enabled to give us a full and clear account of a transaction which took place upwards of forty-seven years ago.

After this investigation had demonstrated the insolvency of the estate, the creditors, by a deed dated 31st December, 1790, which has been produced, agreed that they would give up the administration to Alexander Hubbert and Thomas Rowcroft: and there is no doubt that this arrangement was fully acted upon, and all claims on their part ceased in the year 1799. On the 30th of December, 1790, Lady Skeffington and Mrs. Donovan, in the presence of their respective husbands, executed also a deed **[49]** of renunciation, which has been produced, of their right to administer, in favour of Alexander Hubbert; and on that same 30th December, 1790, Sir William and Lady Skeffington executed a deed of covenant (prepared and executed in two parts) by the recitals in which the insolvency is admitted; and in which, in consideration that Alexander Hubbert should, within a month after obtaining administration, absolutely release the claim of the estate of Thomas Hubbert on Sir William Skeffington, the latter agreed to execute in return a general release of all his beneficial interest in the estate of Thomas Hubbert. Now to this deed Thomas Rowcroft was a party, a circumstance only consistent with the supposition that, although the administration was to be in the name of Alexander Hubbert alone, he, Thomas Rowcroft, was jointly interested in it with him, and his consent was necessary to the validity of the release by Alexander Hubbert to Sir William Skeffington. This deed has been produced by the plaintiff himself in answer to a bill of discovery.

The next deed in order of time is the release, dated 11th of January, 1791, by Donovan to Alexander Hubbert. Here, also, the insolvency is recited -the composition with the creditors—the disputed account—the claim of 2300l.—the agreement to accept 1000l. in full—and the giving of the bond by Alexander Hubbert and Thomas Rowcroft—and then Donovan releases, in terms which I think are quite large enough (when construed as they ought to be with reference to the surrounding facts recited), his whole beneficial interest in the estate of Thomas Hubbert.

It then appears from the entries in the book of Mr. Trundle, which I have received in evidence, that in February, 1791, and within a month after letters of administration granted to Alexander Hubbert, the release stipulated for in the deed of the 30th of December, 1790, was prepared and executed by Alexander Hubbert in favour **[50]** of Sir William Skeffington; and that in the same month, and probably at the same time, a counter deed of release by Sir William Skeffington of his beneficial interest was prepared and stamped; and that it was delivered to Mr. Donovan for the purpose of its being executed by Sir William Skeffington and his wife. Here the positive evidence stops. There is no further proof given of the actual execution of this release; but the question is whether I ought not to infer it from all the other admitted facts of this case. All the probabilities seem to lead to the belief that such would be the case. Whether I ought to infer that it was so must depend on the subsequent conduct of the parties.

How, then, have the parties acted since this period? The very first thing which Alexander Hubbert does as administrator is to pledge the lease of 1788 for money

borrowed on mortgage. Both these acts are very improper if he was an ordinary administrator; but if he and Rowcroft had really the beneficial interest, and thought, as the event has proved, that the property would ultimately rise in value, they would naturally enough be disposed to speculate upon it. But why should they do so, if the consequences of failure would make them responsible as for a devastavit, and if success would only expose them to account for the surplus profits to the next of kin? If they had been accountable they would have sold the leases out and out.

It is to be observed—which is a confirmation of this—that they were accountable sub modo to the creditors until 1799, and they took, therefore, the precaution to recite these acts in the schedule to the second deed of composition in 1793. Again, the subsequent purchase of the fee by Rowcroft, and his building upon the property, are facts much more consistent with this supposition than with the notion that he was accountable to the next of kin in respect of these leases. His whole conduct leads to the [51] same conclusion. How else can we reasonably account for his taking on himself such heavy liabilities? Then there is the strong fact that neither Sir William Skeffington, who survived this transaction twenty-five years, nor Mr. Donovan, who lived sixteen years after it, and who both survived their wives,(*a*) ever called for any account of this estate either from Alexander Hubbert or Thomas Rowcroft, with whom they were well acquainted, and of whose dealings with the property in question they could not have been ignorant. In fact, no claim was ever made by any one till 1826, a period nearly thirty-six years after the original transaction took place, when this litigation seems to have had its origin in the unfortunate application on the part of the late Mr. Atcheson to the present plaintiff.

Now the answer given by the learned counsel for the plaintiff to all these strong facts is that the deeds executed between the parties after 1790 and ending in 1818 clearly shew that this was treated as a mortgage title, and that the conclusion, which I have before adverted to, is not correct.

I have looked at these deeds with the attention which they deserve, and after considering them with reference to the very able arguments addressed to me upon them by both sides, I have been unable to see how they are at variance with the notion that Sir William Skeffington executed the release in question.

Let us examine these deeds a little in detail. Undoubtedly, in the earliest deeds, those executed by Alexander Hubbert in 1791, in which he took the estate originally from Carter, he is described as the administrator of Thomas Hubbert. I do not see how this could be otherwise. He was claiming under a bargain with Thomas Hubbert, and [52] his only title to have it completed was in that capacity. But all the covenants are with him and his representatives; and some of them, which relate to the laying out of the money in building on the premises, are such as seem more consistent with the defendant's than with the plaintiff's view of the case.

Then come the deeds executed in 1791 to Mrs. Spriggs and Mrs. Smith, to both which deeds Rowcroft is a party. There, also, Alexander Hubbert is described as the administrator of Thomas Hubbert, and his title as administrator set forth, which seems to have been necessary, inasmuch as the conveyance from Carter is recited also in deducing the title. But, in this deed also, the covenants are by Alexander Hubbert and Thomas Rowcroft, and upon payment of the annuity and all arrears, the trustee is to reconvey to Alexander Hubbert and his representatives to and for their own use. The same observations apply to the mortgage of 1500*l.* to Mrs. Smith.

I do not think that the deeds of December, 1795, carry the case at all farther. At that time the creditors were still unpaid, and it was possible that the power reserved to them in the second composition deed of making Alexander Hubbert account, as administrator of Thomas Hubbert's estate, to them, might be put in force. It would, therefore, be of great importance to Rowcroft, if he advanced the money to Mrs. Smith and took the mortgage, to have the deeds drawn in that form, and therein to speak of Alexander Hubbert as administrator of the estate, as in fact he then was, on either hypothesis. And besides, as between Alexander Hubbert and Thomas Rowcroft, this was a real mortgage, in which Thomas Rowcroft had a right, in settling their accounts, to take credit for 1500*l.* beyond what he had before advanced in discharge of the debts of the estate.

(*a*) For the respective periods of the deaths of the next of kin, see ante, p. 21.

The deeds by which Rowcroft secured the annuities to Logie, and which were executed in 1802, after all the cre-[53]-ditors were paid, do not at all speak of Alexander Hubbert; and, if they have any effect, have a tendency to shew that Rowcroft was then dealing with the property as his own.

Then comes the deed which is dated in 1805, and by which Thomas Rowcroft makes an equitable mortgage of his fee simple in the premises, and recites that the premises were subject to that lease of 1788, and that Alexander Hubbert was the administrator to Thomas Hubbert's estate, and was indebted to him, Rowcroft, both in his own right and also as administrator of Thomas Hubbert, in the sum of 7878l. and upwards, and he then deposits with Smith, Payne & Smith, the title deeds and the lease of 1788, assigning also to them his debt due from Alexander Hubbert, as a security for 15,000l. This deed, no doubt, as well as those which follow it, speak of those premises, the fee simple of which had then been vested in Thomas Rowcroft, as being subject to the lease of 1788, and to the annuities to Logie and Spriggs; and they speak of the lease of 1788 having been deposited with Rowcroft as a security for the debt recited to be due to him from Alexander Hubbert, therein also described as administrator of Thomas Hubbert.

But looking at them all, it seems to me not at all clear that the inference sought to be established from them by the learned counsel for the plaintiff is the true one. If the question before me were between the representatives of Alexander Hubbert and the present defendants, these deeds would be of the greatest importance in the cause; but as between these parties their effect is very doubtful.

It is clear to me that, even on the supposition that the defendants have made out their case, still these leases were, as between Alexander Hubbert and Thomas Rowcroft, at one time to be treated as securities in which Alexander Hubbert was interested, and that Thomas Rowcroft had no absolute title to them, but was liable to [54] be called to an account by Alexander Hubbert, if that should be thought advisable: and I think that the recitals in these various deeds may be very well accounted for without its being at all necessary for me to come to the conclusion that Rowcroft has ever treated these terms as belonging to Alexander Hubbert as administrator of Thomas Hubbert, and also as being part of the estate of Thomas Hubbert, for which Alexander Hubbert was accountable to the next of kin. Mr. Turner's very able and ingenious argument on this point satisfied me that all the expressions may not unreasonably be reconciled with the defendant's hypothesis and the other admitted facts of the case.

Taking, however, these deeds as evidence for the plaintiff, and as leading to the supposition that Sir William Skeffington and Mr. Donovan never did release their beneficial interest in this estate, still they are to be contrasted with the evidence offered by the defendants that they did so; and, if so, I am of opinion that the latter greatly preponderates, and I have come to the conclusion, entirely satisfactory to my own mind, that they did release, as the defendants contend they did, their whole claim on the estate.

Mr. Swanston, however, contended that this defence was not competent to be set up on this record. But I think it is; for as his case is to shew that the plaintiff, as administrator de bonis non, is entitled to set aside the reservation of the equity of redemption to the representatives of Alexander Hubbert, by shewing that it properly belonged to the estate of the intestate—this defence, which negatives that case, and shews that the administrator did right in making the reservation in the form in which it is found in the deeds—effectually and properly negatives the plaintiff's title to relief. It is not, therefore, the setting up a title in a third party, but a negativing the plaintiff's title upon the record.

[55] Neither do I see how it could be expected that the execution of the release could be stated in the defendant's answer more explicitly. If Alexander Hubbert or Thomas Rowcroft had been living, and had so answered, the case would have been very different. But they are dead; their papers lost and dispersed by time and accident; and after a lapse of forty years and upwards since these transactions took place, this can hardly excite surprise. My surprise is, not that so much has been lost, as that so much has remained, under all the circumstances of this case.

I shall not advert to the other points made on the part of the defendants. I think at present (but I beg to be understood as giving no definite judgment on that subject) that there is no solid ground for distinguishing between the case of the defendants

Thompson and Farrand, and that of Davis & Company. Nor do I think that the lapse of time alone is such as to be a sufficient answer to the plaintiff's case if I had taken a different view of the evidence contained in the deeds on which so much of the argument turned. But as I think the plaintiff cannot recover as administrator de bonis non, nor, upon the facts appearing in this case, as the party beneficially interested, I have come to the conclusion that this bill must be dismissed with costs.

Decree accordingly.

KEYS *v.* WILLIAMS. Jan. 16th, 1838.—Where, in order to prevent immediate proceedings against a debtor, the title deeds of an estate were deposited by him with his creditors' attorney, for the purpose of preparing a mortgage of the property: Held, that this transaction amounted to an equitable mortgage by deposit of title deeds.—Where title deeds are left in the hands of an attorney for the purpose of preparing a mortgage, as a security for money previously advanced, this is an equitable mortgage by deposit of title deeds.—The evidence of one witness corroborated by a letter of the defendant, held sufficient to contradict the defendant's answer.

[S. C. 7 L. J. Ex. Eq. 59. See further, p. 462, post.]

The defendant being indebted to one Burrell, in the sum of 400l., executed to him a bond for securing the repayment of that sum with interest. The debt was afterwards reduced to 350l. Burrell being unable to obtain **[56]** payment of the balance, and the interest upon it having fallen in arrear, he, in March, 1836, assigned the debt then due, with the arrears of interest, to the plaintiff. In April, 1836, the plaintiff's solicitors wrote to the defendant pressing for payment of the money on a certain day, or that the defendant would place in their hands sufficient security. In consequence of this application the defendant called on the plaintiff's solicitors on the 13th of April, and made to them a proposition for further security; at the same time leaving in their custody certain deeds of lease and release, being the conveyance to him of a piece of freehold land at Shenley, in Hertfordshire. On the following day the defendant again called upon the plaintiff's solicitors; when, upon learning that his proposition was not acceded to, he made another proposition which was accepted by the plaintiff. On the same day a policy of assurance for 1000l., on the defendant's life, was left with the plaintiff's solicitors.

The bill alleged that the proposition which the defendant had made, and which the plaintiff had accepted, was as follows:—That he would execute to the plaintiff a mortgage of the land at Shenley, and an assignment by way of mortgage of the policy of assurance, and likewise a warrant of attorney; and that he would pay the whole of the sum of 350l. and interest in October, 1836; and that the title deeds of the freehold premises, that is to say, the above mentioned deeds of lease and release, and also the policy of assurance, should be a security for the said sum until the mortgage should be executed. The bill, after alleging that the plaintiff's solicitors had prepared the drafts of the mortgages and warrant of attorney, which the defendant had refused to execute, and that the debt, with a large arrear of interest, remained due, prayed the usual account, and in default of payment for sale of the freehold premises and policy, and payment thereout; or otherwise an absolute conveyance and assignment of **[57]** the freehold premises and policy to the plaintiff; or in case the Court should be of opinion that the plaintiff was not entitled to such relief, then that the defendant might be decreed to execute to the plaintiff a good and sufficient mortgage, and assignment by way of mortgage, of the freehold premises and policy, together with a warrant of attorney, for securing to the plaintiff repayment of the said debt and interest.

The defendant, by his answer, denied that he ever proposed to execute a mortgage for securing payment of the money in October, 1836, or to execute any warrant of attorney. On the contrary, he stated that the proposition which he had made to the plaintiff's solicitors, and which the plaintiff had acceded to, was that he would execute a mortgage of the freehold premises and policy of assurance so as to secure the payment of the debt and interest to the plaintiff at the end of three years, and not before; and he denied that the title deeds and policy had been left with the plaintiff's

solicitors for any other purpose than for carrying such proposed mortgage into execution.

In support of the plaintiff's case, his solicitor, after stating the proposal made by the defendant on the 13th of April, and his leaving the title deeds of the land at Shenley in his, the deponent's custody, deposed as follows:—"I had a conversation with the defendant on his calling at my office on the 14th of April, 1836, and I then explained to him that the plaintiff would not accede to his proposal. I then handed back to the defendant his deeds, and informed him that the instructions of my partner and myself from the plaintiff were to proceed immediately to enforce payment of the bond and interest, and I requested a reference to the defendant's solicitor; whereupon the defendant said he would give a mortgage of the estate at Shenley, and his life policy, payable in October next (meaning October 1836), and added that he would give a warrant of attorney to secure payment to the plaintiff in **[58]** October, and due payment of the premium on the policy; I took down his proposition in writing at the time and in the presence of the defendant; and I now produce the memorandum in writing, &c. The defendant left with me the deeds of the estate at Shenley as a temporary security, and for the purpose of preparing the mortgage securities in the event of the plaintiff acceding to his proposition; and he also promised to bring me the policy of assurance if the plaintiff should accede to this arrangement. I made a minute in writing at the time of this promise of the defendant, and communicated to the plaintiff the particulars of the defendant's proposition. On the same 14th April the plaintiff called on me at the office of my partner and myself in consequence of my last letter, when I read to him the defendant's farther proposition, which the plaintiff said he would accept, and directed me to inform the defendant of it. I accordingly did so in a letter directed and sent to the defendant, &c."

In corroboration of this testimony, the plaintiff gave in evidence a letter from the defendant to the plaintiff, dated April 16th, 1836, containing the following paragraph:—"As I am to pay the expense of a mortgage, allow it to be made in the usual way for one year, and with an understanding between us that I may pay it off before if I please. I do hope there will require no registry for the policy."

Mr. Simpkinson and Mr. Wilcock, for the plaintiff, said that the main question in this case was whether the Court would decree a sale or a foreclosure, and they contended that this being an equitable mortgage, the plaintiff was entitled to a sale. A deposit for the purpose of preparing a mortgage is sufficient to constitute an equitable mortgage: *Edge* v. *Worthington* (1 Cox, 211), *Ex parte Bruce* (1 Rose, 374).

[59] Mr. Spurrier, for the defendant. The testimony of the plaintiff's witness, uncorroborated by other testimony, cannot be received in contradiction of the defendant's answer. It is clear, upon the whole circumstances of this case, that the title deeds were left in the custody of the plaintiff's attorney, not as a deposit by way of security for the debt, but simply for the purpose of preparing a mortgage deed; and therefore this transaction does not amount to an equitable mortgage: *Brander* v. *Boles* (Pre. Ch. 375), *Brizick* v. *Manners* (9 Mod. 284), *Ex parte Bulteel* (2 Cox, 243). In the cases in which the transaction has been sustained as an equitable mortgage, there has been an express pledge of the title deeds, as a security for money lent: *Russel* v. *Russell* (1 Bro. C. C. 269), but even those cases were disapproved of by Lord Eldon, who regretted that the doctrine of equitable mortgage had ever been established, and took many opportunities of expressing his opinion that that doctrine ought not to be extended: *Ex parte Hooper* (1 Mer. 9), *Ex parte Whitbread* (1 Rose, 299). The case of *Ex parte Bruce* is at variance with the other authorities. In *Norris* v. *Wilkinson* (12 Ves. 192) it was expressly decided that the party in possession of the title deeds had no lien upon them, because the deed had been delivered, not as a present immediate security, but for the purpose of preparing a future mortgage security.

Mr. Simpkinson, in reply. Although the general rule is that one witness shall not prevail against the answer, yet the Court will see whether the probability in favour of the evidence will not predominate over the probability in favour of the answer. The letter of the 16th of April cannot be explained away, and shews that the defendant was mistaken in his answer. Upon the question of mort-**[60]**-gage, the earlier cases which have been cited are scarcely applicable at present. Those cases went upon a principle which is now disregarded, that there could be no equitable mortgage without a writing. But as the law now stands, there is no difference between a deposit by way of equitable mortgage and a deposit in order to have a legal mortgage

prepared. Could the party recover these deeds at law without paying the money? It is true that *Norris* v. *Wilkinson* was decided on the supposition that there was no authority for the proposition now contended for; but the case of *Edge* v. *Worthington* was not then reported, and *Ex parte Bruce* follows that decision.

THE LORD CHIEF BARON. The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds; and no doubt there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title deeds as a pledge of payment. A court of law could not assist such a party to recover back his title deeds by an action of trover, the answer to such an action being that the title deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages, therefore, appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title deeds and preparing the mortgage. Expediency, [61] therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute. The question here is whether the circumstances under which these deeds were deposited lead to any distinction between this case and others which have been decided on the general doctrine. It has been very ably argued for the defendant that the circumstance of the deeds having been deposited, not as a present security, but with a view to a future security, gives rise to such a distinction. Certainly, if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case the deeds are given in part of the security, and become pledged from the very nature of the transaction.

Then is there evidence to shew that such was the nature of the transaction in this case? It seems to me, upon a view of the answer and the evidence, that the defendant has been mistaken in many of his statements; and if so, the general rule as to the rejection of the evidence of one witness contradicting the answer, will not apply. Admitting, therefore, the evidence of the plaintiff's witness, it amounts to this—that, in order to avoid immediate proceedings against him, the defendant made to the plaintiff's solicitor the proposition mentioned in the bill; that such proposition was taken down in writing and read to him; that the deeds were then deposited with the plaintiff's solicitor as a temporary security, and with a view to prepare a mortgage; and that afterwards the policy of assurance was deposited with him in the same manner. It may be admitted that this is but slight evidence; but still it is evidence of a deposit by way of security to prevent immediate proceedings against the depositor.

[62] If it were necessary to decide the specific point, I should say that an agreement to grant a mortgage for money already advanced, and a deposit of deeds for the purpose of preparing a mortgage, is in itself an equitable mortgage by deposit; but here the deposit was evidently made as a present security, as well as with a view of preparing a future mortgage. Upon the whole, it appears to me that in default of payment of principal and interest within the usual time, a sale must take place.

Decree accordingly.(*a*)

EX PARTE GRAINGE. IN THE MATTER OF THE GREAT WESTERN RAILWAY ACTS. Feb. 17th, 1838.—By a railway act it was enacted that in case any question should arise as to the title of the lands to be taken or used for the purposes of the act, the party in possession at the time of the purchase should be deemed to be lawfully entitled, until the contrary should be shewn to the satisfaction of the

(*a*) Upon the subject discussed in the above case, see a valuable note in Jarman's Conveyancing, vol. 5, p. 466; and see *Hockley* v. *Bantock*, 1 Russ. 141.

Court; and it was further enacted that in case the proprietor or other party interested in the land and entitled to receive the purchase money, should be unable to make a good title to the land, it should be lawful for the company to pay the money into Court to the credit of the party interested, subject to the disposition of the Court; and thereupon the company's title should be deemed complete. Under this act the company, having contracted to purchase a piece of land of the party in possession, and having entered into possession under the contract, objected to the title, and paid the money into Court to the credit of the party with whom they had so contracted: Held, that such party, upon his own affidavit of title, was entitled to payment of the money out of Court to his own absolute use.

[S. C. 2 Jur. 640.]

By the 39th section of statute 5 & 6 Will. 4, c. cvii., for making the Great Western Railway, it is enacted that in case any party to whom any money shall be agreed or awarded to be paid, for the purchase of any lands, to be taken or used under or by virtue of the powers of that act, shall refuse or neglect to accept the same, or to convey the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, to the satisfaction of the company, or shall be absent from England, or shall not be conveniently found, &c., it shall be lawful for the company to order the money so agreed or awarded to be **[63]** paid as aforesaid, to be paid into the Bank of England, in the name and with the privity of the Accountant General of the Court of Exchequer to be placed to his account to the credit of the parties interested in the said lands (describing them so far as the said company can do), subject to the control and disposition of the said Court; and the Court, on the application of any party making claim to such money, or to any part thereof, by petition, is thereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payments of the dividends thereof according to the estate, title, or interest of the party making claim thereunto; or to make such other order in the premises as to the Court shall seem proper.

By the 40th section of the same act it is enacted that where any question shall arise in reference to the provisions aforesaid or otherwise upon the said act, touching the title of any party to any lands or to any interest in any lands to be taken or used in pursuance of this act, the parties respectively who shall have been in possession or receipt of the rents or profits of such lands, at the time of such purchase, and all persons and corporations claiming under such parties, or under or consistently with the possession of such parties, shall be deemed to have been lawfully entitled to such lands or such interests therein, according to such possession, until the contrary shall be shewn to the satisfaction of the Court; and the dividends or interest of the annuities or securities to be purchased with such money, and also the capital of such annuities or securities shall be paid, applied, and disposed of accordingly.

The 42nd section enacts that upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury for the purchase of any lands, rent, or other charge, or as a **[64]** compensation for any loss or injury to the respective proprietors of such lands or other persons respectively interested therein, and entitled to receive such money or compensation respectively, within three calendar months after the same shall be so agreed upon or awarded; or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse to receive such money as aforesaid; or shall refuse, neglect, or be unable to make a good title to such lands (to the satisfaction of the said company), or if any party entitled unto or to convey such lands shall not be known, or shall be absent from England, or shall refuse, neglect, or be unable to convey the same, then, upon payment of such money into the Bank of England, as before directed, to the credit of the parties interested in such lands, it shall be lawful for the said company immediately to enter upon such lands, and thereupon such lands, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the company, to and for the purposes of this act.

By the stat. 6 & 7 Will. 4, c. xxxviii., which was passed for the purpose of altering

the line of this railway, and for amending the former act, it is enacted that all the costs, charges, and expenses, on the part as well of the seller as of the purchaser, of all conveyances and assurances to be made of any lands and hereditaments which should be purchased or taken by the said company for the purposes of this and the said recited act, and all expenses whatsoever incident to the investigation, deduction, or verification of the title of such lands and hereditaments, should be exclusively borne and paid by the company.

The petition stated that the commissioners, under an act of the 59 Geo. 3, for enclosing lands in the parish of Harlington, in the county of Middlesex, had by their [65] award, dated the 12th of June, 1821, allotted and awarded to the petitioner a certain piece of freehold land situate in that parish; that the petitioner had, ever since the making of the award, until the time thereafter mentioned, been in possession of the said land, and in the receipt of the rents and profits thereof; that the petitioner having received notice from the Great Western Railway Company, that they would require the said allotment for the purposes of the railway, it was agreed between the company and the petitioner, that the value of the said allotment should be determined by a surveyor, and that the amount of such valuation, together with 15l., for the crops on the said land, and 25l. for the petitioner's costs, should be paid by the company to the petitioner; that the surveyor, who had been appointed for that purpose in the month of June, 1837, certified the value of the land to be 315l.; that in July, 1837, an abstract of the petitioner's title to the said land was delivered to the solicitors of the company; that, in August following, the company, without the petitioner's consent, took possession of the land, and that, having some objections to the title, they paid the sum of 355l., being the amount of the purchase-money, and the other sums before mentioned, into the bank, in the name of the Accountant-General of this Court, "Ex parte William Wyatt Grainge, or other the person or persons interested in an allotment of land in the parish of Harlington, in the county of Middlesex;" and that such sum of 355l. was, at the time of presenting this petition, remaining uninvested.

The petition prayed that the said sum of 355l. might be ordered to be paid to the petitioner, and that the company might pay the costs of this petition; the petitioner by his affidavit stating, in addition to the foregoing facts, that he was not aware of any right in any other person, or of any claim made by any other person, to the said sum of 355l. so paid into the bank as aforesaid, or to any part [66] thereof, or to the said allotment of land, in the parish of Harlington, in the county of Middlesex.

Mr. Simpkinson, for the petition, said that notwithstanding the objections of the company to the title of the petitioner, he was, under the 40th section of the act, to be deemed to have a good title, until the contrary should be shewn, and he was therefore entitled to an order to have the money paid to him for his absolute use. Similar orders had been made by former judges.(*a*)

Mr. Stevens, for the company.

ALDERSON, B., said that there were great objections to such an application as the present, as it was obvious that the party applying for the money might have a very limited interest in the lands. He, however, would consider himself bound by the decisions of other judges, and would therefore examine the orders which had been made in the cases cited, and deliver his opinion on a future day.

Feb. 23rd.—On a subsequent day, his lordship said that he had examined the orders made by former judges, and that upon the authority of those orders he felt himself bound to accede to this application.

Order accordingly.(*b*)

(*a*) Alexander, C. B., *In re the Liverpool Dock Company;* Lord Gifford, M. R., in an *Anonymous case;* and Lord Lyndhurst, C. B., in *Ex parte Povah, in the Matter of the Hampstead Church Act.*

(*b*) May 16th, 1838. A similar application was this day made on behalf of Lord Ellenborough, in the matter of the Birmingham and Gloucester Railway Act, there being no other evidence of the title of the lands than Lord Ellenborough's affidavit.

Alderson, B. I am bound by the authorities, though I do not comprehend them. The party may sell to the company lands in strict settlement, and then apply for the money out of Court. However, the order must be made.

Order accordingly.

[67] Ex parte Tatham. In the Matter of the London Bridge Acts. Feb. 14th, 1838.—One of two trustees for sale, under a marriage settlement, the other being absent in America, held entitled to the costs of sale, &c., under the London Bridge Acts.—Where one of two trustees is absent in America, the other is an "incapacitated" person under the London Bridge Acts, and consequently is invested with the power to sell given to such persons by virtue of those acts.

[S. C. 7 L. J. Ex. Eq. 64; 2 Jur. 440.]

By the marriage settlement of Mr. and Mrs. Grewett, certain freehold tenements in the city of London were conveyed to trustees, in trust for the wife, for her separate use during her life, with remainder in trust for her husband for his life, with remainder to the children of the marriage, in such shares as the wife should appoint; and power was given to the trustees, with the consent of the wife, to sell the premises. The husband died, leaving his wife and four children of the marriage surviving him. The trustees also died in the lifetime of the wife; the survivor of them having devised the trust estates to Parkinson and Tatham, and having made Tatham his executor. Parkinson refused to act in the trust, and went many years ago to America; accordingly Tatham, who was a solicitor, took the whole management of the trust. The widow afterwards sold the trust estates to the corporation of London, for the purposes of the new London bridge. In 1837 she died, having, by her will, bequeathed and appointed the produce of the sale to the four children of the marriage.

Upon the sale of the estates as before mentioned, the conveyance, in consequence of Parkinson's continued absence in America, was made to the corporation of London, under the provisions of the statute 10 Geo. 4, c. 136. The purchase money was accordingly paid into this Court, and was afterwards invested in the stocks in the name of the Accountant-General.

The petition prayed that the Accountant-General might be ordered to sell so much of the stock as might be necessary to defray the expenses of the sale and of this application, and to transfer the residue to the parties interested, according to their respective shares.

[68] Mr. Tatham, for the petitioner, referred to *Ex parte Layfield* (1 Y. & C. 79).

Mr. Wood, for the corporation of London.

Alderson, B., made the order as prayed.

Campbell *v.* Dickens. April 3rd, 1838.—In this Court the Master's certificate of impertinence in the answer must be confirmed on motion with notice; but quære the propriety of the practice.

[S. C. 7 L. J. Ex. Eq. 64; 2 Jur. 297.]

The answer of two of the defendants having been referred for impertinence, and the Master having certified them to be impertinent, a motion was now made on behalf of the plaintiff, for a reference back to the Master to tax the costs of the order of reference and to expunge the impertinent matter. There was a cross motion by the defendant, founded on special circumstances, for liberty to except to the Master's certificate.

Mr. Kenyon Parker, for the plaintiff.

Mr. Webster, for the defendants, said that the plaintiff's motion must be refused, because the Master's certificate of impertinence had not been confirmed: *Ward* v. *Botralin* (8 Price, 86), *Jones* v. *Green* (1 Younge, 269).

The Lord Chief Baron said that such appeared to be the practice of the Court, and therefore, as he could not put the practice upon a new footing except by a general order, the plaintiff's motion must be refused. He thought, however, the practice of the Court of Chancery upon this point preferable to the practice here. As to the cross [69] motion, it appeared that from circumstances for which neither party were to blame that the defendants had not had an opportunity of seeing the Master's certificate. He should therefore accede to their application.

Order accordingly.

RABITTS *v.* RABITTS. April 19th, 1838.—In this Court the Master's certificate of the insufficiency of an examination put in before him by a party to the suit, under an order to examine the parties, must be confirmed.

[S. C. 7 L. J. Ex. Eq. 76; 2 Jur. 440.]

In this case the Master having been directed by the decree to examine the parties to the suit, and having certified the examination put in before him by the defendant to be insufficient,

Mr. Follett, for the plaintiff, moved for a reference to the Master to tax the costs of such insufficient examination, and that such costs, when taxed, might be paid by the defendant. He cited *Hubbard* v. *Hewlett* (2 Madd. 469).

No opposition being made to the motion, the Court made the order as prayed.

On a subsequent day, however, Follett said that he had ascertained that this order was irregular, in not containing a declaration that the Master's certificate be confirmed. Whereupon it was ordered that the Master's certificate stand confirmed, and that it be referred back to the Master to tax the costs, &c.

[70] ROE *v.* WARDLE. April 27th, 1838.—The Court will not make an immediate decree of foreclosure under the statute 7 Geo. 2, c. 20, where any of the defendants do not admit, though they may not absolutely deny, the plaintiff's title.—Quære whether the Court will not make such a decree against an infant, unless he do more than merely submit his rights and interests to the Court?

[S. C. 2 Jur. 640.]

By indentures of lease and release, dated respectively the 3rd and 4th of February, 1815, a freehold messuage and lands, situate at Rushton Spencer, in the county of Stafford, whereof James Wardle was seised in fee, were by him conveyed to the plaintiff and his heirs by way of mortgage for securing the sum of 500l. The same premises were afterwards, by an indenture dated the 3rd of March, 1823, further charged with a sum of 400l., which had been advanced by the plaintiff to Wardle.

By indentures of lease and release, dated respectively the 26th and 27th of October, 1826, reciting the mortgage and further charge to the plaintiff, James Wardle mortgaged the equity of redemption in the premises to one Matthew Dawson, in consideration of 500l.

By his will dated the 25th of September, 1827, James Wardle, after bequeathing legacies to certain of his children, devised to three persons (whom he also appointed his executors) and their heirs, all the mortgaged premises, to hold the same, to them and their heirs, to the use and intent that his wife, Elizabeth Wardle, and his assigns, should, during so much of her life as she should remain his, the testator's, widow, receive out of the rents and profits thereof a clear annual sum or yearly rent of 30l., with powers of distress and entry for enforcing payment thereof; and subject thereto, the testator gave and devised the said premises, and all other his real estates whatsoever and wheresoever, &c., and all his leasehold and personal estate, &c., unto the said three trustees and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, upon trust as to the personal estate, to call in and convert the same into money; and as to the real estate, to sell and dispose of the same, subject to the said annual sum or [71] yearly rent of 30l., and the powers and remedies for recovering and enforcing payment of the same; and after payment thereout of his debts, funeral expences, and also the legacies thereinbefore bequeathed, he directed his trustees to stand possessed of the residue or surplus of the monies so to be produced in five equal shares, for the benefit of five of his sons. One of these shares was directed to be invested for the benefit of the testator's son, Charles Wardle, for his life, and after his death to be divided amongst his children attaining twenty-one.

The testator died in June, 1828, leaving the several children named in his will surviving him. In January, 1832, one of his sons, William, who was entitled to a fifth share of the residue, died, having made a will and appointed executors. In October in the same year the testator's eldest son, James, who was also entitled to a fifth share of the residue, died intestate, and without issue; and afterwards the

testator's son Charles died, leaving an only child, Ann, who at the hearing of the present motion was an infant.

The present bill, which was filed against the trustees, the widow Elizabeth Wardle, the testator's surviving children, the infant Ann Wardle, the executors of William Wardle, and Matthew Dawson, the second mortgagee, prayed foreclosure of the mortgaged premises, and an injunction to restrain the trustees from committing waste.

The defendants, the trustees, did not by their answer deny the plaintiff's title, but put him to the proof of it.

The infant defendant, Ann Wardle, by her answer, submitted her rights and interests to the Court, and also that some personal representative of James Wardle, the eldest son of the testator, ought to be made a party to the suit.

A motion was now made on behalf of the defendant Elizabeth Wardle, that it might be referred to the Master to take an account of what was due to the plaintiff for principal and interest on his mortgages, and to tax the **[72]** plaintiff's costs, and that the defendant Elizabeth Wardle might be at liberty to pay the plaintiff the amount to be so found due to him for principal, interest, and costs within the usual period; and that thereupon all further proceedings in this suit might be stayed, the defendant undertaking to pay the plaintiff, &c., and the plaintiff undertaking to convey the mortgaged premises and debt, including the costs, to the defendant.

Mr. Rogers, for the motion. This defendant, who stands in much need of her annuity, and who has not yet received any portion of it, seeks by this motion to put an end to the unnecessary delay which will take place if the cause goes on to a hearing. It is conceded that Dawson, the second mortgagee, has a right, prior to this annuitant, to redeem the plaintiff's mortgage, and what she asks is that, if Dawson does not redeem, she may redeem. The plaintiff will get the same benefit as he would do if the cause went on to a hearing, and none of the parties can be damnified. It is submitted that the legislature has provided for a case of this nature by the stat. 7 Geo. 2, c. 20, s. 2; but supposing this case not to be within the strict provisions of that statute, the observations of Sir John Leach in *Praed* v. *Hull* (1 S. & S. 331) are clearly applicable to it. His honour says, "I consider that courts of equity have inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant will at once submit to a decree establishing the full demand made by the bill, and the whole relief prayed in respect of that demand, with costs." What this defendant now asks for is the order which would be made at the hearing.

Mr. Simpkinson and Mr. Kenyon Parker, for the plaintiff. We should not oppose this motion if justice could **[73]** be done upon it; but one of the defendants is an infant who cannot comply with the order, and who likewise insists on the necessity of making the representative of a deceased child of the testator a party to the suit. Three is no admission on the answers upon which, if the cause came to a hearing, the Court could make a decree. The case, therefore, is not within the act. To meet the words of the statute, the application must be made by the "defendant or defendants," and therefore must be made by all the defendants if there are more than one. Here the other defendants do not admit the plaintiff's title; and it is clear that the act only applies to cases where the mortgage is admitted, and there is no dispute as to what is due; *Huson* v. *Hewson* (4 Ves. 105), *Garth* v. *Thomas* (2 S. & S. 188).

Mr. Sutton Sharpe, for a party representing one of the fifth shares. The defendant has not a right to redeem prior to the trustees. The estate is devised to the trustees upon trust to sell, subject to the annuity. The annuitant, therefore, has only a charge upon the estate, and has no right to redeem till persons who have the estate subject to that charge have refused to do so. The Court is called upon to decide between co-defendants without hearing the answer or evidence. The case of *Garth* v. *Thomas* is conclusive upon this point, and is a much stronger case than the present.

Mr. W. Hetherington, for the infant defendant, and for one of the trustees, did not oppose the motion.

Mr. Hind and Mr. Blair, for other parties.

Mr. Rogers, in reply, observed that it was a mistake to say that the annuity was a mere charge upon the estate of **[74]** the trustees, for that by the terms of the will the annuitant had a legal estate.

THE LORD CHIEF BARON. I wish I could accomplish the object of the statute

by shortening the duration, and thereby diminishing the expense of this suit; but I am at a loss to see my way to that object under present circumstances. If the parties had admitted the plaintiff's title there would have been no difficulty. But how can I make a decree admitting the plaintiff's title (for that must be the effect of the decree now asked for) against those who do not admit it?

Motion refused.

RODGERS *v.* MAULE. April 27th, 1838.—By the statute 1 Geo. 4, c. 35, the jurisdiction of the Queen's Remembrancer, in all matters of equity (except as to the entering of decrees and orders) is entirely transferred to the Masters on the equity side of the Court: therefore, upon a bill filed by creditors for the administration of the assets of their deceased debtor against the Crown, as the only representative of the debtor (he having died intestate, and without heirs): Held, that, under the decree for an account, the reference should be to the Master, and not to the Queen's Remembrancer.—Questions of equity, though arising out of matters of revenue, are properly determinable on the equity side of this Court.

[S. C. 7 L. J. Ex. Eq. 76; 2 Jur. 656: in Chancery, 1841, 1 Y. & C. C. C. 4.]

The bill was filed by the plaintiff on behalf of himself and all other the creditors of J. M. H. Brown, who was illegitimate, and who died intestate and unmarried, praying an account and satisfaction of their debts out of the real and personal estate of the intestate. The defendants were Mr. Maule, who, as nominee of the Crown, had taken out letters of administration of the personalty, and the Attorney-General, who, as the representative of the Crown, claimed the realty by way of escheat, subject to a mortgage existing thereon. Upon the hearing of the cause the Lord Chief Baron made a decree, referring it to the Master to take an account of the real and personal estate of the intestate; and the decree being drawn up was taken to the Queen's Remembrancer for the purpose of being entered, but he refused to enter it in the form in which it was drawn up, on the ground that the reference ought to have been made to him and not to the Master.

[75] Mr. Simpkinson now moved that the Queen's Remembrancer might be ordered to enter the decree as drawn up. This is a decree in equity and not in a revenue cause; otherwise your Lordship personally would have had no power to make it; the statute 57 Geo. 3, c. 18, giving power to the Chief Baron, sitting alone, to make decrees in equity only. The law as to revenue cases is unaffected by that act. Then the subsequent act of the 1 Geo. 4, c. 35, makes a clear distinction between the equity and revenue side of the Court. Under the 17th section,(*a*) it is **[76]**

(*a*) The stat. 1 Geo. 4, c. 35, s. 17, after reciting the stat. 57 Geo. 3, c. 18 (by which the Lord Chief Baron, or in case of his sickness or other unavoidable absence, any Baron nominated and appointed by the Crown, is empowered to sit alone in equity), and reciting that by the course and practice of the Court for many years, the deputy Remembrancer had taken the minutes of all decrees and orders of the said Court, as well in matters of revenue as on the equity side of the Court, and had also been employed in reporting to the Court his opinion upon the several matters referred to him; and that in consequence of the division of the business of the said Court, it had become expedient that there should be two joint officers to perform the said duties on the equity side of the said Court, in all suits and matters between subject and subject—enacts that the Lord Chief Baron for the time being shall "nominate and appoint, by writing under his hand and seal, to be enrolled among the records of the said Court, two fit and proper persons, being barristers at law of not less than five years standing, to be and be called Masters of the said Court of Exchequer; and that one of such Masters shall be the Accountant-General of such Court, as hereinbefore mentioned; and that such two Masters shall hold such offices during their good behaviour therein, and not be in anywise subject to the orders or control of the King's Remembrancer of such Court or his deputy; and that each of the Masters of such Court shall act jointly or severally, as such Court or Lord Chief Baron, or other Baron to be nominated and appointed as aforesaid, from time to time shall direct, in all matters of reference from the Court or Lord Chief Baron,

obvious that the proper reference in a case of this nature is to the Master and not to the Queen's Remembrancer. The circumstance of the Crown being partially interested can make no difference. The case of *Attorney-General* v. *Sitwell* (not reported on this point. See ante, vol. 1, p. 559) was stronger than this. That was a bill to enforce the specific performance of a contract entered into by the defendant with the Commissioners of Woods and Forests. A decree was pronounced for the plaintiff, and a reference was directed as to the title; and on that occasion the Queen's Remembrancer put in a claim to have the benefit of that reference. Mr. Baron Alderson [77] was of opinion that the reference ought to be made to the Master, but thinking the point of some importance, he left it to the decision of the full Court. The Court gave its opinion in favour of the reference being made to the Master.

Mr. Wray, who appeared both for the Crown and for the Queen's Remembrancer, said that he should argue the question rather on behalf of the Crown than on behalf of an officer of the Court. It is said that this Court has no jurisdiction in cases of revenue. That is a mistake; because a court of revenue is a court both of equity and law. [The Lord Chief Baron. No doubt the equity side of the Court of Exchequer arises out of the court of revenue as much as the law side.] All cases which come into this Court connected with the Crown, or in which the Crown has any thing to recover in the shape of property, are matter of revenue. Your Lordship therefore is sitting in revenue, and the question is whether there is any power in the Court so circumstanced to direct a reference to the Master, the act giving the Master power only as between "subject and subject." The office of Queen's Remembrancer is still preserved except in what is specially provided for by this act. He is an officer of the Crown, and accounts for all fees received by him, as part of the public revenue. In *Attorney-General* v. *Sitwell* the Crown was the plaintiff, and obtained the decree. It may therefore have been considered that the Crown had waived the right of reference to the Queen's Remembrancer. The act only authorizes the Chief Baron to do in equity what all the Barons might have done before. The Chief Baron is thereby constituted the sole judge in equity, whether the question arise in a matter between subject and subject, or in a matter of revenue. In the former case the reference is to the Master; in the latter, according to the ancient practice. [The Lord Chief Baron. Suppose [78] the bill had been filed in the Court of Chancery?] The Court of Chancery claims a right to compel payment of debts; but in this case it would be a

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or other Baron, &c., and proceedings relating thereto, in all suits and matters on the equity side of such Court between subject and subject; and it shall be the duty and office of such Masters to attend such Court and the Lord Chief Baron, or other Baron, &c., in their own proper persons, and not by deputy, and to take the minutes of all orders and decrees which shall be made by such Court or the Lord Chief Baron thereof, or by the Baron to be nominated and appointed as aforesaid, as well in matters of revenue as on the equity side of such Court, which orders or decrees shall be afterwards drawn and engrossed by the clerks in Court in each respective cause or suit, and shall and may be corrected, either in form or substance, by such Masters respectively, at the instance of any of the parties affected by any such order or decree, according to the minutes taken by such Masters respectively, pursuant to the directions of such Court, or of such Lord Chief Baron, or the Baron to be nominated and appointed as aforesaid, and shall be afterwards entered by the King's Remembrancer amongst the records of such Court, pursuant to the ancient course thereof; and it shall also be the office and duty of such Masters respectively to receive all such references on matters of account, and on all other matters and things on the equity side of such Court, as shall be made and referred to them by the Court of Exchequer, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid, and to report thereon to such Court, or the Lord Chief Baron, or to the Baron to be nominated and appointed as aforesaid, in such manner as heretofore was used and accustomed to be done by the person holding the office of deputy Remembrancer, or as shall be directed or ordered by such Court, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid, and from time to time, and in all things to do, execute, and perform all such duties as Masters of the equity side of such Court as they shall be required to do by any order or orders to be for that purpose from time to time made by such Court, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid."

claim adverse to the rights of the Crown. The right of administration of the personalty is in the Crown. The legal estate in the realty has passed to the Crown, subject to the mortgage. It is strictly a matter of revenue.

Mr. Simpkinson, in reply, observed that there was no instance of the Attorney-General demurring to a bill of this nature, filed against him in Chancery. As to proceedings in the Exchequer, it was clearly the intention of the legislature that the Chief Baron should refer all matters of equity to the Master, who, by the terms of the act, are to take the minutes of all orders and decrees, "as well in matters of revenue as on the equity side of such Court."

THE LORD CHIEF BARON. If the Queen's Remembrancer or the Attorney-General had appeared before me, for the purpose of suggesting that the minutes of the decree ought to be corrected, on the ground that the reference was wrong in principle, it would have been undoubtedly a proper question for consideration. But here the Queen's Remembrancer has altered the minutes without any authority, and therefore I do not know whether, on that ground alone, I should not do right in acceding to this application. But, taking the question as Mr. Wray has considered it, namely, on the construction of the statute, it appears to me that, upon the terms of the 17th section, the Queen's or (what is the same thing,(*a*) for this purpose) the Deputy Remembrancer's authority is gone. Undoubtedly there is some confusion in the act, from the use of the words "between subject and subject," and I presume those words have given rise to the doubts which [79] have occurred. They first occur in the recital. [Here his Lordship read the recital.] Then, in describing the duties of the Masters, the act says that "each of the Masters of such Court shall act jointly or severally, as such Court, or Lord Chief Baron, or other Baron, &c., shall direct, in all matters of reference from the Court, or Lord Chief Baron, or other Baron, &c., in all suits and matters on the equity side of such Court between subject and subject." If the act had stopped at those words, it would have given rise to the conjecture that the legislature intended to confine the cases to be heard by the Lord Chief Baron and the other Baron to be appointed for the purposes of the act, to cases in equity arising between subject and subject; but then it goes on to say, that the Masters shall attend and take the minutes of all orders and decrees to be made by such Court, or Lord Chief Baron, or Baron, &c., "as well in matters of revenue as on the equity side of such Court." At first it seems as if the Masters had nothing to do with the revenue, but here they are directed to take minutes of matters relating to the revenue, and the restricting words "subject and subject" are altogether omitted. There is then a provision that those minutes and orders, when drawn up, shall be corrected. Now, who are the parties to correct them? Not the Deputy Remembrancer, but the Masters. If there is anything wrong in carrying into execution the minutes, the party whose business it is to alter the order or decree, as framed upon the minutes, is the Master; and, when so altered, the Deputy Remembrancer is to enter it amongst the records, "pursuant to the ancient course." The act then proceeds, "And it shall also be the office and duty of such Masters," &c. Now observe: their first duty was to act in all matters of reference in all suits on the equity side of the Court: their second duty is to receive all such references on matters of account, and all other matters and things on the equity side of the Court [80] as shall be referred to them, and to report thereon to the Court, "in such manner as was heretofore used and accustomed to be done bythe person holding the office of Deputy Remembrancer." So that by this clause they have precisely the same powers when an account or any other matter is directed to them by the Court, as the Deputy Remembrancer had before the statute.

I certainly do feel that there was some doubt as to the extent to which the powers of the Deputy Remembrancer were affected by the act, but upon the whole I am of opinion that the effect of the act is to exclude the whole jurisdiction of the Deputy Remembrancer in cases of this nature, and that all the duties which were formerly exercised by him in such cases are now to be exercised by the Masters. On a former occasion, when a memorial was presented to me on this subject, I thought it right to consult the other Barons, and they were clearly of the same opinion as myself. I am therefore enabled to express myself on the present occasion with more confidence than I otherwise should have done. The only question, then, is, what order I am to make

(*a*) As to the abolition of the office of deputy see 57 Geo. 3, c. 60.

here: and I think it must be that the Queen's Remembrancer do enter the decree as the Court pronounced it.

Order accordingly.

VULLIAMY *v.* HUSKISSON. May 9th, 1838.—Testator bequeathed 80,000 rupees to his daughter absolutely upon her attaining 21; and in the event of her dying under 21 he bequeathed the fund to his brother's children. He then directed that should his daughter live to marry, her interest in the said rupees was to be enjoyed by her during her natural life, and, at her decease, the principal to be divided amongst her children: Held, that the latter clause was to be confined to the case of a marriage under 21, and consequently that the daughter, who did not marry until after she had attained the age of 21, took the fund absolutely. —The statement in a will of the date of a person's birth, held to be primâ facie evidence of that person's age.

[S. C. 2 Jur. 656.]

John Crake, surgeon of his Majesty's 67th regiment of foot, serving in India, by his will, dated the 22nd of June, 1816, bequeathed as follows:—"I give and devise to my dearly beloved child, Charlotte Crake, who was born at **[81]** Cawnpore, the 27th of February, 1814, the net sum of eighty thousand sicca rupees, the interest only of this principal sum of eighty thousand rupees to be expended for the maintenance and education of the said Charlotte Crake till she shall attain the age of twenty-one years, the money to be invested in the Honourable East India Company's 6l. per cent. government paper. In the event of the said child's decease before the age of twenty-one years, to devolve to the children of my dearly beloved brother, William Crake, share and share alike. Should the said child live to marry, her interest of the said eighty thousand sicca rupees to be enjoyed by her during her natural life, and at her decease the principal to be divided among her offspring, share and share alike. Should she die without issue, to devolve as before directed to the children of my beloved brother, William Crake." The testator then, after bequeathing another legacy, bequeathed the residue of his property to his brother William Crake, whom he appointed his executor in England.

The testator died in India without revoking his will, leaving his daughter surviving him. She attained her age of twenty-one years (supposing the statement of her age in the will to be correct) on the 27th of February, 1835. In August following she married the plaintiff, Mr. Vulliamy, by whom she had a daughter, who was made a defendant to this suit.

The questions were, first, whether Mrs. Vulliamy, in the events which had occurred, was entitled to the 80,000 rupees absolutely, or had only a life interest in them; and, secondly, supposing she had an absolute interest, whether the statement in the will was sufficient evidence of her having attained the age of 21, there being no other evidence upon that point.

Mr. Spence, for the plaintiffs. Mrs. Vulliamy, upon attaining the age of 21 years, before marriage, became **[82]** entitled to the 80,000 rupees to her absolute use. If she had married before she came of age, she would, by the express terms of the will, have been entitled only to a life interest in that sum; but upon her attaining 21 before marriage, all restrictions imposed upon her by the testator ceased. For instance, until she attained the age of 21 only the interest of the principal sum was to be applied in her maintenance and education, but upon her attaining that age the principal was to be applied as she thought proper. The only doubt that can be raised upon the subject arises from a subsequent clause, beginning "Should the said child live to marry," &c.; but it is obvious that that clause, together with the clauses immediately preceding and succeeding it, refer to what might take place before she attained the age of 21. If she died unmarried under 21, or if she lived to marry under 21, and died without issue, then the sum in question was to devolve to the children of the testator's brother; but if she married under 21 and had issue (or, as the testator calls it, "offspring"), she was to take a life interest in the sum, and her issue to have the principal after her decease. But none of the events provided for by these clauses having occurred, she, or her husband in her right, is entitled to the fund absolutely.

Mr. Swanston and Mr. Parker, for the defendants. In the first place, there is no

evidence that Mrs. Vulliamy has attained the age of 21. [The Lord Chief Baron. The will states that she was born in Cawnpore, on the 27th of February, 1814. That is sufficient evidence of the time of her birth unless you shew the contrary.] Then, upon the construction of the will; although in the first instance the testator uses words which would, if they stood alone, give the legatee an absolute interest, yet that interest is qualified by all the subsequent clauses. This is obvious from the provisions relative to maintenance and to the in-[83]-vestment of the money. The will then contains a clause providing for the death of the party under 21, and it is not disputed that that clause is equally operative whether she dies married or unmarried. Then comes the clause relative to her marriage. Why should not that be equally operative, whether she married before or after 21? It is clear that the intention of the testator was that after the decease of this lady, unless her issue took the legacy, the issue of her brother should take, and not a stranger. The last clause, "should she die without issue," &c., must mean "should she die without issue after attaining 21;" the dying without issue under 21 having been already provided for.

Mr. Haldane, for other parties.

Mr. Spence, in reply.

THE LORD CHIEF BARON. I do not see how this will can be made sensible without joining the latter clauses of it together, and supposing the party's not attaining 21, to be the condition both as to the bequest over and the bequest to her for life. The ground I take is that nothing certain is given to her till she attains 21.

If you suppose the marriage clause not to have reference to a marriage before 21, look at the consequences: if she had married, and had had children and died under 21, her children would have taken nothing. The testator, however, never could have intended that, in any case, her children should not take before any other of his next of kin.

In making the provisions which he has done, the testator might choose not to trust his daughter's entire discretion over the property till she attained 21. He might say, "I will make a marriage settlement for her while she is a minor; but if she attains 21, I do not object to her [84] making it herself." It is for these reasons probably that he gives her the whole interest, and then qualifies the gift by the clauses which follow. The will is clumsily expressed, but what he meant was that if she married or died before 21 the property was to go to his brother's children, in case she left no children; but if she lived to 21, and then married, she was to have it absolutely.

Decree for the plaintiffs.

PEARCE *v.* SLOCOMBE. Jan. 26th, 1838.—By the terms of a deed of trust executed by two partners for the benefit of certain persons, some of whom were the joint creditors of the firm, and others the separate creditors of one of the partners, it was declared that the joint creditors should be paid within a year after the execution of the deed, and that the surplus of the joint estate, after payment of the joint creditors, should be applied for the benefit of the separate creditors. Joint estate, sufficient to pay the joint creditors, was got in within the year; but in consequence of difficulties in relation to the separate creditors, the trustees made no distribution of any of the funds, but caused a suit to be instituted for carrying into execution the deed of trust, and in the meantime invested at interest both the joint and separate estate. Upon the Court, some years afterwards, decreeing payment to the various creditors: Held, that the joint creditors (although their debts did not in their nature carry interest) were entitled to be paid out of the joint estate interest at 4*l.* per cent. upon their respective debts, from the time appointed by the deed for payment of the principal monies due to them: and that, until the joint creditors had received satisfaction both of their principal and interest, the separate creditors were not entitled to receive any payments whatever out of the joint estate.

The defendant, William Leigh, for many years prior to 1825, carried on business as a solicitor at Barden, in the county of Somerset, and acted as agent, steward and receiver for various gentlemen in that neighbourhood. In February, 1825, he admitted his son, the defendant Robert Leigh, into partnership with him in the business of attornies and solicitors, reserving to himself the agencies, stewardships, and receiverships which he then held.

In 1830 William Leigh became insolvent in his separate capacity, and by a deed of trust, dated the 25th of October in that year, William Leigh conveyed all his separate estate, both real and personal, and William and Robert Leigh assigned all their partnership credits and effects to the defendants Slocombe and Clarke and the plaintiff Pearce, upon trust as to the separate estate of William Leigh, to collect, get in, sell, and dispose of the same; and out of the produce of such sale to pay and **[85]** satisfy the costs of carrying the trust deed into execution, and to apply the surplus in payment of the separate creditors of William Leigh. The trusts declared as to the partnership estate were that the trustees should, within one year after the date of the deed, by and out of the monies which should arise from the collection and getting in of the said partnership debts and monies, in the first place pay off and discharge all debts which should be due and owing from the said partnership, with full power to them to admit or reject evidence of any alleged debt or debts due therefrom, and in the next place should pay over to Robert Leigh one equal half part, which should, after such payment as aforesaid, remain of such partnership monies, and retain the other moiety thereof upon the general trusts of the said indenture.

In pursuance of the trusts of this deed, the trustees, in 1831, collected various large sums of money on account both of the joint and separate estate. Some difficulties, however, having arisen as to the claims of the separate creditors, who were more numerous and more deeply involved than the joint creditors, the trustees declined to make any distribution of the funds to either class of creditors without the sanction of a court of equity. Accordingly, in 1832, the present suit was instituted, at the suggestion of the separate creditors, for the purpose of carrying the trust deed into execution, the bill alleging that difficulties had arisen in determining what was joint and what was separate estate.

The cause now came on for hearing on further directions. It appeared from the Master's report that the several sums which had been received by the trustees, under the deed of trust, had been invested in the funds and made productive by accumulations of interest, though, in regard to those investments, no distinction had been made between the separate estate of William Leigh, and the joint estate of the partnership. It also appeared **[86]** that William Leigh's separate estate was insolvent to a very large amount, but that the joint estate (taking into consideration the additions to it arising from accumulations of interest) was sufficient to pay not only the principal monies due to the joint creditors, but interest at 4l. per cent. from the time appointed by the deed for the payment of the joint debts.

The question now was whether or not such interest, in addition to the principal monies due, should be paid to the joint creditors out of the joint estate, before that estate should be applied in satisfaction of the other trusts of the deed: the greater portion of the debts due to the joint creditors being such as did not in their nature bear interest.

Mr. Simpkinson and Mr. Turner, for the joint creditors. By the terms of the deed of trust, the joint creditors ought to have been paid the full amount of their debts, within one year after the execution of the deed. Instead of that they have remained unpaid for six or seven years, although a large proportion of the joint debts were got in before the filing of the bill. It is said that difficulties in regard of the settlement of the claims of the separate creditors rendered the bill necessary, and that on that account payment to all the creditors was delayed. It is difficult to see how that should affect the joint creditors; but at all events, whether it was the fault of the trustees or the separate creditors, it is clear that payment to the joint creditors has been most vexatiously withheld. On that ground alone, therefore, they are entitled to interest on their debts at 4l. per cent., although those debts are not in themselves of a nature to carry interest: *Meredith* v. *Bowen* (1 Keen, 270). Another ground may be that the deed converts the joint debts into specialty debts: *Barwell* v. *Parker* (2 Ves. sen. 363), *Maxwell* v. *Wettenhall* (2 P. W. 26).

[87] Mr. Heberden, for the defendants the Leighs. The decree does not provide for interest, and the question which has been raised is altogether a surprise upon these defendants. Robert Leigh is solvent; and if he had had any notion of the claims now set up by the joint creditors, namely, that their simple contract debts should be treated as specialties, I am not prepared to say that he would have consented to the deed. But in truth, interest was never provided for by the deed, and the attention

of the parties was not called to it. Robert Leigh has been kept out of the administration from no fault of his own. The cases cited as to the conversion of simple contract into specialty debts have no application here. In those cases the party indebted executed a deed, with the same view as a party frequently makes his will—providing for the administration of equitable assets against himself. This is a totally different arrangement. It is a trust deed for dealing with an insolvent estate; not for providing for the payment of all the party's debts. The misconduct of the trustees, if there has been any, cannot affect Robert Leigh.

Mr. G. Richards, for the separate creditors of William Leigh. A more unjust demand than that made by the joint creditors cannot be conceived. The deed of trust was in effect a general arrangement and compromise amongst all parties, by which the debts were to be provided for as well as they could be, out of an insolvent estate. Interest upon the debts was not contemplated. It happens, however, that the joint estate is amply sufficient to pay the joint debts while the separate estate of William Leigh is insolvent. Yet the joint creditors are not satisfied with payment of their debts in full, but seek to abstract from our fund a further sum for interest. [The Lord Chief Baron. The deed provides for payment of the joint creditors in 1831, and they say that the fund, or **[88]** the greater part of it, out of which they were entitled to be paid, was got in at the time. The moment the joint estate is got in and invested it bears interest. Here the principal and its accumulations are enough to pay the joint creditors with interest; and accordingly they claim payment to that extent. But according to you, the interest which has been accumulating from 1831 to 1837 ought to swell the fund of the separate creditors. Is that just?] We must look at the terms of the arrangement. By that the partnership debts were to be paid out of the partnership property, and the remainder of the property was to be deemed separate estate. That was the consideration for which the separate creditors executed the deed. They might have arrested William Leigh, or done something else to secure payment of their separate debts; but instead of that they enter into an arrangement by which the surplus of the joint estate was to be handed over to them, as a compensation for what the separate estate was not able to pay. Would they have entered into this arrangement if they could have foreseen that by something dehors the deed they might be deprived of the benefits of it? It is said that a deed of this description has frequently had the effect of converting debts by simple contract into specialty debts. That may be so as against the individual who makes it, but not as against a trust fund. The parties rely on the trust deed only. The cases of *Barwell* v. *Parker* and *Maxwell* v. *Wittenhall* shew that it is only upon the intention of the parties, made apparent by the deed, that simple contract debts will be considered as bearing interest in the nature of specialties. Independently of the deed itself, the only document which the Court can look to as explaining the nature of it is the decree for carrying the trusts of it into execution; and that contains no direction to the Master to compute interest on the simple contract debts. If the joint creditors are entitled to any interest for the detention of their money, **[89]** the trustees and not the separate creditors ought to be made responsible for it.

Mr. Spence, for the trustees.

The Lord Chief Baron. I think this case does not depend upon the principles of those authorities which have been cited by Mr. Turner. This is the case of two partners possessing joint property which is abundantly sufficient to pay the joint creditors, and in my opinion, by the terms of the deed, all the property, joint and separate, was conveyed to the trustees to pay the joint and separate creditors, according to their respective interests, out of the joint and separate property; so that each class of creditors should be fully paid to the extent to which each of the respective funds would permit. If this be not the construction of the deed, and if the construction contended for on the part of the separate creditors is to prevail, it is manifest they would have an interest in protracting the general settlement in order to benefit particular individuals. They would have an interest in delaying payment to the joint creditors in order to get interest from the joint creditors' fund to pay themselves. Something has been said about making the trustees responsible in case they have done wrong in delaying payment to the joint creditors. But the question now is—be the trustees wrong or right, are the separate creditors to profit by that delay? They ask that the interest which has accumulated on the fund of the joint creditors may be put into their pocket. They talk of the joint creditors abstracting from their fund; but,

on the contrary, it seems to me that they seek to take the interest which in justice belongs to the joint creditors. I see no equity in that.

It is a gross injustice that by any arrangement with the trustees the separate creditors should have allowed the fund of the joint creditors to be invested at interest. By **[90]** that means they would, upon their construction of the deed, get as much, by the interest accumulating in twenty years, as the joint property was originally worth. But was that the intention of all the parties? By the terms of the deed the joint creditors were to be paid on or before a certain day. It is admitted that there was enough to pay the joint creditors in 1831. It is admitted that when the bill was filed the trustees had enough to pay them. I do not see, therefore, how the fund applicable to the payment of the joint creditors could with propriety be laid out to bear interest for the separate creditors.

Suppose an action had been brought by the parties interested to recover payment of the monies withheld; no doubt they would have been entitled to interest if the jury thought proper to award it.(*a*) Upon the whole, therefore, it seems to me that they ought to have interest on their debts at 4*l.* per cent. from the day appointed by the deed for payment of their debts.

Order accordingly.

TIMES *v.* NEGUS. May 25th, June 12th, 1838.—Where a person who was a necessary party to a conveyance, though he had no beneficial interest in the property, refused to execute the deed of conveyance, and in his answer to a bill filed against him to compel the execution of the deed set up as the ground of his refusal a case of fraud in the plaintiff, which he did not attempt to support by any evidence at the hearing: Held, that this was not a case for any inquiry as to the alleged fraud, and that the defendant must pay the costs of the suit.—Married woman, living apart from her husband, by whose misconduct the suit had been rendered necessary, and who herself had shewn an indisposition to assist the plaintiff, held not entitled to her costs.

By an indenture of demise dated the 3rd of July, 1806, and made between Frances and Sarah Woodward of the one part, and Edward Cowley of the other part, certain freehold property, situate at Little Brickhill, in the county of Bucks, became mortgaged to Cowley for the term of 1000 years. The mortgaged premises were afterwards, **[91]** by an indenture dated the 11th of October, 1814, in consideration of 600*l.*, assigned to the defendant John Negus, and William Thompson, their executors, administrators, and assigns, as tenants in common for the residue of the term, subject to a proviso for redemption.

The defendant, John Negus, was son-in-law of Thompson, having married Thompson's daughter; and by a deed of even date with the last mentioned deed it was agreed between Negus and Thompson that the latter should receive all the interest on the 600*l.* for his life; and that after Thompson's death, all interest thereafter to grow due should become the absolute property of Negus; and that he should be solely possessed of the remainder of the term of 1000 years.

In December 1815 William Thompson died, leaving the defendant Mrs. Negus, his only child, surviving him; but letters of administration of his effects were not taken out until the year 1818, when administration was granted to Mrs. Negus, who about that time separated from her husband.

By an indenture bearing date the 24th of October, 1816, and executed by and between the defendant John Negus, of the one part, and Daniel Times of the other part, reciting a contract between the parties for an assignment of the premises to Daniel Times, for the residue of the term, in consideration of 500*l.*: it was witnessed that in consideration of 100*l.* therein expressed to have been previously paid, and of 400*l.* expressed to be paid at the date of the indenture by Daniel Times to Negus, the latter granted and assigned to Daniel Times, his executors, &c., all the hereditaments and premises comprised in the said term of 1000 years; to hold the same to Daniel Times, his executors, &c. for the residue of the term subject to the proviso for redemption contained in the indenture of the 11th of October, 1814. This deed contained a covenant by Negus, for further assurance of **[92]** the premises to Daniel

(*a*) See *Arnott* v. *Redfern*, 3 Bing. 353, 11 Moore, 209.

Times, his executors, administrators, and assigns, during the term; and a receipt for the two sums of 100l. and 400l., making the whole consideration money of 500l., was endorsed upon it, and signed by John Negus.

By a decree in a suit of foreclosure, in which Daniel Times and the defendants, Negus and wife, were plaintiffs, and Frances and Sarah Woodward were defendants, and by an order consequent on that decree, dated the 12th of February, 1820, the Woodwards, and all persons claiming under them, were absolutely foreclosed from all equity of redemption in the mortgaged premises.

In January 1821, or at some time previously, Daniel Times entered into the possession of all the premises, and continued in such possession until the time of his death, which took place on the 25th of September, 1835.

The plaintiffs being devisees in trust for sale of the premises under the will of Daniel Times, and having entered into treaties for the sale of them to various purchasers, were unable to proceed with their contracts by reason of the following objection, which was taken to their title: namely, that at the time of the execution and date of the indenture of assignment of the 24th of October, 1816, letters of administration had not been taken out of the effects of William Thompson, and consequently that such assignment operated as a legal transfer of a moiety only of the term of 1000 years, the other moiety being outstanding in the personal representatives of William Thompson.

In order to remedy this objection, the plaintiff caused an endorsement to be made on the indenture of the 24th of October, 1816, purporting to be an assignment by the defendants, Negus and wife, of William Thompson's moiety of the term which had become vested in Mrs. Negus as his administratrix. Upon tender, however, of this deed to Negus for his execution, he absolutely refused to execute it; and although no formal tender was made to Mrs. [93] Negus, she declined executing any deed of that nature. The plaintiffs, therefore, filed the present bill for the purpose of compelling execution of the assignment endorsed on the indenture of the 24th of October, 1816.

The defendants, who had lived apart since the year 1818, put in separate answers. The defendant, John Negus, by his answer, wholly denied that he ever contracted with Daniel Times for the assignment to him of the mortgage term for 500l., as recited in the indenture of October, 1816, but stated that, in the year 1816, being in want of money, he applied to Thomas Times, a solicitor (since deceased), for a loan; that Thomas Times agreed to procure 200l. from his brother Daniel Times, upon condition of the defendant's leaving with him a receipt for 100l.; that the defendant accordingly gave such receipt, taking no money for it; that, in October following, the defendant went with Thomas Times to Daniel Times's house, and received from Daniel Times 200l.; that the defendant then and there executed a deed, believing it to be a mortgage for only 200l.; that the deed was never read over to him, but that it was explained to him to be a mortgage for 200l.; and that he never received from Daniel Times more than 200l. He further stated that, the foreclosure suit was instituted without his knowledge or consent.

The defendant, Mrs. Negus, by her answer, alleged her ignorance of the contract between her husband and Daniel Times, but admitted she knew the nature of the plaintiff's application relative to the proposed deed, stating that she had declined to sign it because some money was due from the Woodwards to her father's estate. She also stated that she had lived separate from her husband since 1818, during the greater part of which period he had not allowed her any maintenance; and that she had been obliged to appear and put in her answer at her own expence. She [94] submitted to act as the Court should direct, but claimed her costs.

The plaintiffs proved their case as before stated, and, amongst other witnesses, examined a clerk of Thomas Times, who was an attesting witness to the execution of the deed of the 24th of October, 1816. This witness stated that Thomas Times acted in the transaction as solicitor for both parties, and that to the best of the deponent's judgment and belief the defendant John Negus was fully made acquainted with and understood the contents of the deed in question, by means of the same being read over and explained to him previously to his executing the same; it being the invariable habit of Thomas Times to read over to his clients, deeds and other documents required to be executed by them, unless the clients expressed themselves otherwise satisfied.

The defendants entered into no evidence.

Mr. Barber and Mr. G. Richards, for the plaintiffs. The defendant, John Negus, has neither filed a cross bill nor entered into any evidence in support of the allegations in his answer. He has now, for the first time, set up a case of fraud against the plaintiffs. He does not, however, allege that he has acquired any further information on that subject since the death of Daniel Times. During the life of Daniel Times he took no proceedings to sift the conscience of that individual; yet now he says that Daniel Times committed a gross fraud upon him, so far back as 1816. It is obvious that this is a false imputation of fraud, set up for the mere purpose of resisting the plaintiff's right to have the term delivered to them. The defendant, therefore, according to the known rules of equity, must pay the costs of the suit.

Mr. Burge and Mr. Flather, for the defendant John Negus, contended that their client was not bound to enter **[95]** into evidence of the fraud set up by his answer, because the Court, in a case of reasonable suspicion arising out of the answer alone, would direct an inquiry as to the fact of fraud. This was in effect a bill for the specific performance of the covenant for further assurance contained in the deed of October, 1816, and therefore the Court would act upon the dictum of Lord Manners in *O'Rourke* v. *Percival* (2 Ball & Beat. 62), where his Lordship says, "It is an established principle of this Court to decree a specific execution of an agreement, unless it appears that the party who calls for this peculiar aid of the Court has acted not only fairly, but in a manner clear of all suspicion. If there be a reasonable doubt upon the transaction, the Court will leave the party to his legal remedy for the non-performance of the contract."

Mr. Hallett, for the defendant, Mrs. Negus.

ALDERSON, B., said that in his opinion this was not a case which called for any such inquiry as that which had been suggested; and that there appeared to be no ground for the refusal of the defendants to execute the deed. Upon the question of costs he would reserve his judgment.

June 12th.—ALDERSON, B. In this case I took time to consider as to the question of costs, which, being in the discretion of the Court, to be exercised, however, according to fixed principles, is always a matter of difficulty.

Here, if the defendant had rested his refusal to convey, only on the ground of the form of the conveyance, or on the ground that he required to be satisfied of the right of the plaintiff to require him to execute it, he would, probably, according to the rules governing courts of equity, **[96]** have been entitled to his costs; or, at all events, would not have been liable to the costs of the plaintiff. But here he has set up a charge of fraud; and, on the hearing, that has failed. I think he has, therefore, made himself liable to the costs of a suit so conducted, and made necessary by this his unfounded charge.

As to Mrs. Negus, I think, under all the circumstances, that she is not entitled to receive her costs.(*a*)

Decree accordingly.

FAGG *v.* DOBIE. May 14th, June 26th, 1838.—Assignment by the assignee of an equitable term to a person in poor circumstances, held valid, although it was made in order to avoid payment of a sum of money chargeable on the lessee under the original agreement, which agreement the assignee had adopted in all its parts.—The motive which induces the assignee of a lease to assign over his interest has no bearing upon the question whether the assignment is fraudulent or not, provided the assignment is real, and intended to operate as it appears to operate.

[S. C. 2 Jur. 681.]

Thomas Fagg being seized in fee of certain freehold premises, entered into an agreement with one Simon Kemp, dated the 1st of March, 1824, to the following effect, namely, "Thomas Fagg hereby agrees to grant and execute to Simon Kemp a good and sufficient lease of all that messuage or tenement &c. (describing the premises) for the term of 61 years, at a rent of 30l. per annum, from Midsummer next, free from all taxes and other outgoings; the lease to contain the usual covenants. Simon

(*a*) As to the costs where married people sever in their defence, and there are no apparent demerits in the defendants, see *Barry* v. *Woodham*, vol. 1, p. 538.

Kemp to lay out before Midsummer a sum of money not less than 400l. in constructing and making two new dwelling houses, to the satisfaction of John Fagg, and agreeable to the particulars signed by Simon Kemp. John Fagg to supply Simon Kemp with the money necessary for the above purpose. Simon Kemp well and substantially to repair and keep repaired the said premises. The money to [97] be advanced by John Fagg as aforesaid to remain on the security of the premises, and no lease to be granted, nor this agreement to operate as a lease till this money so advanced be repaid and satisfied, with interest at 5l. per cent. The money to be repaid with interest at or before Christmas, 1834."

Upon the execution of this agreement by both parties Kemp was let into possession. The erection were made, money was advanced by Fagg, and it was ascertained between the parties that the money for which Kemp was to be liable to Fagg in respect of the buildings was 400l.

In May, 1825, Kemp entered into the following agreement, dated the 23rd of that month, with the defendant Dobie:—"Whereas Robert Dobie hath advanced and lent a sum of money to Simon Kemp, amounting to 200l., it is hereby witnessed that Simon Kemp, in consideration of such advance, agrees to sell, and Robert Dobie agrees to purchase, all that messuage or tenement, &c. (describing the premises), for the residue of the term of 61 years which Simon Kemp hath therein, subject to the right which John Fagg hath as superior landlord, for ground rent, and also to interest of 20l. a year for money advanced by John Fagg to Simon Kemp, and secured upon the premises. And the said Simon Kemp hereby agrees to procure a lease to be granted by the said John Fagg to the said Robert Dobie for 61 years; or in case of his refusal to grant the same, then the said Simon Kemp, his executors, administrators, and assigns, shall procure a lease to be granted to him or them, and shall assign the same to the said Robert Dobie, his executors, administrators, and assigns."—(Signed) "Simon Kemp, Robert Dobie."

Soon after the execution of this agreement, Kemp went to New South Wales, and Dobie entered into possession of the premises, received the rents and profits, and exercised various acts of ownership, as the person beneficially entitled. Amongst other acts of ownership he in June, [98] 1827, executed a lease of one of the houses to a person named Patience, for a term of years, in consideration of a bonus or premium of 30l. He also from time to time paid to John Fagg, and after Fagg's decease to the plaintiff as his representative, the rent reserved and made payable under the agreement of March, 1824, and also interest on the 400l.

At the beginning of the year 1834, the premises being, as alleged by the plaintiff, very much dilapidated, Dobie offered to assign them to Patience, upon a representation that a clear annual profit might be made of them of 68l. 6s. 10d. Patience, however, refused to accept the offer. About the same time, notice to repair was served on behalf of the plaintiff on one of the tenants in possession of the premises.

By an instrument of assignment, dated the 16th of July, 1834, the benefit of the original agreement of March, 1824, under which these premises were held, was assigned by Dobie to the defendant, Robert Brown, a journeyman plasterer, in consideration of 5l.—the assignment being expressed to be made as from the preceding midsummer.

The bill prayed that the assignment to Brown might be declared void, and that the defendant Dobie (Kemp not being made a party) might be decreed specifically to perform the agreement of March, 1824, and might account to the plaintiff for the rents due, and repay to the plaintiff the 400l. and interest, and might also be charged with the repairs, &c.

The bill charged, amongst other things, that the assignment to Brown was merely colourable, by reason that the alleged consideration of 5l. had not been actually paid by Brown to Dobie, but had been deducted by Dobie out of the rents, Dobie himself continuing to receive the rents notwithstanding the assignment. In answer to this charge, it was proved by the defendants that the rents had not been received by Dobie personally, but by a person who [99] had acted as his receiver, and who after the assignment was nominated the receiver for Brown.

Mr. Simpkinson and Mr. Wilcock, for the plaintiff. It is clear that the defendant Dobie adopted the agreement made between Fagg and Kemp, and became liable to Fagg and his representative in the same manner and to the same extent as Kemp would have been if he had not assigned. The questions therefore are: 1. Whether

the plaintiff has not a right (or would not, independently of the assignment to Brown, have a right) specifically to enforce the contract of 1824 against Dobie. 2. If he would have had such a right, independently of the assignment, whether that assignment is not fraudulent. 3. Whether, if it be not fraudulent, the plaintiff has not a right in equity to go against Dobie for the rent which accrued due between the period when it was last paid by Dobie, and the period when the assignment was made to Brown, and whether he has not a right to enforce against Brown the repairing of the premises.

Upon the first point, where an agreement has been entered into and assigned, the assignee has a right specifically to enforce the agreement itself against the original contractor, and by parity of reasoning the original contractor has a right to enforce the agreement against the assignee. In all agreements of which courts of equity will decree the specific performance mutuality of remedy is implied: *Flight* v. *Bolland* (4 Russ. 298), *Holden* v. *Hayn* (1 Mer. 47). This subject as regards leases has been dealt with in a variety of cases: *Tovey* v. *Pitcher* (2 Ventr. 228), *Treackle* v. *Coke* (1 Vern. 165), *Richmond* v. *City of London* (1 Bro. P. C. ed. Tom. 516), *Lucas* v. *Commerford* (3 Bro. C. C. 166; 1 Ves. jun. 235), *Flight* v. *Bentley* (7 Sim. 149), *Jenkins* v. *Portman* (1 Keen, 435). These cases sup-**[100]**-port the proposition that at all events Dobie was liable to the plaintiff under the agreement, during the time he was in possession under that agreement, until he assigned it to Brown, supposing that assignment to stand; and supposing that assignment not to stand, then that he is liable to the plaintiff up to the present time.

But, secondly, the assignment by Dobie to Brown is altogether colourable and void. Having failed to persuade Patience to take the premises—having received notice to repair—and bearing in mind the fast approach of Christmas, when he would become liable for the payment of the 400l., he thinks it necessary, at all hazards, to throw off the appearance of ownership; and, after casting about for a purchaser, he meets with one in the person of an insolvent plasterer, to whom he assigns the premises for 5l. He takes care, however, virtually to retain possession, for he contrives to receive the Michaelmas rents, deducting the 5l. out of them. This transaction cannot be supported: *Philpot* v. *Hoare* (Ambl. 480; 2 Atk. 219) is very similar to the present case. There the assignment was made to an insolvent immediately before the rent became due, and the Court held the assignment fraudulent. Here the assignment was made to Brown a short time before the stipulated time of payment of the 400l., and after notice of repair had been served on one of the tenants. It is submitted, therefore, that the plaintiff is entitled to a declaration that this assignment is fraudulent. But whether fraudulent or not, Dobie is liable for rent between the last payment of rent and the assignment; and also liable for all breaches of covenant, or implied covenant, during the time he was equitable owner.

Kemp is properly omitted as a party to this suit, having parted with his interest and being out of the jurisdiction. Full justice will be done by making Dobie pay over the **[101]** money to the plaintiff without the intervention of Kemp. Decrees have frequently been made that a doweress in the suit should receive her dower, without being put to file her bill for that purpose.

Mr. Boteler and Mr. Purvis, for the defendant Dobie. First, this is not an agreement which can be specifically enforced against the defendant. No doubt there was originally a distinct agreement on the part of Fagg to execute a lease; but a cautious avoidance on the part of Kemp to take a lease at all hazards. The agreement between Kemp and Dobie runs in the same way. Under that agreement Dobie was not bound to pay the 400l. or take a lease; though, if he paid the 400l. he could enforce a lease either from the plaintiff or from Kemp. As between A. and B., adults, A. may agree to sell an estate for 1000l. without B. being bound to buy an estate for 1000l. Mutuality, in that view of the subject, is not necessary.

But supposing that Dobie was originally bound to take an assignment of a lease, or an original lease, and that Kemp was bound to grant one, yet Dobie is now absolved from all responsibility in that respect. The assignment to Brown, whoever he was, in consideration of 5l., was one which released Dobie from all responsibility to the plaintiff for matters after that time. The plaintiff could never, under any circumstances, have enforced the original lease against the defendant; he could only have made him the assignee of Kemp; and for that purpose Kemp should have been a party. But it is unnecessary to dwell upon that, because, according to the known

principles of law and equity the assignment to Brown was valid. In the various cases which have been cited on the other side, relief was sought either against a party who was still in possession, or against a party who had assigned, but who had not paid his rent, or had committed other breaches of covenant while **[102]** he was in possession. The present defendant stands in neither of those situations, and nothing short of proof of the alleged extra fraud, in his retaining possession after the assignment, will render the assignment invalid. The only case which appears at all favourable to the plaintiff is that of *Philpot* v. *Hoare;* but it is clear that in that case Lord Hardwicke considered Robinson as holding the premises as agent for Mrs. Hoare. Here, there is no pretence for saying that Dobie remained in possession after the assignment. The mere accident of the same person being receiver both for Dobie and Brown ought not to lead to such a conclusion.

It is unnecessary to argue at the present time of day that an assignment of a term by an assignee to a mere beggar is valid. The authorities, amongst which may be mentioned the case of *Onslow* v. *Corrie* (2 Madd. 330), are sufficiently explicit upon that point. There is no proof however of the insolvency of this party, though the probability is that he is a poor man. Your Lordship could not have entertained a bill to restrain the assignment to him upon the mere allegation that he was insolvent; there must have been some specific case of fraud to warrant an interference by injunction. It follows that in the present situation of the parties the assignment must be supported.

Mr. G. Richards, for the defendant Brown, observed that there was no charge in the bill, nor any proof of collusion between the two defendants; and he contended that this assignment could not be vacated without overturning long established principles both of law and equity.

Mr. Simpkinson, in reply.

[103] At the close of the argument Alderson, B., said that the question of fact as to the dilapidations demanded investigation. Upon the point whether this was a bonâ fide assignment, he should take a short time to consider his judgment. The law upon the subject of assignment by assignees to insolvent persons was clear. The only doubt was in what manner this case was to be dealt with in reference to the particular circumstances attending the assignment.

June 26th.—ALDERSON, B. I have considered this case, and it seems to me to depend upon clear and satisfactory principles, and that the application of them to the facts before the Court is not difficult.

An assignee of a term is liable to the covenants only by reason of his privity of estate. The lessor has made no covenant with him—has given no trust to him. The law, therefore, which imposes on him the liability, directs that it shall continue so long as the privity of the estate continues and no longer. Any real assignment therefore puts an end to it.

There is no doubt that a fraudulent assignment is as no assignment at all. In that case, both at law and in equity, the act is altogether void. But it is a mistake to call an assignment to a beggar a fraudulent assignment. If a party assign nominally only, retaining the beneficial possession all the time, it is fraudulent, because, whilst he assumes to do one thing, he really does another. He retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act, done be a real act, intended really to operate as it appears to do. The decisions both at law and in equity concur in this point.

[104] But though this be so, yet equity will give relief as to antecedent rent due, or antecedent breaches of covenant committed at the time the party was liable for them, although by his subsequent assignment the remedy at law is gone.

Now, if we apply these principles to the present case it will be easy to decide it. Here, the assignment is to a man in humble circumstances, not to a mere beggar; so that that difficulty, even if it were one, does not exist. It seems to me that the assignment is valid; and that for all rent and breaches of covenant since the assignment the defendant is not liable. But he is liable for all antecedent breaches. I think his acting and taking possession of the estate quite sufficient to bind him to that extent. As to the rent, however, there is now no question, for it has been satisfied. But as

to the repairs, I think there should be an inquiry before the Master as to the state of repair of the premises at the time of the assignment; and in case the Master reports against the defendant, he will ascertain the amount due in that respect for which the decree will ultimately go against the defendant.

I must, however, reserve the question of costs, so far as relates to the inquiry, till that fact is determined. The bill will be dismissed with costs as to the 400l., and as to the rent claimed.

Decree accordingly.(*a*)

[105] SMALL *v.* ATTWOOD. May 5th, 8th, June 1st, 1838.—The purchasers of certain mines having paid part of their purchase money, and having been let into possession, agreed to pay the residue of the purchase money by instalments, and in the meantime to pay to the vendor half-yearly interest on what should remain due. Having paid one half-year's interest, but no portion of the remaining purchase money, they filed their bill to set aside the contract. The vendor then recovered the next four half-yearly portions of interest by several successive actions, but, upon bringing his action for the fifth, was restrained by an order for an injunction in the suit instituted by the plaintiffs. The terms of that order, dated the 28th of February, 1829, were that upon the plaintiffs paying into Court the sum which was the subject of that action, the defendant should be restrained, &c.: and that, upon their continuing from time to time to pay in the like sums half-yearly, the injunction should be continued to the hearing. Under that order several half-yearly instalments of interest were paid in and invested and made to accumulate in the funds; but under two subsequent orders, made at the instance of the defendant, for the purpose of enlarging publication, all further payment into Court of these half-yearly sums was suspended until the hearing. The cause was heard in November, 1831, and in the following November judgment was given in favour of the plaintiffs; under which the accumulated stock was sold out and paid to them, and the defendant was compelled to pay 9766l. for costs. In March, 1838, the House of Lords reversed this decree, and remitted the cause back to this Court, to do therein as should be just and consistent with their reversal: Held—1st. That the defendant was entitled to be repaid the sum of 9766l., but without interest.—2nd. That as to the instalments of interest which became due on the unpaid purchase money after the decree in the Court below, the defendant had no remedy in this suit, but must be left to his remedy at law.—3rd. That the defendant was entitled to be repaid in this suit the instalments of interest which became due between the orders for suspension and the decree of the Court below, but that he was not entitled to interest on those instalments.—4th. That the defendant was entitled to the value of the accumulated stock sold out at the hearing.—5th. That if the stock had been merely transferred to the plaintiffs, and not sold out, they would have been accountable to the defendant for the dividends since received upon it.—Where a party obtains an injunction to restrain an action at law, upon the terms of paying the money which is the subject of that action into this Court, and the Court afterwards orders such payment to be suspended until the hearing of the cause, the effect of this order is to reserve to this Court both legal and equitable jurisdiction over the money at the hearing. Therefore, if, upon the hearing of the cause, the Court is of opinion that the plaintiff in equity has no equity and that the defendant has a legal right to the money, it will order the money to be brought into Court and paid over to the defendant, in compensation for the suspension of his legal right; without putting the defendant to the necessity of taking any further proceedings at law, in order to establish his legal right.—Where money is paid out of Court through the erroneous act of the Court, the party who receives it, and is called upon to refund, is not liable to pay interest upon it.—The decree in this Court, notwithstanding it may be afterwards

(*a*) An assignee of a lease is not liable for rent accruing after an assignment over, although such assignment be in breach of a covenant not to assign; *Paul* v. *Nurse*, 8 B. & C. 486; 2 M. & R. 525. Upon the general rule of law as to assignments to insolvent persons, see *Taylor* v. *Shum*, 1 B. & P. 21.

adjudicated upon in the House of Lords is the final decree in the suit; and this Court has no jurisdiction over matters arising between the decree and the judgment of the House of Lords, which, though connected with the suit, are not embraced by the decree.

[See *Humphries* v. *Horne*, 1844, 3 Hare, 276.]

In November, 1825, possession of the property which was the subject of this suit was delivered to Philip Taylor, as the agent of the plaintiffs.(*a*) At that time the sum of 325,000l., residue of the purchase money, being still due to the defendant Attwood, it was agreed that the same should be paid off by instalments, and that until it should be paid off, interest, at 5l. per cent. upon the sum remaining due, should be paid on the 1st of April and the 1st **[106]** of October in every year. Each of these half-yearly payments amounted to 8125l.

The plaintiffs paid to Attwood the half-yearly interest which became due on the 1st of April, 1826. On the 27th of June, 1826, before they had paid any part of the residue of the purchase money, they filed their bill against Attwood to set aside the contracts which they had made with him. The four subsequent instalments of interest, to the 1st of April, 1828, inclusive, were obtained by Attwood, by means of actions brought and verdicts obtained against the plaintiffs; but by an order, dated the 28th of February, 1829, made in this cause (and also in the cross cause brought by Attwood against the plaintiffs), upon the plaintiffs paying into Court the sum of 8125l., being the interest which became due on the 1st of October, 1828, the defendant Attwood was restrained by injunction from proceeding in the action which he had brought for that sum, and likewise from commencing or prosecuting any other action in respect of the contracts in the pleadings in the said causes mentioned. And it was thereby further ordered that upon the plaintiffs continuing from time to time to pay into Court the like sum of 8125l., within one week after the 1st of April and the 1st of October in each year, until the hearing of the said causes, the injunction should be continued to the hearing of the said causes. And it was further ordered that the sum of 8125l. already paid into Court, and the other sums to be paid in by virtue of this order, should be invested in the 3l. per cent. consols, and that the interest and dividends thereon should be invested in like manner.

The cross cause of *Attwood* v. *Small* was subsequently dismissed, on the application of the plaintiff in that cause.

In pursuance of the order before mentioned, the plaintiffs paid into Court five half-yearly portions of interest, namely, from the 1st of October, 1828, to the 1st of October, 1830, inclusive. These sums, amounting to 40,625l., **[107]** were invested, pursuant to order, in the 3l. per cent. consols.

The defendant Attwood being obliged to apply for a second order to enlarge publication (the first order for that purpose being an order of course), obtained on the 11th of February, 1831, an order that publication should be enlarged until the 30th of April then next, whereupon it was, on behalf of the plaintiffs, made part of this order that payment of the portion of interest due on the 1st of April, 1831, should be postponed till July.

The defendant Attwood being compelled to apply for further time to examine his witnesses, obtained, on the 2nd of May, 1831, an order that publication should be further enlarged till the 23rd of that month; upon which it was made part of that order that no further payment of interest, under the order of the 28th of February, 1829, should be made by the plaintiffs until the hearing of the cause.

The cause came on for hearing on the 7th of November, 1831, and judgment was given on the 1st of November following, when a decree was made, declaring the contracts which were the subject of the suit to be fraudulent and void, and directing the costs of the plaintiffs and of the defendant, Philip Taylor, to be paid by the defendant Attwood and the remaining defendants.

In June, 1833, the defendant presented his petition of appeal from this decree to the House of Lords.

In August, 1833, the stock standing in the name of the Accountant-General, and arising from the investment of the before-mentioned sum of 40,625l., amounted to 49,449l. 13s. 1d. consolidated 3l. per cent. annuities. There was also in the bank, in

(*a*) See 1 Younge, 407.

the name of the Accountant General, the sum of 1483l. 9s. 10d. cash dividends arising from that stock.

By an order made in the original cause and supplemental (*a*) cause, dated the 10th of August, 1833, it was or-**[108]**-dered that the Accountant General should transfer the said sum of 49,449l. 13s. 1d. consols into the name of the plaintiff, Robert Small, and also pay to him the said sum of 1483l. 9s. 10d. cash; the defendant not to be accountable for any loss in consequence of the purchase of consols which had been authorized by the Court. Accordingly, in pursuance of this order such transfer and payment were made to Robert Small on the 22nd of August, 1833.

On the 27th of November, 1833, the defendant Attwood, pursuant to the decree of the 1st of November, 1832, paid to the plaintiffs' solicitors the sum of 9766l. 1s. 3d., the amount of the taxed costs of the plaintiffs and the defendant Philip Taylor.

On the 26th of March, 1838, the House of Lords reversed the decree of the 1st of November, 1832, in the following terms:—"That the said decree, so far as therein complained of, be, and the same is, hereby reversed; and that the bill be dismissed with costs. And it is further ordered that the cause be remitted back to the said Court of Exchequer, to do therein as shall be just and consistent with this judgment." Which order and adjudication of the House of Lords was made an order of this Court.

At the time of this reversal the number of the half-yearly payments of interest which had been suspended by the order of the 2nd of May, 1831, amounted to fourteen, and the value of them amounted to 113,750l.

In consequence of this decision of the House of Lords, the defendant Attwood now presented his petition to this Court, praying that the Court would order the plaintiffs to pay to the petitioner, within a given time, the following sums, namely, 131,108l. 10s. 3d.; 53,705l. 12s. 8d.; and 11,430l. 6s. 0d.; which sums were constituted of the several before-mentioned sums—namely, the sum of 113,750l., the produce of the 49,449l. 13s. 1d. consols, with its addition of 1483l. 9s. 10d., and the sum of 1483l. 9s. 10d., **[109]** and their several accretions. They were calculated in the following manner:—

First—Instalments of interest, which were suspended by the order of the 2nd of May, 1831 . . .	£113,750	0	0
Simple interest on ditto, at 4l. per cent. per annum, to 25th April, 1838	17,358	10	3
Total, . .	£131,108	10	3
Secondly—49,449l. 13s. 1d. consols, transferred to Robert Small at 88⅞l., on the 22nd of August, 1833, calculated to produce cash (after deducting 67l. 16s. 3d. for brokerage)	£43,762	18	9
Add, cash received by the Accountant General . .	1,483	9	10
	£45,246	8	7
Simple interest on 45,216l. 8s. 7d., at 4 cent. per annum, from 22nd of August, 1833, to 25th of April, 1838 .	8,459	4	1
Total, . .	£53,705	12	8
Thirdly—Amount of taxed costs paid by the defendant to the plaintiffs' solicitors, on the 27th of November, 1834	£9,766	1	3
Interest on ditto at 5l. per cent. per annum, from the 27th of November, 1834, to the 25th of April, 1838 .	1,664	4	9
Total, . .	£11,430	6	0

[110] The petitioner likewise claimed interest at 4l. per cent. on the sums of 113,750l. and 45,216l. 8s. 7d., from the 25th of April, 1838, till such time as those sums should be paid to the petitioner, and also interest on the sum of 9766l. 1s. 3d.,

(*a*) As to the supplemental cause, see 1 Younge, 507.

from the same 25th of April till such time as that sum should be paid to the petitioner.

Mr. Serjeant Wilde, Mr. Wakefield, and Mr. Lovat, for the petition. The object of this petition is that Mr. Attwood may be placed, as nearly as circumstances will permit, in the same situation as he would have been in, if the orders suspending the payments of his interest and the decree compelling him to pay costs, had not been made. It therefore prays that he may be paid the several instalments of interest which ought to have been paid to him, with interest from the time when he ought to have received them; that he may also be paid the value of the stock which ought to have been transferred to him (estimating it at 82⅝ its value, on the day on which it was actually transferred to Robert Small), with interest from the time when it ought to have been transferred to him; and, lastly, that he may be repaid the sum of 9766l. 1s. 3d. which he has improperly been compelled to pay by way of costs, with interest from the time when he was compelled to pay that sum.

The first point to be pressed on your Lordship's consideration is that we are in substance before the Court at the hearing of the cause. That is the effect of the judgment in the House of Lords. We ask for no general equity, but merely that the acts of the plaintiffs in the cause may not prejudice the petitioner, but that he may, on the contrary, be remitted to that situation from which the orders in the cause removed him. In regard to the two first items which are the subject of this petition, it is clear that they were ordered to be paid into Court for the purpose of being made available to the parties according to the view **[111]** which the Court might ultimately take of their rights at the hearing. Now this petition goes only to the extent of asking that the Court may execute this order according to its original purpose and design, and may deal with the fund according to the rights of the parties. It may be attempted on the other side to shew from general rules of equity that a defendant in a cause cannot have such relief as we now seek against a plaintiff; but that has nothing to do with merely remitting him to his original right. *James* v. *Biou* (3 Swanst. 234; 2 S. & S. 600) is an authority to shew that a Court of equity will, in the plaintiff's suit, redress the injuries which the plaintiff has done the defendant by his proceedings. There the plaintiff alleged himself entitled to an equity of redemption, and filed his bill to redeem the defendant the mortgagee. The defendant denied the plaintiff's right to redeem, and brought ejectment against the tenants in possession. In 1818 Lord Eldon, on the application of the plaintiff, made an order to stay the proceedings in the ejectment, upon the plaintiff undertaking to give judgment in the action as the Court should direct. In November, 1818, the bill was dismissed for want of prosecution, on the application of the defendant, who sued out a writ of execution upon the judgment, and took possession of the mortgaged premises. In May, 1819, Lord Eldon being of opinion that the order of dismissal was irregular, restored the bill, and ordered the plaintiff to be restored to the possession of the mortgaged premises, upon his undertaking to deal with the possession as the Court might direct. The cause afterwards came on to be heard before Sir John Leach, when an order was made to the effect that the bill should be dismissed with costs, and the injunction dissolved. It appears, however, that no injunction had been obtained, and upon the cause being heard by Lord Brougham, upon appeal, his Lordship affirmed the order of Sir John Leach, with this vari-**[112]**-ation, that instead of directing the injunction to be dissolved, he ordered that the plaintiff, having undertaken to deliver possession as the Court should direct, should deliver possession to the defendant; and he referred it to the Master to take an account of the rents and profits from 4th of May, 1819, and that the plaintiff should pay to the defendant what should be found due on taking the account. The case of *Brown* v. *Newall* (2 Myl. & Cr. 558), which will be cited on the other side, is distinguishable from the present. There the defendant having brought ejectment against the plaintiff, the latter filed his bill, and upon the eve of the trial of the ejectment applied to the Vice Chancellor for an injunction, and obtained it ex parte. By means of that injunction the trial went over to the next Assizes, and thereupon an application was made to the Vice Chancellor to dissolve the injunction, and he did so. A few days afterwards a further application was made by the defendant to the Vice Chancellor, to order the plaintiff to give the defendant judgment in the action, and his Honor made the order without discussing the merits of the ejectment. Upon appeal to the Lord Chancellor, his Lordship discharged this order. Now, in that case, the effect of the Vice Chancellor's order was

to give a remedy out of the cause, not to remit the parties to their original situation. It was in fact placing the parties in a third situation. Here all that is asked is to have the original situation of the parties restored, upon the principle that the Court will take care to reinstate all parties, whether plaintiffs or defendants, in that position from which they may have been erroneously removed by its own orders.

Upon the question of interest in regard to the two first items it is clear that the defendant is entitled to interest upon such monies as he was prevented from receiving by means of the orders obtained by the plaintiffs. It has been established by a variety of cases which have been decided **[113]** upon annuities and rent charges, that interest is payable on the arrears, if the party was prevented from otherwise obtaining interest by the proceedings of the debtor. In *Morgan* v. *Morgan* (2 Dick. 643. See ante, p. 84) interest on the arrears of a rent-charge were awarded to the defendant in the suit who had been prevented from receiving the rent-charge by the proceedings of the plaintiff. *O'Donel* v. *Browne* (1 Ball & Beat. 262), *Hart* v. *Cradock* (6 L. J. Ch. 358), *Todd* v. *Gee* (Sug. V. & P. App. No. 20), *Lewes* v. *Morgan* (3 Clarke & Finn. 159). In *Grant* v. *Grant* (3 Russ. 598; 3 Sim. 359) an obligor in a bond having, by vexatious proceedings, delayed the obligee from recovering on his bond, payment was decreed of the full amount of the principal and interest, although it exceeded the penalty of the bond. The principle is that notwithstanding any general rule of the Courts against the allowance of interest, if a party chooses by improper proceedings to prevent a creditor from having payment as soon as he ought, those proceedings shall not operate to the prejudice of the creditor.

With respect to the last item, it is clear that the right of the plaintiff to the sum of 9766l. 1s. 3d. arose only under the decree, and that the reversal of the decree reverses the right. The Court therefore will order this money to be restored to the party; and, in order to work out complete justice, will direct restitution of it with interest. The purpose to which this sum may have been applied can make no difference. We admit that as a general rule this Court will not decree interest on costs because the sum is not ascertained. But here the sum paid was a gross sum, and although paid by way of costs, it was improperly paid. Suppose it had been paid into Court, and had remained there till the House of Lords gave their judgment: it would have been laid out at interest, and the whole of **[114]** it, together with its accumulations, would have been restored to Mr. Attwood. If the plaintiffs have had the use of it in the meantime, instead of its being so laid out, ought that to prejudice the defendant? In cases of this description the Courts have constantly applied the principles which would have originally governed the case to an altered state of circumstances. *Pulteney* v. *Warren* (6 Ves. 72) was a remarkable instance of that. One of the Pulteney family thought he had power to grant a reversionary lease. He did so, and the lease ultimately vested in Lady Cavan. The plaintiff, who denied the right to grant this lease, brought ejectment against the tenants, one of whom was Warren. The proceedings at law were stayed till the question between Lady Cavan and the plaintiff should be decided. The question was determined in favour of the plaintiff, but before he could obtain judgment against Warren, the latter died, by which the plaintiff's right at law to the mesne rents and profits ceased. The plaintiff, however, recovered them in equity against the executors of Warren, upon the ground that his original right ought not to be affected by a mere accident which occurred during the existence of the proceedings, and which ought to have been provided for by the Court. Upon this subject the observations of Lord Redesdale in *Bond* v. *Hopkins* (1 Sch. & Lef. 429) are in point. In the present case, if the Judge who decided it had foreseen the consequences, he would have impounded this money.

Mr. Knight Bruce, Mr. Wigram, and Mr. Sutton Sharpe, for the plaintiffs and the defendant John Taylor. At an early period of the cause (see 1 Younge, 412) John Taylor was a plaintiff, but was converted into a defendant before any injunction was granted or any order made which affected the rights **[115]** of Attwood. The prayer of the petition, therefore, is not confined to the plaintiffs who were the applicants for the order and decree, but extends to an individual who was not an applicant. The appeal in the House of Lords was against an order and decree made in a cause in which neither John nor Philip Taylor were plaintiffs, and the judgment of the House of Lords was given accordingly. The consequence is that the very grounds on which the petitioner founds his right to relief under this petition precludes him from any right of proceeding against John Taylor. If he has any right against John Taylor,

it must be on grounds inconsistent with those upon which he proceeds against the other respondents. If, therefore, he proceed against them, this application, as against John Taylor, must be dismissed with costs.

Again, Mr. Attwood's defence was not that he contracted with the company, but with Small, Shears, and Taylor alone. If he was right in that defence, and the suit was improper, that of itself would justify the decision of the House of Lords, the reasons of particular Lords forming no part of the judgment. Now, the present petition not only attacks the three individuals before mentioned, but it is addressed as against all the plaintiffs, many of whom never contracted with Attwood, and by whom, as he contends, he was not liable to be sued. Much has been said about the restoration of original rights; but how can any such observation apply to any right claimed against plaintiffs with whom he never contracted, whom he never sued at law, and by whom he was not sued—some of whom, in fact, never would have been liable but for this suit? He has made his election at law, and cannot hold liable at law more than those three.

Of the several questions which have been discussed, that of costs may first be disposed of. We shall not attempt to dispute your Lordship's jurisdiction to order the repayment of costs; therefore, except as against John Taylor, **[116]** we shall make no opposition to such an order. But as directing the repayment of costs under a decree reversed is common, so is the asking interest upon such costs uncommon. No instance can be adduced in which any man has had the nerve to ask a court of Justice to do such a thing. The Masters in Chancery have a jurisdiction, depending on certain acts of Parliament, to decide on matters of costs. Appeals from their decisions in these points to the Court of Chancery are frequent, and the Court frequently orders the repayment of costs, but interest is never asked. Rehearings as to costs are less familiar here, because there is a less variety of judges; but the law is so universally settled that no court, without an act of Parliament, can change it. It is a principle, both at law and in equity, that a party shall not have interest except in two cases—1. Where there is an express or implied contract for interest; 2. By way of damages for unjust detention or misuse of the principal. *Higgins* v. *Sargent* (2 Barn. & Cres. 348), *Page* v. *Newman* (9 Barn. & Cres. 378), *Harrington* v. *Hoggart* (1 B. & Adol. 577), *Bushman* v. *Morgan* (5 Sim. 635). This is not a case of contract. Is it, then, a case of unjust detention, the money having been paid under the order of a court of competent jurisdiction? Where there has been fraud, or a misuse of the principal (as in the case of a trustee who has not made the trust fund productive), a court of equity will order restitution with interest. But this is a sum which the Court gave the plaintiffs, upon an opinion, which other judges have thought erroneous, that they were justly entitled to it. Is the difference of opinion among judges to be a ground for fixing a party with the payment of interest?

The other subjects of this petition resolve themselves into three distinct heads: 1st. The instalments of interest brought into Court. 2nd. The instalments not brought **[117]** into Court by reason of the orders of suspension, and which became due between the period of those orders and the decree. 3rd. The instalments which became due between the decree and the reversal of it in the House of Lords.

As to the first class of instalments, we will not question, though we do not admit, the jurisdiction of the Court to order the repayment of them; nor will we dispute the defendant's right to simple interest at 4*l.* per cent. on the sums brought into Court and laid out from the times when they became due until they were taken out. We object, however, to any other sort of interest, or any interest subsequent to that time. [The Lord Chief Baron. Would it not be reasonable that the defendant should have the dividends on the instalments from the time they were invested?] The question is whether or not he is entitled to have the stock specifically as it stood when it was taken out of Court (which consisted of the original investments, together with dividends laid out and relaid out), and interest upon the stock since that time, the stock not having since been productive. We say that he is not entitled to more than the original sums paid into Court, with such interest as has been mentioned. The sums paid into Court are considered not as a payment, but as a security. A deposit is part payment; but when an injunction is granted on the terms of paying money into Court, the party pays it in as a security only, and not as payment. The money lies in medio as a security for the demand. Suppose the gain had happened the other way, the question is whether the loss would have been mutual. If it were

payment Mr. Attwood must have suffered by any fall in the funds which might have taken place. In *Broughton* v. *Pitchford* (6 Madd. 295) the **[118]** Court exercised the discretion of giving 4l. per cent. interest on the money which was paid out of Court to the defendant, but it did not give the dividends which had accrued while the money was in Court. The circumstance that the stock had been productive was a reason for giving a collateral thing, namely, the interest; but not for giving the specific stock itself. That was a stronger case, in many of its circumstances, than the present. [The Lord Chief Baron. That case is distinguishable from a case where, if any thing is due, a specific sum is due. There something was admitted to be due.] That case, and the case of *Taylor* v. *Waters* (1 Myl. & C. 266), are authorities to shew, that as the risk of the investment would not have been Mr. Attwood's, so the benefit cannot be his. Compound interest has never been given except in *Raphael* v. *Boehm* (11 Ves. 92), a case which went a great length and has seldom been cited without disapprobation. In the grossest case of misapplication of money, as where a trustee has taken an infant's money and disposed of it, judges have refused to give compound interest, though, if in such a case the money were specifically invested, you might follow it.

Next, as to the instalments of interest falling due between the orders for suspension and Lord Lyndhurst's decree. The success of the cause cannot affect the interlocutory proceedings. They were obtained by Mr. Attwood's own seeking, and must stand as before. If he, for his own convenience, postponed the hearing, he is cut out of the intermediate time between the orders and the hearing. It is as if the condition for that time had never been imposed. Besides, supposing that this bill ought to have been dismissed, and the injunction dissolved at the hearing, is there any case in which, by reason of an injunction being dissolved, the Court has given the party what he could not otherwise obtain in equity without bringing his **[119]** suit? In such case he is remitted to his remedy at law, or if he have no legal remedy, he must file his bill. In *Brown* v. *Newall* (1 Myl. & C. 572) the Lord Chancellor says that "where by the interposition of the Court to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, the Court will give him a remedy equivalent to that from which the interposition of this Court has debarred him." But further on he says that the remedy at law so lost by the defendant "constitutes an equity to be administered in a suit to be instituted for that purpose, and giving each party an opportunity of stating his case." That view of the subject is corroborated by the case of *Furnival* v. *Bogle* (4 Russ. 142), where, although the injunction was dissolved, it was held that the money in Court should not be paid to the defendant till he had obtained judgment in the action. In *Bond* v. *Hopkins* (1 Sch. & Lef. 429) the equity was enforced by suit. The case of *James* v. *Biou* (ante, p. 111) is no exception to this rule. Lord Brougham in that case did what could not be avoided; he kept the party to his terms. We admit that where an injunction has prevented the payment of interest on a bond till it has arrived at the penalty, the Court will interfere; but we deny the right of awarding the payment of money on which there has been no adjudication in a case where the bill has been dismissed, and the power of the Court has altogether ceased. The defendant here has still his remedy at law, and Small, Shears, and Taylor, have a right to defend themselves at law. Suppose they have a case of set-off; is that a proper defence at law, or will your Lordship take the account in this dismissed suit? By the dismissal of this bill, the power of the Court is at an end, except as to money remaining in its hands, and Mr. Attwood is left with his legal rights only.

[120] But even if this were not so, and the Court had jurisdiction to order this money to be refunded, it does not follow that the Court would exercise the jurisdiction. Although the plaintiffs might not be in a situation to rescind the contract, yet Attwood might not be in a situation to enforce it; and would the Court in such case order the money to be paid to him? Mr. Attwood has dismissed his own bill; yet he asks the Court to give him that relief which he might or might not have had if he had prosecuted his suit to a hearing. He asks the Court to consider that he would have succeeded in his suit. When the order of February, 1829, was made, there were two causes in Court; one to rescind, and the other to enforce, the contract. If both had been brought to a hearing, and the plaintiff's bill had been dismissed while the defendant had got a decree, there was then a fund in Court to answer the demand of the plaintiff in the cross bill. But supposing both bills had been dismissed,

as in *The Marquis of Townshend* v. *Stangroom* (6 Ves. 328), would the Court have allowed even the money in Court to be paid to any party but the party who had paid it in? If the Court had told Mr. Attwood that he had no equity on his own bill, it is clear that it could have made no order in his favour. [The Lord Chief Baron. What you say may be true as a general proposition; but here he had obtained verdicts and judgments at law, and I think the Court would have considered that his right at law was established.] The question still would be whether he should not be left to his further remedies at law. Upon the whole, we submit, upon this part of the case, that to enable the Court to order the repayment of these monies, the injunction ought to have been granted upon the terms, not only of the money being brought into Court, but of "the Court dealing with it at the hearing, notwithstanding the plaintiff's bill might be **[121]** dismissed;" and that the omission of the latter terms in the order renders it impossible for the Court now to order these monies to be refunded.

But supposing the Court should be of opinion that it has jurisdiction to make this order, the next question is whether interest is payable on the sums to be refunded. That question stands on the same footing as the interest on costs, and on other monies paid by the authority of the Court, as in *Gittins* v. *Steele* (1 Swanst. 199). When has it ever been decided that a party receiving money by the adjudication of a Court in his favour, if called upon to refund, has been made to pay interest for what the Court has paid into his hands? If the money here had been traced, the case might have been different. But non liquet what the company did with it. Where, then, is the contract for interest? Where is the conduct that comes in lieu of contract, and gives the Court a penal jurisdiction? There is no impropriety of conduct in conducting an unsuccessful suit. Judges have come to a different conclusion on the same materials, and it is impossible to make the parties suffer from their acts. Upon the general question of interest, *Tebbs* v. *Carpenter* (1 Madd. 290), *Ashburnham* v. *Thompson* (13 Ves. 402), *Heathcote* v. *Hulme* (1 J. & W. 122), and *Page* v. *Broom* (4 Russ. 6), are in point.

Lastly, with respect to the instalments coming due after the decree and before the reversal; there can be no question that the Court has no jurisdiction to order their repayment, because it is admitted that your Lordship can only make such orders as might have been made at the hearing.

Mr. Serjeant Wilde, in reply. The general question is whether an individual who had a clear right to recover at **[122]** law an annuity or (what is the same thing) certain payments due at specific times, and who is intercepted while diligently pursuing that right, by an injunction issued under a bill filed on the ground of fraud, shall, upon the evidence of fraud failing, and consequently the bill and injunction falling to the ground, be deprived of an equivalent for that which the injunction has wrested from him.(*a*) The equity of the case is that Mr. Attwood's legal right being clear, and there being no affidavit by these plaintiffs suggesting that they have any defence at law, he has a right to be placed in the position in which he would have been if his legal rights had not been obstructed. The injunction was granted on the terms of the money being paid into Court. The time for payment was afterwards extended, but the right of payment under the first order remained. What your Lordship does now is part of the duty of the Court which followed upon the dismissal of the bill. The hearing in the House of Lords was the continuation of the suit. It was the final hearing, and was the hearing referred to in that order: for no hearing reversed could be considered as a final hearing. We do not bring the case beyond that, because your Lordship is sitting in assistance of the order.

The clear legal right of the defendant being thus intercepted upon a condition, the general equity in question has been called for. What are the answers presented to that claim? 1. That the defendant's own bill having been dismissed, the order prayed for cannot properly be prosecuted. 2. That the plaintiff has not established his right at law, and therefore has no equity. 3. That supposing the defendant has the equity insisted on, still that the remedy he proposes to give effect to that equity is wrong, and must require a new suit. 4. That supposing he has a right to the money in Court, yet that interest on **[123]** it ought to stop when the money was paid out, and that the party ought not to suffer for the error of the Court. 5. That as to

(*a*) See the case at law, 1 Man. & Ryl. 246.

the suspended instalments, the defendant has obtained no judgments at law, and therefore the money not being in court, he has no right to payment of them on this petition. 6. That the sum of 9760l. was paid as costs, and must follow the fate of costs. 7. That the order is wrong, as applied to John Taylor. [The Lord Chief Baron. The change in the record as to time was made for the plaintiffs' convenience, and ought not substantially to make a difference. They say, however, that the present plaintiffs were not the parties with whom you contracted.]

These are the technical objections which the plaintiffs raise to the defendant's equity. They make no observations shewing that this is money which he ought not to receive or which he has not lost, or that his application is contrary to justice and good sense. As to that, the plaintiffs' case remains untouched, and they rest on technical points. Technical points, however, are not framed to defeat justice, but to aid it. It is true that where a plaintiff has a clear legal remedy, and he is delayed in the prosecution of it by injunction founded on a suggestion of equity which appears to be unfounded, the Court will, in construing the order upon which the injunction is founded, give relief or an equivalent (as the Chancellor says) for what he has been deprived of by injunction? The Chancellor says, that if this be not true he would not grant an injunction at all (2 Myl. & C. 570). It is unnecessary to state the enormous sums of principal and interest which this injunction has withheld from Mr. Attwood; yet the object of an injunction is to preserve the rights of all parties unprejudiced. Can a man, by a suggestion of fraud receive this injury and obtain no redress? [The Lord Chief Baron. They deny that he **[124]** can obtain it in this particular suit.] They do not deny that he ought to recover these sums in some shape or other, and if the right to the remedy is admitted, there will be no difficulty as to form. The question whether, where it is clear that the legal remedy might be prosecuted, the Court will not grant an equivalent for what has been withheld by injunction in that suit, has been resolved by many of the cases which have been already cited: *Morgan* v. *Morgan*, *O'Donel* v. *Browne*, *Bond* v. *Hopkins*. In *James* v. *Biou* (ante, p. 111) the plaintiff was held not entitled to redeem, and was ordered to account for the rents and profits, during the period of his possession, with interest. In *Broughton* v. *Pitchford* (6 Madd. 295), the defendant brought an action at law for a sum due on an account. An injunction was granted on the terms of the amount being brought into Court. The amount was invested. The defendant established his demand against the plaintiff, but not to the extent he had claimed at law. In that suit, having lost no legal remedy, and having recovered no judgment, he was held entitled to the amount which he had established to be due to him, with interest. That was given to him in lieu of his remedy at law. It is said that *Pulteney* v. *Warren* (6 Ves. 73) and *Bond* v. *Hopkins* (1 Sch. & Lef. 429) were cases in which new suits were brought; but they were not brought because relief could not be had in the old ones. They were only supplemental suits, and not treated as new suits for the particular purpose of establishing this equity. In *Brown* v. *Newall* (2 Myl. & Cr. 558) the Lord Chancellor held that the party was not entitled to an injunction at all, and therefore that the condition of obtaining the injunction was a nullity.

The case, however, does not depend solely upon this general rule of equity, but upon the construction of the **[125]** order of February, 1829. It was a condition, of course, in that order, that the money should be brought into court until the hearing. The plaintiffs contend that postponing the time of payment destroys the condition. They admit that the money in court ought to be repaid with interest, but they contend that as to the postponed instalments they have escaped payment altogether. But if the postponement was intended to be a discharge of the condition, why was it not so expressed in the order? If such had been the intention of the parties, the direction would have been that so much of the order as directed payment into court of the instalments should be discharged. So far, however, were the subsequent orders a discharge of the former order, that they appear to be a renewal of the condition.

If these main objections urged by the plaintiffs are answered, the rest may be disposed of more speedily. If the legal right of the defendant is clear, it follows that both the fund in court and the monies of which payment has been suspended must be considered as the fruit of those judgments, which he could never have obtained but for the injunction. If that be so, the rule of law as to interest upon judgments will

be adopted, by analogy, in this court. In *Hart* v. *Cradock* (6 Law Journ. Chan. Rep. 358) the Vice-Chancellor, after observing that the parties who had drawn up the order in that case had assumed that interest would be due on the securities given for the annuitants, proceeded to affirm that order, and in doing so, his Honour observed that the provisions of the stat. 3 & 4 Will. 4, c. 42, s. 28, which allows interest to be given at common law on debts circumstanced as therein mentioned, must necessarily be adopted in courts of equity. In the same manner your Lordship, by analogy to the statute of Hen. 7 (3 Hen. 7, c. 10; 19 Hen. 7, c. 20), which **[126]** gives interest on judgments, will give the interest which the plaintiff now claims.(*a*)

But it is asked, are the plaintiffs to be made to pay interest upon sums which have been paid to them under the authority of the court? In *Lewes* v. *Morgan* (5 Price, 42; 3 Cl. & Finn. 159) the defendant, during the life of Lewes, was ordered to pay 8000l. into court as the balance due from him. That sum fell into a fund of 30,000l., which had been applied with the sanction of the court to the payment of debts, some of which bore interest and others not, and costs. It turned out that the order was erroneous, and it was reversed. In the meantime Lewes died, and application was made to this court for restitution of the 8000l. with interest; and the order was made. If it be said that that was a case of circumstances, so is the present. If the plaintiffs have founded the bill against the defendant on a charge of fraud, and that charge has failed, why are they not to suffer from the error of the judge? It is not necessary to shew that the funds which they have received have been productive—it is sufficient to shew that they might have been productive. But here we have actual evidence that the fund which was paid out of court to them was in a productive state when it came into their hands; and as to the suspended payments, why is it to be assumed that the company did not make interest on 16,000l. a year in London? After all, these funds are rather to be dealt with as matters in the cause, than as having been paid out under an erroneous judgment of the Court. As to the interest on the 9766l, the petitioner claims it, not in the character of interest on costs, but as interest on a sum of money which he was wrongfully compelled to pay, and which ought to be restored to him.

THE LORD CHIEF BARON. The points which have been argued are of great importance, and I shall of course take **[127]** time to consider my judgment. It appears to me at present that the great question turns upon the construction of the orders. If the condition contained in the first order for payment of the money into Court was altogether discharged by the subsequent orders, then of course there is an end to the jurisdiction in this Court to make any further order after the bill has been dismissed. But I should think that the words, "until the hearing," were intended to reserve a jurisdiction to the judge in regard to those payments, until his mind should be made up as to the general merits of the cause.

Upon that part of the case which relates to the right of the defendant in equity, where the bill has been dismissed, to recover in that cause any equivalent for the losses which he has sustained by the orders of the Court, or whether he ought to take another mode of proceeding for that purpose, this case seems to me to be distinguishable from *Brown* v. *Newall*. If the order here had merely been for an injunction, and, after the bill had been dismissed and the injunction dissolved, the judge had gone on and ordered the money to be paid to the defendant, that would have been the case of *Brown* v. *Newall*, and no doubt such an order would have been irregular. But, if the plaintiff bring the money into Court as the price of his injunction, as he does in this case, it does not strike me at present that an order for the payment of that money over to the defendant, upon the dismissal of the plaintiff's bill would be inconsistent with the Lord Chancellor's decision in *Brown* v. *Newall*.

June 1st.—THE LORD CHIEF BARON. This is an order from the House of Lords, after dismissing the bill of the plaintiffs against Mr. Attwood with costs, that the Court of Exchequer should make all the other orders that are necessary for the purpose of justice, which I take to mean that the House of Lords have devolved upon the Court of Exche-**[128]**-quer that duty which, properly speaking, would have fallen upon the House itself, to do justice between the parties according to the view which that House entertained of the whole merits of the suit. Now, nothing is more established as a principle than that it is the duty of a Court of error or a

(*a*) See *Lind* v. *Marquis of Donegall*, 1 Lloyd & Gould, 227.

Court of appeal to give the precise judgment that the Court below ought to have given, as nearly as circumstances will permit; I say as nearly as circumstances will permit because it must often happen that between the time of giving the judgment below and reversing that judgment events have occurred which make it impossible that the Court can place the parties precisely in the same situation in which they stood at the time of the original judgment. That occurs not only in cases of appeal from the decrees of courts of equity, but also upon writs of error in the courts of common law. The Court of error is bound to give the same judgment which the court below ought to have given; but if it happen that the judgment below has been executed, as very often is the case, the sheriff having taken possession of the goods of the defendant below, and having sold them and paid the amount to the plaintiff, it is manifest that the Court of error, in reversing the judgment, cannot place the parties precisely in the same situation as they stood below: all they can do is simply to reverse the judgment; and, by nullifying the proceedings on which that writ of exception was founded, the writ of execution itself becomes void, the consideration for which the money was paid to the plaintiff below becomes void, and the party may recover it back again or maintain an action of trespass to recover damages for the injury done by the execution of the writ. However, with that and one or two other executions of the same nature, a court of error or a court of appeal ought to place the parties as nearly as possible in the precise situation in which the court below ought to have placed them. I conceive, therefore, that the duty has developed upon me in this case to give the **[129]** same sort of judgment that the House of Lords thought that the Chief Baron ought to have given when the cause was decided below. Now, that judgment involves not only the interest of the parties affected by the precise terms of the decree, but all orders consequential upon the decree. It will not, of course, apply to intermediate and interlocutory orders made in the earlier parts of the cause in which the parties acquiesced, and upon which they have acted; but, under it, I conceive that all those orders for the purpose of doing justice, which ought to have been made at the time the decree was made, I now not only have the power, but am under the obligation of making. The question then is what my Lord Lyndhurst ought to have done if, instead of allowing the plaintiffs' bill and making the orders consequent upon that judgment, he had dismissed the plaintiffs' bill with costs. Of course it will be considered that any part of the argument, which was addressed rather to the character and ability of the judges than to the merits of the case, must pass for nothing; entertaining, as I do, the profoundest respect from my Lord Lyndhurst's decisions, and professing to have no opinion at all myself upon the merits of his judgment in this case, but considering myself bound to hold, under all the circumstances, that he ought to have dismissed the bill with costs instead of making the decree which he thought it his duty to make.

Having premised these general observations, I would rather take the case not exactly in the order it stands in this petition, but begin first with the question of costs. It appears that a sum of 9766l. 1s. 3d. were the costs taxed to the plaintiffs, which have been paid by the defendant, Mr. Attwood, under the decree which is now set aside. Now, I think there can be no doubt, supposing that the decree was simply reversed and the bill dismissed with costs, that Mr. Attwood might recover those costs at law, because the consideration on which they were **[130]** paid has failed. It is also very clear, and indeed it was not disputed in argument, that the court has jurisdiction to order those costs to be returned. The petition, however, is not confined to the prayer that the costs should be returned; it asks that interest upon those costs should be given. Now, I must own that I see no principle upon which I can possibly order any interest upon those costs. This is one of the cases in which from the circumstances that have intervened, the court finds it impossible to place the parties in precisely the same situation without doing that which a court of equity has never yet done. If a court of justice, by mistake, orders a sum of money to be paid by one man to another, that mistake may be corrected; but when was it ever found that the party who had received the money under lawful authority, who was no wrong-doer, and who consequently had a right to retain it and do as he pleased with it, should be obliged, when he refunded the principal, to pay interest upon it? A court of equity will never decree interest except upon a contract that bears interest, and which it is about to enforce, or where a party is made to pay interest for some abuse of a privilege in retaining the money. Thus, in the case of an executor or trustee, who makes use

of the money with which he is entrusted for his own benefit, instead of applying it to the object of his administration, the court will compel him either to pay interest upon the money, or to account for the profits he has made upon it—one or the other. There are also one or two excepted cases of a peculiar character, where the court will award interest even upon the arrears of an annuity; as in the case decided by Lord Thurlow,(*a*) where the court itself having intervened by injunction to prevent the party receiving his annuity, and where the party who had to pay the money had improperly retained it, did justice to the **[131]** party entitled to it by awarding interest upon the arrears of the annuity in the meantime. Neither of the principles, however, which I have stated apply to the present case. Mr. Attwood has paid this money under an authority which was lawful at the time the plaintiffs received it. It is very reasonable they should give it back again, because that authority is taken away and the foundation of the payment is gone; but I do not see on what principle I should award that he should pay interest upon that money. It has been said, and I believe very justly, that there is no example to be found of any decree giving interest upon costs; but whether it be costs or any thing else, if money be paid as a consequence of the decree, and legitimately and properly paid, I do not see, when the decree is reversed, how the party receiving it though he be bound to return the principal, is bound to pay interest upon it; therefore I think that part of the petition which relates to costs must be complied with, to the extent of returning the sum of 9766l. 1s. 3d., but that interest upon that sum cannot be granted.

I come next in order to the important sum which consists of the aggregate of those half yearly instalments of interest, which became due to Mr. Attwood under the contracts between the parties, and which, but for an order suspending the payment, would have been paid into this court. The question upon that part of the case arises in this manner: the contract between Mr. Attwood and the plaintiffs in this cause, or some of them, and the defendant, Mr. Taylor, bound them to pay to Mr. Attwood the half yearly sum of 8125l., being the calculated interest upon the principal which remained due to him, until the principal should somehow or other be paid. The first half yearly instalment of interest was paid to him. He recovered the four next by bringing four actions. He brought a fifth action, and whilst that was depending, and after the suit was instituted, an application was made to **[132]** the court to enjoin him from proceeding at law to recover that instalment; and an order was made for that purpose upon condition of the parties bringing the money into court. By the same order it was further ordered that he should be enjoined from proceeding to recover any subsequent instalment, the plaintiffs bringing into court half yearly the instalments that accrued due, within a week after the day which was originally fixed for their payment. Under that order several instalments were paid into court, but at a certain period of the cause, Mr. Attwood requiring some indulgence as to the time of completing his evidence, a condition was engrafted upon his application, or upon the order granting him that indulgence that the plaintiffs should not be bound to bring in the instalment then depending on the precise day when it was due by the order of the court, but they should have a delay until a certain day which was fixed by the order. Before that day arrived he required further indulgence, and upon an application for that further indulgence, a further condition was engrafted upon the order for that indulgence to this effect—that the period for paying the instalments under the first order, which was half yearly, should no longer be considered as the period for the payment of them, but that the payment of them should be postponed until the hearing of the cause. Now the question is whether that order was, as is contended by the counsel for the plaintiffs, an absolute abrogation of the original order to pay; or whether it was an order only to postpone the payment until a time that was uncertain. There had been an order to postpone one payment until a given day. Nobody can doubt that if nothing had occurred before that day that order would have bound the parties to pay the money upon that day; but before that day arrived, something else occurring, it was thought expedient to extend the order to all further payments, and instead of appointing a particular day when any one of them, or all of them should be made, that they should not **[133]** be made until the hearing of the cause. If it had been the intention of the judge to say, I shall now continue the injunction unconditionally, and make no order at all about the payment of the

(*a*) *Morgan* v. *Morgan*, 2 Dick. 643.

instalments which the party at law was seeking to recover, or might seek to recover; then, undoubtedly, that order would have been absolute, and the Court could not have reserved any jurisdiction at any time to direct the money to be brought into Court: but where the Court having had before it an order for the payment of money on a particular day makes an order that the payment of that money shall not take place until the hearing of the cause, can it be contended that the Court meant to abolish that order altogether? It appears to me, I own, that the intention of the Court must have been to have reserved to itself a discretion whether upon the hearing of the cause the payment should be made or not. In this Court, and in all Courts of equity, where a party seeks an injunction to prevent a sum of money being recovered from him at law, and against the recovery of which he has no legal defence, the general rule is that he should bring the money into Court. That I presume will not be disputed, but at all events the Court has the power so to order it, and if the Court having made that order afterwards modifies it by delaying the period when the money shall be brought into Court, it cannot be inferred from that circumstance that payment is not to be made at all, even though the period for payment fixed by the order may be uncertain. Nobody can doubt that if the cause had been fixed to be heard on a particular day, and the order, instead of using the words "until the hearing of the cause," had said "until the first day of Michaelmas Term," the money then must have been brought into Court. I conceive that where a judge, from the view he thinks it likely he will take of the cause, may imagine that on the hearing of the cause, it is very probable he shall not enforce the order at all, and that in the meantime he might do injus-**[134]**-tice to the parties, if he forced them to do that which afterwards he might consider unnecessarily and improperly done by him, he might very well reserve to his own discretion, to be exercised at the time when he should decide the cause, whether he should order the money to be paid into Court or not. That I conceive to have been the intention of this order; and if, having made this order, I had been sitting here, about to give a judgment in favour of the defendant, and had therefore found myself bound to dismiss the bill, could I have hesitated then to say, under those circumstances, "The cause is now heard, the time is come upon which the order operates, and you must now bring that money into Court?" It appears to me on all the principles of justice that that would have been necessary: but, at all events, I cannot doubt that that is the true construction of this order.

Nor do I think that the exercise of such an authority as I have mentioned in the least trenches upon the decision, which was very much discussed, of *Brown* v. *Newall*, decided by the Lord Chancellor, and in which I fully concur. I think the principles laid down in that decision are perfectly clear, and I shall be exceedingly sorry indeed, and it must be a great error of my own judgment, if any order I pronounce in this case should in the least intrench on that decision. I take that decision to mean this, that a plaintiff in equity who is under no order or condition which the Court has imposed upon him, to do anything for the benefit of the defendant in equity, cannot, if his bill is dismissed, be compelled by a subsequent order of the Lord Chancellor to give relief or satisfaction to the defendant for some matter not in the jurisdiction of the Court. That was a case of an action of ejectment. The defendant at law filed a bill in equity, to restrain the party from trying his ejectment. When the Vice-Chancellor first heard the case, he might, if he had been satisfied that the party had no defence at law, have ordered **[135]** him to confess a judgment—making that the condition of granting the injunction; but he did not do so; he simply granted the injunction, restraining the party from going to trial. Afterwards, when he came to investigate further the merits of the case, he found reason to discharge that injunction: but having discharged the injunction, what jurisdiction had he to order the plaintiff in equity to confess a judgment at law? It is clear that he had no jurisdiction at all. He might have gained the jurisdiction by making it a condition of the original order, either by obliging the plaintiff in equity to confess the judgment at once, before he granted any injunction to stay execution, or he might, for aught I know, have so modified the order as that the plaintiffs should have been bound to submit to the order to give judgment in case he thought he was entitled to it. Nothing of that sort was done, therefore that was the naked case of an order made to give relief against a plaintiff in equity, against whom no relief was sought, which was overstepping the jurisdiction of the Court. And so I say here. If the order to suspend these payments is to receive the construction put upon it by the plaintiffs'

counsel, and amounts to an absolute discharge of the order to pay the money into Court unconditionally, then undoubtedly I could not in this case give relief to the defendant against the plaintiff by ordering him to do that which by no previous order he was bound to do. But I construe this order in the way I have already stated, as an order retaining the jurisdiction; and in that case I am to consider what a judge in equity would have done who found himself bound, after a discussion upon hearing the cause, to come to a decision that the bill ought to be dismissed with costs. Why, what had that judge been doing? He had been for years, by his injunction, restraining the party from proceeding at law to establish a just claim; or rather from enforcing a claim which had been already established at law, to which the parties had submitted at law, [136] and which it was too late for them then to object to; and it had been a condition of his injunction that the plaintiffs should bring the money into Court, though not until the hearing of the cause. Then, upon the hearing of the cause, what would have been the consequences? He must have made a very improvident order indeed, unless he meant to retain to himself that jurisdiction which enabled him to do justice between the parties, or rather to remedy the injustice he had been doing. It appears, therefore, to me, on that part of the case, that I am bound to consider myself now at liberty to do that which Lord Lyndhurst ought to have done if he had dismissed this bill with costs, namely, to order the money to be brought into court.

What I have now said applies to those instalments of interest which became due previously to Lord Lyndhurst's decree. As to the instalments which became due subsequently to that time, I consider that I have no jurisdiction. It appears to me that I have no power to deal with any other instalments than those which Lord Lyndhurst could have ordered into court at the time he made his decree. It has been said that the date of the dismissal of the bill is the judgment of the House of Lords; but I do not think so. There are no subsequent rights accruing to either party between the time of the decree and its reversal. As to those instalments, therefore, the defendant is remitted to his remedy at law.

The next question is whether I have any authority to order interest to be paid on the instalments which the defendant is now to receive? I am of opinion that I have not. The interest asked for is interest from the time when the instalments became due. Supposing Lord Lyndhurst had ordered, as he ought to have done, the instalments due at the time he made the decree to be brought into court, he could not have ordered interest upon them. He had allowed the parties to retain the money, and therefore he could not have ordered interest upon them; [137] and if he could not do it, I cannot do it. The defendant was entitled to nothing more than the aggregate amount of the instalments then due. The interest upon these instalments since that period presents a somewhat different question, but I must come to the same determination upon that also. I consider Lord Lyndhurst's decree as equivalent to an order on his part that the money should remain in the plaintiff's hands, and that therefore they have rightly kept it, and cannot be charged with interest upon it. Upon that part of the petition, therefore, I am of opinion that the defendant, although entitled to have the aggregate amount of the instalments due at the time Lord Lyndhurst made his decree, is not entitled to interest upon those instalments.

I now come to the question which I have thought it most convenient to consider last, though it stood first in the petition, namely, as to those instalments which were actually brought into court. It was contended by Mr. Knight Bruce, in a manner which made a strong impression upon me, that those instalments were brought into court only by way of security; and in order to prove that, he put the case of the money having been invested in the funds, and having, by a fall in the price of the funds, turned out to be less upon the whole, on the termination of the cause, than Mr. Attwood was entitled to, and he asked whether, in that case, the Court could have said that he was bound to take only the fund in court, and be satisfied with that? That certainly is a very ingenious and striking way of putting it, but at the same time I think it is fallacious. The cases which were adverted to in order to support that view of the question do not, I think, bear any analogy to this. One was the case of a mortgagee seeking to foreclose, and the mortgagor bringing the money into court, but praying an account. Now he brings the money into court, not because he admits that money to be due, but for the purpose of shewing the Court that [138] he is ready to do all that justice can require of him. He, indeed, prays an account to

be taken ; but if, upon the account being taken, it turns out that much less is due to the mortgagee than he claims—that he has in fact received from the rents and profits a great deal more than will reduce the interest of the mortgage—it follows of course that the money brought into court is only a fund upon which he is to draw for the balance, and he can take no more than the balance which is due to him. Another case was put of a party who, having an action brought against him at law for a sum of money, files a bill in this Court, alleging it as a matter of account, and offering to bring the amount for which the action is brought into court, insisting, however, that a less sum is due to him. Now it is evident, in that case, that if the Court entertains jurisdiction, and the money is brought into court, it is only brought in to secure such balance as may ultimately be found due to the party entitled to it on taking the account. Those cases appear to me to bear no analogy to this. This is a case in which the money is admitted to be due provided the contract is binding—provided the contract is one that a court of equity ought not to set aside. The court of law has already determined by its judgment that the plaintiff at law is entitled to recover. There is no dispute about the sum ; there is no quantum in dispute at all. It is admitted that if he is entitled to any thing, he is entitled to these instalments exactly according to the stipulation. No account is to be taken in this court about it, and therefore the plaintiffs in equity are ordered to bring that very money into court which, without that order, must have gone into the defendant's pocket. Then, when it comes into court, what does the Court do with it? By common consent of all parties, by arrangement—it might have been without consent, still nobody can suppose that any objection was made to it—the money is brought into court and directed to be invested, and the dividends from time to **[139]** time to be invested so as to allow the fund not to waste, but to accumulate. For whose benefit is that accumulation made? Can it be said for a moment that if the Court, after many years during which the cause was depending, should come to a decree to dismiss the bill with costs, the intention was that the money should accumulate for the benefit of the plaintiff whose bill is dismissed, and that the defendant should take merely the naked instalments? That proposition appears to me quite preposterous. It is supposed that the Court is under some doubt whether that instalment is really due to the plaintiffs at law or not. If it is due to him, it is due to him on a certain day. The money is to be brought into court on that day. The Court orders it to be invested. Invested for whose benefit? For the benefit of the party who, at the hearing of the cause, shall be found entitled to it, whether it be the plaintiffs or defendant.

It appears to me, therefore, that the investment and the accumulations were clearly made in this case for the benefit of Mr. Attwood. If they had fallen short by a fall in the price of the funds, as Mr. Knight Bruce put it, of the aggregate amount of all the instalments due to him, he might have said that he was not sufficiently paid. I will not give a definite opinion upon that subject ; but it is quite consistent with my opinion as to the reverse of the case, for the Court to have said to Mr. Attwood that they could not deprive him of any remedy he had at law to recover the balance, and upon this plain principle—that the plaintiffs having, by their injunction, prevented Mr. Attwood recovering the money at law, and having brought the money into court, could not bind him to take less than the amount whenever they paid it, which, by being brought into court, they had admitted he was entitled to. However, there is no occasion to pronounce any opinion upon that part of the case, because the circumstances do not give rise to the necessity of any decision upon it.

[140] Now, the money being brought into court and being the property of Mr. Attwood, being a fund bearing interest, and he being entitled, according to my judgment, to have that stock transferred to him at the moment when the decree was made dismissing the bill with costs, it becomes important to ascertain what has become of it in the meantime? If the stock had remained untransferred, and the dividends had been received in the meantime by the plaintiffs, I should have said that he was entitled to have the stock transferred back to him, and the dividends in the meantime paid to him. But if, as is suggested, the stock has been sold, the sale of the stock and the application of the money may give rise to a different question. No blame attaches to the plaintiffs for selling the stock when it was transferred to them, if the fact was that they sold it ; but whether or no they should account for interest in that case, and in what shape, and to what extent, they should account for it, I own are matters which at present press upon my mind with some difficulty. But I should like to know the

precise state of the facts before I come to any determination upon that question. So far as respects that, therefore, unless the parties can agree on a statement of facts, I shall refer it to the master to make some inquiry upon that subject.

Before I dismiss the case, it may be right to notice two objections, in point of form, which have been made to this application. One is, that the application is not made by Mr. Taylor, who, being one of the trustees for the plaintiffs, has been made a defendant to the suit, having been originally a plaintiff. Now, it is observable that Mr. Taylor was made a defendant pro formâ only, that being stated in the very order for that purpose. The parties who made the application for an injunction, who were the plaintiffs, undertook to bring in the money, and did bring it in. Therefore, I do not think it lies upon them now to object that Mr. Attwood, and the defendant in the cause [141] with whom he is connected, presented this petition, and that Taylor does not join in it. Taylor is substantially concerned with the plaintiffs in the cause. I think, therefore, that this matter of form does not at all impede the course which I think it my duty to take upon this occasion.

The other objection is that this application is not made in both the causes in which the original order was made. That seems to me a matter of indifference. It is in the suit in which Mr. Attwood was defendant in equity that every thing substantially has been done. In that suit the original decree has been made, and a decree has since been made dismissing the plaintiffs' bill with costs. Under these circumstances, I do not think that any point of form intervenes to prevent the making this order. I think, therefore, that the costs must be repaid without interest; that the instalments due up to the time when Lord Lyndhurst ought to have made the decree dismissing the bill with costs, which was the time of the hearing of the cause, ought to be paid to Mr. Attwood by the plaintiffs; that for the other instalments due since that time he is remitted to his remedy at law; that no interest ought to be paid on any of the instalments; and with respect to the stock, I must reserve making any order till the parties are so good as to inform me (if they can, by agreement) how the stock has been disposed of, and what has been done with the produce of it.

Order accordingly.

It was afterwards stated to the Court, by consent of both parties, that the stock had been sold soon after it had been transferred to Robert Small. It was therefore ordered that the amount of cash realized by the sale, but without interest on that amount, together with the sum of 1483*l.* 9*s.* 10*d.*, should be paid to Mr. Attwood.

[142] SMYTH *v.* FOLEY. June 25th, July 5th, 1838.—Under a marriage settlement lands were limited to the use of the intended husband for life, with remainder to trustees to preserve the contingent remainders, with remainder to the intended wife for life, with remainder to trustees for the term of 500 years, with remainder to the first and other sons of the marriage successively in tail, with remainder to the daughters in tail; and the trusts of the term were declared to be for raising portions for the younger children at 21, by sale or mortgage of the term. The marriage took effect, and the wife died, leaving her husband and several children of the marriage, both sons and daughters, surviving her, who all attained the age of 21: Held, that the younger children were entitled to have their portions raised by sale or mortgage of the term in the lifetime of their father, the tenant for life.—In the construction of marriage settlements, Courts of Equity will decline to act upon any views of the expediency or inexpediency of the provisions in such settlements.

[S. C. 7 L. J. Ex. Eq. 34.]

By indentures of lease and release dated respectively the 19th and 20th of April, 1802, being the settlement made in contemplation of a marriage between Richard Chambers and Mary Elizabeth Gray, a certain messuage and lands, situate in the parishes of Cradley and Isbitch, in the county of Hereford, were, in consideration of the intended marriage, and of 5000*l.*, the fortune of Mary Elizabeth Gray, and for the purpose of providing a jointure for M. E. Gray, in case of her surviving her intended husband, and for the other ends, intents, and purposes &c., conveyed and assured to Harry Lechmere and Robert Gray, their heirs and assigns, to the uses and upon the trusts following,—that is to say, to the use of Richard Chambers the elder (the father

of the said Richard Chambers) until the solemnization of the said intended marriage, and after the solemnization thereof, to the use of the said Richard Chambers and his assigns for his life, without impeachment of waste, with remainder to the use of the said Anthony Lechmere and Robert Gray and their heirs, during the life of the said Richard Chambers, upon trust to preserve the contingent remainders, with remainder to the use of the said M. E. Gray for life, in bar of dower: and from and after the decease of the said M. E. Gray, or other sooner determination of the said estate, then to the use of John Barnaby and John Surman, their executors, &c., for the term of five hundred years, without impeachment of waste, upon the trusts thereinafter declared; and from and after the expiration or sooner determination of the said term, and subject thereto, to the use of the first and other sons of the marriage successively in tail, with remainder to the use of the daughter and daughters of the marriage, equally to be divided between them (if **[143]** more than one) as tenants in common in tail, with cross remainders between them in tail, with remainder to the use of the said Richard Chambers, his heirs and assigns.

The instrument then proceeded in the following terms:—"And as to, for and concerning the said term of five hundred years hereinbefore limited to the said John Barnaby and John Surman, their executors, administrators, and assigns as aforesaid, it is hereby declared and agreed that the same is so limited to them upon the trusts, and under and subject to the powers, provisoes and agreements hereinafter expressed and declared concerning the same (that is to say) in case there shall be an eldest or only son, and one or more child or children of the said Richard Chambers the younger on the body of the said Mary Elizabeth Gray, his intended wife, to be begotten, then upon trust that they, the said John Barnaby and John Surman, their executors, administrators, or assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, such sum or sums of money for the portion or portions of all and every such child or children (other than and except an eldest or only son) as are hereinafter mentioned, that is to say, if but one such child, the sum of 3000*l.* of lawful money of Great Britain for the portion of such only child, and if two or more of such children, then the sum of 4000*l.* to be equally divided between them, if more than one, share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of 21 years, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of 21 years, or day or days of marriage, which shall first happen. And upon this further trust that, in the mean **[144]** time, and until the same portions shall become payable as aforesaid, the said John Barnaby and John Surman, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children as shall not exceed in the whole, the interest of their respective portions, after the rate of 5*l.* per cent. yearly; provided always, that in case any of the said children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go, and be paid unto, and be equally divided among the survivor or survivors of them, when, and at such time as the original portion or portions of such surviving child or children shall become payable: Provided always that it shall and may be lawful to and for the said John Barnaby and Joseph Surman, or the survivor of them, his executors, or administrators, at any time or times after the decease of the said Richard Chambers the younger, or in his lifetime with his consent, by the ways and means aforesaid, to raise, levy and pay any sum or sums of money, not exceeding the sum of 600*l.*, for the putting or placing out any such younger son or sons to any profession or business, or other advancement in life, before such time as his or their portion or portions shall become payable as aforesaid, and such sum or sums of money, so to be raised and paid for the advancement of, and putting out such younger son or sons shall be deemed and taken as part of his or their portion or portions, hereinbefore appointed to be raised or paid to him or them as aforesaid: Provided also, that in case there shall be no such child or children of the said Richard Chambers the younger, on the body of the said M. E. Gray, his said intended wife, begotten, besides an eldest or only son, or in case all and every such child or children shall happen to **[145]** die before all or

any of the said portions shall become payable as aforesaid, or in case the said portions and such maintenance as aforesaid shall by the said John Barnaby and John Surman, their executors, administrators, or assigns, be raised and levied by any of the ways and means, in that behalf before mentioned, or in case the same, by such person or persons as shall for the time being be next in reversion or remainder of the same premises, expectant upon the determination of the said term of 500 years shall be paid or well and duly secured to be paid according to the true intent and meaning of these presents, then, and in any of the said cases and at all times thenceforth, the said term of 500 years, or so much thereof as shall remain unsold or undisposed of, for the purposes aforesaid shall cease, determine, and be absolutely void to all intents and purposes." The settlement further provided that in case any of the trustees should die, or be desirous of being discharged from the trusts before the same should be fully performed, then, and as often as the same should happen, it should be lawful for the said Richard Chambers the younger and Mary E. Gray, in their joint lives, or for the survivor of them, by any writing or writings under their, his, or her hands and seals, or hand and seal, to appoint new trustees; and that upon such appointment all the monies to arise from any sale of the premises, under a power thereinbefore limited for that purpose, and also all the monies arising by sale or assignment of the term of 500 years, for the purposes aforesaid, and which should then remain unapplied and the stock upon which the same might be invested, should be assigned to, as to vest in the new trustees jointly with the continuing trustees for the purposes of the settlement.

The marriage took effect, and there were six children of the marriage, three sons and three daughters, all of whom attained the age of 21. Richard Chambers the **[146]** elder died some years since, and Mary Elizabeth, the wife of Richard Chambers the younger, died in 1834.

The present bill was filed on the part of the younger children, claiming to have the sum of 4000l immediately raised for their benefit by sale or other disposal of the term, notwithstanding the life interest of their father, Richard Chambers the younger, in the settled estate; and also claiming interest at 5l. per cent. on their respective portions from the respective times of their attaining 21.

The eldest son, by his answer, submitted that the sum of 4000l. provided for the younger children by the settlement was not raisable until after the decease of Richard Chambers the younger.

Mr. Duckworth and Mr. Roupell, for the plaintiffs. The question to be argued in this case has not been much agitated of late years. In the last century there were numerous decisions on the subject, and the opinions of judges upon it were conflicting; Lord Talbot holding that the question whether a reversionary term should be sold for the purpose of raising portions depended solely on the intention of the parties to be gathered from the instrument, while other judges, particularly Lord Macclesfield, though occasionally deciding in favour of a sale of the term in the lifetime of the tenant for life, yet expressed extreme reluctance in so doing, and placed the question, as far as they could consistently with decided cases, on the ground of expediency: *Corbett* v. *Maidwell* (1 Salk. 159), *Stanley* v. *Stanley* (1 Atk. 549; 1 West, 146), *Stevens* v. *Bethick* (3 Atk. 39), *Lyon* v. *Duke of Chandos* (3 Atk. 416), *Clinton* v. *Seymour* (4 Ves. 164), Coote on Mortgages (see book 2, chap. 6). The various conflicting opinions are commented **[147]** upon by Lord Eldon in *Codrington* v. *Lord Foley* (6 Ves. 364), which is the last case on this important subject; and his Lordship ultimately adopts the rule as laid down by Lord Talbot in *Hebblethwaite* v. *Cartwright* (Ca. T. T. 31)—that the raising or not raising the portions in cases of this nature must depend upon the peculiar penning of the trust and the intention of the instrument. Here, if the construction of the instrument depended solely on the words of limitation or the declaration of trust, there would be no question that these portions would be raisable immediately. But the argument on the other side will depend on the clause of maintenance, and *Brome* v. *Berkeley* (2 P. W. 484) will be cited in opposition to the plaintiff's claim. But in that case no money was to be expended for maintenance until the term "should take effect in possession;" there was also no clause of advancement, nor words authorizing the maintenance to be raised by mortgage. *Butler* v. *Duncomb* (1 P. W. 448), *Churchman* v. *Harvey* (Ambl. 335), and *Verney* v. *Verney* (2 Eden, 26), were decided in the same manner upon expressions of a similar nature. The rule is that the portion is raisable at the time positively fixed for that

purpose by the instrument, unless you can shew a contrary intention from any other part of the instrument. It must be admitted that clauses of maintenance and advancement are those on which the courts have relied as counteracting the previous directions that the portions should be raised at 21, but here these clauses are less strong than in the corresponding clauses in other cases. It is true that in some of those cases the direction that the rents and profits shall be applied in maintenance has been held sufficient to postpone the sale of the term until after the death of the tenant for life; the words being considered to create a necessary im-**[148]**-plication that "annual" rents were intended. But that is by no means the necessary implication here, nor indeed in many other cases in which the words "rents and profits" occur. In *Lord Albemarle* v. *Rogers* (2 Ves. jun. 480) it was held that a devise of rents, issues, and profits during a term, with a devise over of the reversion in trust for sale, authorized an immediate sale of the reversion. So a devise of rents, issues, and profits has been held to authorize a sale of a term for the benefit of volunteers (id. 481, note). So in *Gibson* v. *Rogers* (Ambl. 93), under a devise of real estates to trustees, upon trust out of the rents and profits to pay annuities, it was held that the trustees were authorized to sell the estate. In this case, therefore, it is submitted that the trustees would not be compelled, under the clause for maintenance, to wait till the term came into possession before they could raise maintenance, but that they might, under the words "rents and profits," sell or mortgage the term. If that be so, it follows that the clauses of maintenance and advancement are consistent with the trust for raising the portions; but at all events it is submitted that they are not sufficiently strong to counteract the declaration of trust.

In addition to the foregoing cases the following were cited and commented upon: —*Greaves* v. *Mattison* (Sir T. Jones, 201), *Evelyn* v. *Evelyn* (2 P. W. 659), *Hellier* v. *Jones* (1 Eq. Abr. 337), *Gerrard* v. *Gerrard* (2 Vern. 458), *Staniforth* v. *Staniforth* (2 Vern. 460), *Goodal* v. *Rivers* (Moseley, 395), *Savile* v. *Savile* (1 P. W. 456, cited), *Keresby* v. *Newland* (2 P. W. 94), *Smith* v. *Evans* (Ambl. 633), *Hall* v. *Carter* (2 Atk. 355).

Mr. Simpkinson and Mr. Simpson, for defendants in the same interest with the plaintiffs. There can be no **[149]** doubt upon that clause in the settlement which declares the trusts of the term, and the only argument which can be raised on the other side must be founded on the clause of maintenance; the subsequent clause of advancement militating strongly against the construction put upon the settlement by the eldest son. But the clause of maintenance is not of itself sufficient to prevent the immediate raising of the portions: *Greaves* v. *Mattison*, *Goodal* v. *Rivers*, *Sandys* v. *Sandys* (1 P. W. 707), *Hall* v. *Carter*. The case of *Lyon* v. *The Duke of Chandos* (3 Atk. 416) is a complete answer to that of *Brome* v. *Berkeley*, for there the maintenance was only given from the death of the Duke of Chandos, and yet it was held that the portion with interest was raisable before his death. *Cotton* v. *Cotton* (*c*) is likewise at vari-

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(*c*) This case was cited by Mr. Simpkinson from Mr. Melmoth's MSS. in Lincoln's Inn Library, and is as follows:—

Cotton v. *Cotton* in Chancery, 10th May, 1738.—Sir Robert Cotton, the plaintiff's grandfather, settled lands by indenture dated the 17th July, 1701, the uses whereof as to part were to Sir Thomas, his son, for life, then to his wife for life, remainder to trustees for 500 years, remainder to the defendant in tail male, with remainders over. The trusts of the term were that in case Sir Thomas Cotton should die leaving any younger child or children by him begotten on the body of his wife which should be living at his death, then it should be lawful for the trustees out of the rents of the said estate limited for the said term, or by lease thereof for the said 500 years, or by felling of timber, or by any other means as they should think fit, and for the advantage of such child or children, to raise such sums of money for the portions of such child or children, and pay the same in manner following—viz if there should be but one younger child, then 3000l. should be raised for such younger child, and if two or more such younger children, then 5000l. should be raised and be equally divided between them, if daughter, at 18 or marriage, and if sons at 21: and until such portions should be payable and paid, to raise for such only child 60l. a year for his or her maintenance and education; but if more than one, then to raise and pay them the yearly sum of 50l. a piece, by equal half yearly payments at Lady-day and Michaelmas, the first payment to be made at the 1st of the said days which should happen after the commencement of the said term.

[150] ance with *Brome* v. *Berkeley*, although it was decided by the same Judge, Sir Joseph Jekyl. But supposing *Brome* v. *Berkeley* to be good law, how does it bear upon this case? Here the settlement says nothing as to the commencement of the term, but gives maintenance at once out of the rents and profits. The words "rents and profits" do not necessarily mean annual rents and profits, but any interest which would enable the trustees to raise money upon it. Another strong circumstance in favour [151] of the younger children is the wording of the clause of advancement. It seems clear from this clause that the settlor contemplated the possibility of the portions being wanted in his lifetime. He had made the portions payable to the sons at 21, and the daughters at 21 or marriage; but thinking that the sons might want advancement before they attained 21, he gave the trustees power to raise money for that purpose. On the contrary, no power is given to the trustees to advance the daughters before 21 or marriage, that being evidently thought unnecessary. But if payment of the portions was to be postponed until the death of the tenant for life, why were the daughters not advanced as well as the sons? It is clear from this that the advancement to the sons was merely for the sake of enabling them to enter professions before they attained 21, when they would be entitled to their portions. It is supposed that the younger children are seeking something inconsistent with the policy of the law, but it is the policy of the law that they should advance themselves. [Alderson, B. I think that argument will hardly assist you. In settling portions, it is intended to define the rights of the parties under the settlement; but in settling a reversionary term, you define nothing. That is the difficulty which would press on me if this were res integra. It is most improbable that persons should have intended such a mode of raising portions.]

Mr. Coote and Mr. Abraham, for the eldest son. The question is whether the provision intended for the eldest son is to be rendered a nullity, the estate being inconsiderable. If the doctrine advanced on the other side could be acted upon often, it would be the destruction of family estates, and tend to the ruin of the eldest son. If in this case the eldest son is to take merely a reversion expectant on a term of 500 years, the whole estate may as well be sold at once. Considerations of this nature have [152] induced successive judges to disentangle themselves as much as possible from the decision in *Greaves* v. *Mattison* (Sir T. Jones, 201), and although that and

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Sir Thomas Cotton died leaving his wife and nine younger children, having made his will and some provision for them out of his personal estate after the death of his wife, who is yet living.

The plaintiff, Philadelphia, has attained her age of 18, and she and the rest of the younger children bring their bill against the defendant, their elder brother, and the trustees of the term. Philadelphia insists that her portion having become payable, it ought to be raised by sale of the reversionary term, and be paid her together with the arrears of the 50*l.* a year maintenance from the death of her father; and the rest of the plaintiffs insist upon the like maintenance: and the better to support the demand of maintenance, it was urged on behalf of the plaintiffs that they had no other provision in present but by the settlement, and that it could never be the intention of Sir Robert Cotton when he made this provision for the younger children that they should be destitute of maintenance till their portions should be payable.

MASTER OF THE ROLLS. As to the plaintiff Philadelphia's share of the 5000*l.*, she having attained 18, I am of opinion it ought to be raised out of the reversionary term, with interest from the time it became payable, though the Lady Cotton is still living; and let the Master settle what part of the trust estate is proper to be sold for that purpose.

But as to the point of maintenance, I am of opinion that there is no pretence for it, the settlement being express that the first payment of the maintenance is to be made at the first of the days of payment which should happen after the commencement of the term, which term by the settlement does not, nor can, commence till after the death of my Lady Cotton, who is living.

As to the hardship of the case in respect of the plaintiffs, the Court cannot take that into consideration, but must judge upon settlements as they find them, and as the parties have thought fit to make them. It would be to no purpose to make deeds, if this Court should construe them according to what may be for the convenience or inconvenience of the parties.

other cases have not been directly overruled, yet, as Mr. Fonblanque (2 Fonbl. Eq. 201, note (*e*)) remarks, they have been considered as determinations so replete with inconvenience that they ought to govern only cases precisely similar in all their circumstances. [Alderson, B. If the Courts have from time to time varied their decisions, according to their notions of what was expedient, that is the reason why you should not put the Court upon expediency at all. Judges are brought into great difficulties when they begin, as Mr. Justice Burrough used to say, to "ride the high horse of expediency."] Upon the construction of the instrument this case differs from that of *Codrington* v. *Foley*. There the father was dead, leaving two children—a son, who was an infant, tenant in tail under the settlement, and a daughter entitled to a portion raisable under a term of 1000 years. All the limitations of the settlement, however, were over-rode by a term of ninety-nine years, which was limited for special purposes, and the question was whether the raising of the portion should be postponed until the trusts of the term of ninety-nine years were satisfied, and Lord Eldon held that upon the construction of the instrument such could not be the true intention of the parties. But his Lordship expressly distinguished that case from those where, the term for raising portions being expectant on the father's life estate, it had been attempted to raise the portion in his lifetime. It is submitted, therefore, upon the authority of that case and many others, that the primâ facie intention of these instruments must be taken to be that the portion should not be raisable till the term comes into possession; the onus probandi resting upon those who insist on the contrary. It is matter of surprise that the Courts did not originally **[153]** adopt that view of the subject, but *Butler* v. *Duncomb* and that class of cases shew that in more recent times they have adopted it. In those cases if the mere language of the deed had been attended to, there was no reason why the portions should not have been raised immediately; but the Courts, in aid of the general intention, and for the benefit of the eldest son, relied upon the expressions "after the commencement of the term," &c.

But another material question to be considered is this: supposing the deed to be construed as strictly as is contended for on the other side, have all the contingencies happened upon which the portions are made raisable? In *Corbett* v. *Maidwell* (1 Salk. 159; 3 Rep. Ch. 201) the ground of the Chancellor's refusal to allow the portion to be raised in the father's lifetime was that one of the contingencies had not happened, viz. that of the child being a daughter unmarried or unprovided for at the father's death. Here the portions are for all the children, not being an eldest son. Of the parties before the Court two are younger sons; but suppose the present eldest son should die in his father's lifetime without having barred the settlement, the next son, William, will be the eldest son: William now asks to be paid his portion, but the question is whether he is in the situation to ask for it. No doubt, so far as the parties were concerned in framing the settlement, they could not have contemplated such an application. It will be said that the portions are vested, and cannot be devested by any becoming eldest sons. On that point there are, undoubtedly, several conflicting decisions, but *Chadwick* v. *Doleman* (2 Vern. 528) and *Matthews* v. *Paul* (3 Swanst. 328) are authorities to shew that the portions will be devested. The case of *Windham* v. *Graham* (1 Russ. 331) would be against us if not considered as decided on special circumstances. There it **[154]** was held, upon the particular wording of the settlement, that the clause as to a younger child's portion going over to the others upon his becoming an eldest son, was to be confined to his becoming an eldest son while under 21, at which time the portion vested, and consequently that the portion of a younger son, who had become an eldest son after that period, was not devested. It is submitted, however, that unless there be a clause to the contrary, a younger son takes his share sub modo, liable to be devested on his becoming an eldest son. That contingency has not arrived. Allowing that the younger sons take vested interests, they may, nevertheless, successively become eldest sons in the father's lifetime, and in that case they ought not, in fairness, to receive their portions. This argument would not apply if the eldest son, together with his father as protector of the settlement, had defeated the remainders over; but that event has not taken place.

Supposing this objection to fail, the next question is whether, taking the whole settlement into consideration, it was intended that the portions should be raised in the father's lifetime. It is stated very truly that this depends on two clauses, those of maintenance and advancement. Many cases have been cited to shew that under a trust to raise money out of the rents, issues, and profits of an estate, a sale or mort-

gage may be made. As a general proposition that is not denied, but here the trust to raise the money out of the rents and profits is put in opposition to the trust to raise by sale or mortgage. The person who framed the settlement understood the difference, and no doubt any person not a lawyer would say that in this case the portions were to be raised by sale or mortgage, and maintenance out of the annual rents. In *Corbett* v. *Maidwell* (1 Eq. Abr. 339) the same sort of clause of maintenance occurred as in the present instance, and the Lord Chancel-**[155]**-lor, in deciding against raising the portion in the father's lifetime, said, "And this construction is the stronger from the clause which appoints the maintenance, for that is only out of the rents and profits, whereas the portions are to be out of the rents and profits, or by mortgage or sale; and 'rents and profits' in the first clause being put in contradiction to 'mortgage or sale' in the second, must be restrained, and cannot warrant mortgage or sale." The primâ facie meaning of the word "rents" is "annual rents." *Ivy* v. *Gilbert* (2 P. W. 20), *Mills* v. *Banks* (3 P. W. 1), Powell on Mortgages (vol. 1, ed. Coventry, p. 73, n.).

Supposing it to be established that the maintenance can only be raised out of the annual rents, then it cannot be raised till after the death of the father, and if the maintenance cannot be raised till after that time, the portion cannot, because the maintenance must precede the portion: *Brome* v. *Berkeley*. If the portion could be paid before that time, but not the maintenance, the maintenance would run from the infancy of the children, and upon the death of the father they would go back to calculate this. But it could not be intended that the child should have his portion in the lifetime of his father and maintenance at his father's death. The case of *Brome* v. *Berkeley* cannot be considered as contravened by the case cited from Melmoth's MSS., which was decided ten years previously.

The clause of advancement is not confined to provision to be made to infants, but extends to adults. But as the advancement is to be considered as part of the portion, it must, on the construction adopted on the other side, be paid, if at all, at or before the period of the child attaining 21. That, however, does not appear to have been the intention of the parties.

Upon the whole, it is still submitted that if the words **[156]** of the settlement are doubtful, the Court will attend to considerations of convenience or inconvenience: *Hope* v. *Lord Clifden* (6 Ves. 507).

Mr. Romilly, for the tenant for life.

Mr. Stinton, for the surviving trustees of the term.

Mr. Duckworth, in reply. It has been argued on the other side that all the contingencies have not happened on which the portions were meant to vest; but it is difficult to see how the particular contingency alluded to is applied to the circumstances of this case. The question is, when are these portions raisable? But how can that be determined by any question between an eldest and younger son? Upon the death of the eldest son in his father's lifetime, there might be a question as to a portion of a portion, but not as to the portions generally. If it be meant that as long as the limitations of the settlement existed, no younger son would have a right to apply to the Court; the answer to that is that no younger son would apply: the application would be by all the younger children generally. The case of *Matthews* v. *Paul* has not been approved of as to the dicta, though the decision was right, because the portion was not vested. In *Spencer* v. *Spencer* (8 Sim. 87) the portion was held to be vested in the second son, and not to devolve to the sisters by survivorship. This suggests that upon the construction adopted on the other side the words "payable as aforesaid," which occur in the clause of survivorship, must mean "payable at 21 or marriage, after the death of the parent." The consequence of this would be that upon the death of any younger child after marriage, in the lifetime of his parent, his share would go over to the survivors, and his children **[157]** would take nothing. But what court would put such a construction on the instrument?

July 3rd.—ALDERSON, B. This case has been most ably argued before me, and I thought it advisable, before deciding it, to look into the cases, although, at the time of argument, I did not entertain any strong doubts as to the result at which I ought to arrive.

The question is whether the portions of the younger children of Richard Chambers are raisable immediately, or whether that is to be postponed until the death of the present tenant for life.

It is much too late now to consider as to the propriety of the rule as to this subject which has prevailed in Courts of equity. Possibly, if it were res integra, I should not have come to such a conclusion. But being established, it is of much more importance to adhere to general rules than, for any supposed convenience, rashly to depart from them. The titles and estates of men depend in a great degree on the fixedness of the rules by which Courts are governed.

I take the rule, so far as it is necessary on the present occasion to state it, to be this, that where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term; and, secondly, where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens; and, thirdly, where not only the period, but the class of children in favour of whom the portions are to be raised, depends on a contingency (as when it is limited to take effect, in case the father dies without issue male by his wife), there, also, on the contingency happening by the death of the wife without issue [158] male, the portions are raisable immediately, and the term is saleable in the lifetime of the father.

This being the general rule derived from the presumed intention of the settlor that it should be so, it must of course follow that if, taking the whole settlement together, this presumed intention is negatived, the rule can have no effect. Accordingly, on looking into the books, we find a variety of cases in which, from passages contained in the settlement, the Courts have so decided. Some Judges, indeed, to whom the original rule was not satisfactory, have laid down incidentally that the Courts would be eager to decide, or that they would lay hold of slight circumstances to decide against the rule. On the other hand, Lord Eldon, in a very able and elaborate judgment, has, I think, laid down the rule on its true and sound foundation —that the Court holding an equal mind ought to look at all the circumstances, and to see what, on a sound construction of the instrument, was the actual intention of the party. I entirely adopt this principle. Any other would be to violate that which it is conceded ought to govern—namely, the intention of the party himself. How is it possible for a Judge to know, except from the instrument, that intention? How can he know whether his notions of expediency are the same as those of the party on whose expressed intentions he is to decide? A Judge may think the eldest son ought to be the peculiar object of consideration; the settlor may be of opinion that younger children in general are greater objects of favour. To adopt such principles would be to render everything uncertain.

Having premised these observations as to the principles by which I think this case must be decided, and which, without referring to them more in detail, I think may be deduced from a consideration of all the cases, I shall now proceed to apply them to the present case.

By this settlement the estate was settled on Richard [159] Chambers for life, then on his wife for life, and from and after her decease to trustees for five hundred years, for certain intents therein expressed, and subject thereto to the first and other sons successively in tail, with remainder to the daughters, as tenants in common in tail. The term was declared to be limited upon trust in case there should be an eldest or only son, and one or more child or children of Richard Chambers, on the body of Mary Chambers, his wife, to be begotten, then, that the trustees by sale or mortgage of the term should raise and levy, or borrow and take up at interest for the portions of all such children, other than the eldest, 3000l. if there should be one only such child, and 4000l. if two or more such children—to be paid to such children at 21, if sons, and at 21 or marriage, if daughters.

Now the wife has died, and has left more than one younger child; and all the younger children have attained 21. Every branch, therefore, of the contingency has occurred, and, according to the rule of the Courts of Equity to which I have before referred, I ought to infer, unless something else appears in the settlement to shew the contrary, that the intention of the settlor was that these portions should be raisable forthwith. Mr. Coote indeed contended that there was still a contingency, namely, that the eldest son might die in the lifetime of his father, but that argument is not, I think, well founded. The question is as to the estate of the family when the event on which that which was before contingent becomes fixed, namely, the death of the

wife. On that occurring the settlement is to be read as if it were in trust to raise 4000l. for the portions of A., B., C., and D. (the then younger children) to be paid to A. and B., the sons, at 21, and to C. and D., the daughters, at 21 or marriage. Then we are to look to the rest of the settlement to see whether there is any thing there from which we are to conclude that this payment is to be "provided the [160] father be then dead," or, "provided the term of the trustees is then in their possession."

Now it is contended that this is to be deduced from the next clause, by which the trustees are directed "in the mean time and until the portions shall be payable, to levy and raise out of the rents, issues and profits of the premises, competent maintenance not exceeding the interest of their portions at five per cent. I cannot accede to this conclusion. If the trustees had been directed to pay maintenance out of the rents and profits, and pay over the surplus to other parties, the argument would have been very different, for such a direction would necessarily have implied a possession by them of the rents, and would have shewn that the settlor contemplated maintenance previous to the payment of the portions out of the term in possession. That was the case of *Brome* v. *Berkeley* (2 P. W. 484). There the first payment of the maintenance was limited to a period after the term was in possession. I do not fully accede to the reasoning on which that case turns, and which is inconsistent with *Cotton* v. *Cotton*, cited from Melmoth's MSS. But at all events that point, which is clear there, is not at all so here. It is not at all clear here that the maintenance as well as the portions may not have been intended to be raised by mortgage of the rents, issues, and profits in reversion. It was conceded, indeed, in argument, that this might be so, if that were the intention of the settlor. It is said that the intention is doubtful, whether "rents," &c. mean annual rents or general profits. But even if that intention be doubtful, I cannot use this clause in order to negative the clear intention deducible from the other parts of the settlement.

The remaining clause seems to me to confirm the intention deducible from the first clause. There is a power given to the trustees to raise a part of the children's [161] portions in the lifetime of the father, even before the portions were payable. It is most probable that a settlor who was willing that this should be done, should be desirous that the portions themselves should be paid to these objects of his bounty at the time he fixed, without waiting for the father's death. And this clause applies only to the younger sons, so that the daughters would, according to the construction of the defendant, have nothing in the lifetime of their parents, although the sons would be put forward in life. This is not a probable intention. I do not, however, place great reliance on this clause. As far as it goes, however, it confirms my previous view of the case.

Upon the whole, I have come to the conclusion that the intention of the settlor as expressed by the first clause was that, on the contingency happening and the children attaining 21, or marriage, the portions should be raisable.

I think the other clauses of the settlement do not negative or induce me to doubt as to the settlor's intention on this point. I propose, therefore, to decree—the children having all attained 21—that the portions amounting to 4000l. ought now to be raised by sale or mortgage of the term of 500 years.

Decree accordingly.(*a*)

[162] ATTORNEY-GENERAL *v.* LAMBE. May 16th, June 26th, 1838.—Defendant being seised in fee of an ancient freehold tenement, situate within a manor of which the Duke of Cornwall and T. were tenants in common, took a conveyance, by indenture from T., of all the quit rents payable to him in respect of messuages and hereditaments within the ancient tenement; T. reserving to himself by the indenture his interest in the tin and his right of shooting over the premises. Both before and after the execution of the indenture, the defendant exercised various acts of ownership on the wastes adjoining the ancient tenement, alleging

(*a*) As all the children had attained the age of 21, the question did not arise whether, upon any of them attaining 21, the whole sum appointed for portions should be raised, or such part only as belonged to the child or children who had attained that age. Upon that point see *Wynter* v. *Bold*, 1 S. & S. 507, *Gillibrand* v. *Goold*, 5 Sim. 149. See also *Cotton* v. *Cotton*, ante, p. 149.

that they were not manorial wastes, but belonged to the ancient tenement, and that, since the execution of the indenture by which he acquired the quit rents, he had an absolute right to the freehold thereof, subject to the reservations in the indenture, and the customary tolls of tin. The information stated that the Duke of Cornwall and T. were entitled to all wastes within the manor, in equal moieties, as tenants in common; and it charged, 1st, that the indenture contained general words, purporting to convey the waste lands, and also that it conveyed T.'s interest in the waste lands generally, without stating that they formed any part of the ancient tenement, and without stating the boundaries of the ancient tenement, and that the defendant ought to set forth the boundaries; 2ndly, that by the custom of Cornwall all tin bound lands must have been wastes, and that it would appear by the indenture, if produced, that one moiety of the tin under the lands in question, except what was strictly the ancient tenement, was reserved to T. The defendant, by his answer, denied that it would appear from the indenture as was stated in the information, and he submitted whether he ought to be compelled to produce the same; but in his first answer he set forth a considerable portion of the deed, and in his second answer he stated that the boundaries were matters of notoriety, and that, as to them, the effect of the conveyances must be determined by themselves: Held, that the defendant must produce the indenture executed to him by T.

[S. C. 8 L. J. Ex. Eq. 23; 2 Jur. 698. See *Smith* v. *Duke of Beaufort*, 1842, 1 Hare, 521.]

The information stated that the Duke of Cornwall, and John Trevanion, Esq., were lawfully seised or well entitled to the manor or manors of Treverbyn or Treverbyn Courtenay, and Treverbyn Trevanion, and were, until the time thereinafter mentioned, seised of, or otherwise well entitled to, the wastes or unenclosed common lands within the same, with their rights, members, and appurtenances, in undivided moieties, as tenants in common. That there is within the said manor or manors a certain parcel of land near the northern boundary thereof, nearly the whole of which was, until within the last few years, waste or unenclosed and common land: but that ten acres or thereabouts are ancient enclosed land, consisting of three ancient freehold tenements, which in more modern times have been consolidated, and known by the name of Carne Rosemary. That by an indenture dated the 2nd of February, 1829, the said John Trevanion assigned and transferred to the defendant Lambe, his heirs and assigns, all his, Trevanion's, share in the said parcel of land, save and except only his share and interest in all tin, tin ore, and tin stuff, therein, thereinunder, or arising therefrom. That since the year 1812 divers large portions of such parts **[163]** of the said parcel of land as were wastes, or unenclosed and common land, had been from time to time enclosed, and buildings erected thereon, and that the defendant Lambe, as owner of the ancient enclosures, had granted, or joined in granting, leases of such unenclosed wastes, and also of such buildings; and that shortly after the execution of the indenture of the 2nd of February, 1829, he had entered into an agreement with the defendant Martin, whereby the latter had become equally interested with him in the waste lands conveyed by that indenture. That since the year 1830 the two defendants had, by themselves or their tenants, made and received from such new enclosures and buildings divers large sums of money, and that they had also dug, both under such new enclosures and under the lands still remaining unenclosed, and had raised and taken large quantities of china clay, which they had sold to merchants and others, and received from such sales divers large sums of money. The information then, after alleging the Duke of Cornwall to be entitled to a moiety of the china clay so dug, and to the monies so produced, prayed a declaration to that effect, and also discovery, account, and satisfaction.

With reference, more particularly, to the subject of the present motion, the information charged that the defendant Lambe sometimes pretends that the soil and substrata of the whole of the said parcel or portion of land belongs absolutely to him, and those claiming under him, as part or parcel of the said ancient freehold tenement of Carne Rosemary, and that such ancient freehold tenement comprises in its limits unenclosed and waste lands as well as enclosed lands; and that the same was so conveyed to him and his ancestors, subject only to a quit rent, and to tin dues or tin toll

in certain parts thereof; and that since the execution of the indenture of February, 1829, the whole of such freehold tenement, including therein the lands now or **[164]** heretofore waste and unenclosed, have belonged absolutely to him, the defendant Lambe, excepting only the tin dues or tin tolls in respect of certain parts thereof; and excepting only a partial interest by him assigned to the defendant Martin; whereas the Attorney-General charges the contrary, and that the ancient freehold tenement of Carne Rosemary embraced only enclosed lands, and that no waste or unenclosed lands were ever included therein or in any conveyance of such freehold tenement; and that the same was always conveyed as "all that ancient freehold tenement," or by words to that effect; and that no boundary was ever given in a ny deed or conveyance, conveying or purporting to convey the same, it being surrounded with waste lands; and that no mention was ever made of any waste or unenclosed lands as belonging or attached to such freehold tenement, or as forming part thereof; and that the said freehold tenement originally consisted of only ten acres or thereabouts.

The information further charged that the indenture of February, 1829, conveyed to the defendant Lambe certain quit rents (which were particularized), in respect of the ancient tenement of Carne Rosemary, and also of Rose Vear and Rose Vean, which were two other ancient freehold tenements, held of Trevanion's moiety of the manor, and that it conveyed to the defendant Lambe all Trevanion's interest in the lands therein specified, and within the boundary of which the said ancient tenements are situate, but that it does not state the quantity of acres contained in each of those tenements, nor the boundaries of them; and that it conveys all Trevanion's interest in the unenclosed lands, but does not allege or pretend that any part thereof belonged or formed part of Carne Rosemary, nor what part to Carne Rosemary and what to Rose Vear or Rose Vean, &c.; and that there is a plan within or upon such indenture, but that such plan does not shew or give the boundary, &c., and that defendants ought to set out **[165]** what they allege as the boundary of the ancient freehold tenement of Carne Rosemary.

The information further charged that according to the laws, usages, and customs of the county of Cornwall, or of the stanaries therein, all lands in the said county, bounded with tin bounds, must have heretofore been waste or unenclosed land, or land assured for wastrell; and that according thereto no lands therein can or could be bounded with tin bounds but such as are or were at some time waste or unenclosed lands, or lands assured for wastrell. That the ancient freehold tenement of Carne Rosemary consisted originally of only ten acres or thereabouts, and were and have ever been, and are still free from tin bounds, and wholly situate within the parcel or portion of land mentioned in the information; but that as to the remainder of the lands comprised in such parcel or portion, both the enclosed lands (which are encroachments from time to time made from the wastes of the said manors) and the lands remaining unenclosed and waste, have from time immemorial been and still are bounded with tin bounds, and the toll or dues in respect of tin therein belong in equal and undivided moieties to the Duke of Cornwall and the said John Trevanion. That the officers of the duchy of Cornwall have no copy of and have never seen the indenture of February, 1829, but that the same is now in the possession of the defendant Lambe; and that if the same was produced it would thereby appear that one undivided moiety or half part of all tin ore or tin stuff within and under so much of the said parcel or portion of lands as are now or heretofore were waste or unenclosed and common lands embraced therein, and all dues and tolls in respect thereof theretofore belonging to the said John Trevanion were and are thereby reserved to him.

The information further charged that the consideration mentioned in the indenture of February, 1829, was 400l., **[166]** although the quit rents thereby conveyed amounted in the whole to no more than 8s. 7d. per annum; and that certain general words were introduced into the conveyance at the instance of the defendant Lambe, and without the knowledge or consent of Trevanion, for the purpose of comprising the waste lands in question.

The defence on the part of the defendant Lambe was in substance the same as that which was anticipated by the information, namely, that the waste lands in question were not manorial wastes, but belonged to the ancient freehold tenement of Carne Rosemary, of which, together with two other ancient tenements, called Rose Vear and

Rose Vean, he alleged himself to be seised in fee, subject only to the reservations contained in the indenture of February, 1829.

In his first answer to the information the defendant, after stating what he conceived to be the boundaries and quantity of acres contained in the several beforementioned ancient tenements, proceeded to set forth, at considerable length, the indenture of February, 1829, which, as far as appeared in the answer, was a conveyance of the several quit rents, payable to Trevanion in respect of certain messuages and hereditaments, comprised in the several ancient tenements; and also all Trevanion's manorial and other rights in respect of such messuages and hereditaments, and in respect of "such commons or waste lands adjoining the same, as had been theretofore held and enjoyed therewith, or deemed exclusively to belong to the same;" all which messuages, &c., were described in a map, indorsed upon the indenture; with a reservation to Trevanion of such part, dole, or share of tin, tin ore, and tin stuff, within the several messuages and hereditaments, and also such right of hunting and shooting, as Trevanion would have been entitled to if that indenture had not been made. In a subsequent part of the same answer the defendant admitted that the indenture of February, 1829, was in his possession, but denied that if the same were **[167]** produced it would thereby appear, as in the information alleged, that one individual moiety or half part of all tin, &c., within or under the waste or unenclosed and common lands embraced therein, was reserved to the said John Trevanion, though the defendant admitted that such rights in respect thereof had been reserved to Trevanion, as before mentioned: "And this defendant saith that he has herein set out the date of such deed or conveyance, the property thereby conveyed, and the particulars therein contained, and that the boundaries of the said property are hereinbefore set forth in the description of the said several hereditaments and premises called Rose Vear, Rose Vean, and Carne Rosemary, and also in the said map or plan." The defendant further stated that he had been informed and believed that tin bounds were cut upon wastes in which the lord had no right to the soil, and that there were tin bounds both over ancient freehold tenements, which had been enclosed, and over waste lands, which were parcel of such tenements.

The defendant, by his further answer, admitted that the said enclosed lands and unenclosed lands had always been conveyed as "all that freehold tenement," with general words contained in the said conveyances: "however this defendant craves leave to refer to his former answer and the schedule thereto as to the boundaries of the said ancient freehold tenement of Carne Rosemary, which boundaries are notorious and well known; and as to the said conveyances this defendant submits that the effect thereof must be determined by themselves." The defendant further said that, except as in his former answer and in the schedule thereto and therein mentioned, he could not set forth, as to his belief or otherwise, whether any and what boundary was ever and when given, in any and what deeds or deed conveyances, or conveyance conveying or purporting to convey the same or any part thereof. He admitted, however, that the indenture of February, 1829, **[168]** did not state the quantity of acres of the ancient freehold tenement of Carne Rosemary, or of Rose Vear or Rose Vean, but said that the messuages and hereditaments to which the said indenture related, were delineated and described in the map or plan indorsed upon the said indenture, and mentioned in and forming part of his former answer; but whether such plan gave the boundary or quantity of acres of the said freehold tenements respectively, or whether, &c. &c., the defendant could not set forth as to his belief or otherwise, "save as appears by the said plan itself, to which he craves leave to refer."

The defendant further admitted that the whole of the quit rents amounted to the sum of 8s. 7d., and that the consideration for the indenture was 400l.: "however this defendant saith, that as to what the said John Trevanion conveyed to this defendant will appear in the said conveyance itself." In answer to other charges of the bill, he admitted that the said indenture of February, 1829, and the plan indorsed thereon, did not state the property thereby conveyed as being within certain limits, or state any such limits to be its boundary, except as appeared upon the plan indorsed thereon and mentioned or referred to in the former answer, "but whether the said indenture alleges that the defendant had any previous or any what particular interest therein, or whether &c., will appear by the said indenture itself, and this defendant submits to this honourable Court whether he is bound to produce the same." The defendant then denied that the consideration for the deed was Trevanion's right to

the china clay to be dug within the waste, or that the quit rents formed a small part of the consideration; but stated that his agreement with Trevanion was to purchase all his interest, whatever it might be, in the lands, except his interest in the toll of tin, and his right of hunting and shooting; and that the indenture was made in conformity with that agreement, and did not pur-[169]-port to convey more than Trevanion had agreed to convey. He denied the allegations in the information as to the newly enclosed lands being encroachments, alleging the whole of the soil and freehold thereof to be in himself, though he admitted the unenclosed parts to be under tin bounds, and the toll of tin to belong to the Duke of Cornwall and Trevanion in equal shares.

The Solicitor-General and Mr. Barlow, for the plaintiff, now moved for the production of, amongst other documents, the indenture of February, 1829. The boundary of these lands is common matter, affecting the title of both parties, and we have here a right to see that what the defendant sets out as the boundary of his lands is correct. Now he describes the boundaries as the result of the descriptions contained in a certain deed to which he refers; the question therefore is, whether we have not a right to see that deed. He says, also, that what Trevanion conveyed to him appears by the conveyance itself. If it appear, therefore, that the conveyance was of a moiety, that would shew that we are entitled to the other moiety. The defendant has not included this deed in his schedule, but, by his manner of referring to it, he has made it part of his answer, and is therefore bound to produce it: *Atkyns* v. *Wright* (14 Ves. 214), *Herbert* v. *Dean and Chapter of Westminster* (1 P. W. 773), *Evans* v. *Richard* (1 Swanst. 8), *Hardman* v. *Ellames* (2 M. & K. 745).

Mr. G. Richards, for the defendant Lambe. The information does not state that the boundaries are confused, or pray the defendant to set out the boundaries, but merely asks a declaration that the crown is entitled to a moiety of the china clay, and that an account may be [170] taken. The real question is, whether the freehold belongs to the defendant or the crown; and the defendant is not bound to produce his title deeds in order to aid the crown in that inquiry. It does not follow because part of the land is unenclosed that therefore it belongs to the lord of the manor. It is clear that this is a title deed between Trevanion and Lambe, in which the crown has no interest. It is said that the defendant has referred to the instrument, but there is no paragraph in his answer to that effect. The defendant refers to the map, and has no objection to produce that document, but there is no such reference to the deed of February, 1829, as will authorize the court to compel its production. *Hardman* v. *Ellames* decided that if you state an instrument in your answer, and refer to it when produced, you must produce it, because by so referring to it you incorporate it in your answer. Here the defendant says that the instrument will speak for itself when produced, but he does not offer to produce it. [Alderson, B. You say, the deed will speak for itself: they say, what are its contents?] The allegation that the deed speaks for itself is no offer to produce it now. We may produce it for our own purposes on other occasions.

The Solicitor-General, in reply. The defendant admits that he agreed to purchase of Trevanion all his interest, whatever it was, in these lands, with certain exceptions; and that the deed of February, 1829, carried that agreement into effect. That is an interest in which Lambe and the duchy are jointly concerned. It is material, therefore, for the duchy to know what Trevanion conveys and what Lambe accepts. In that respect the right of the duchy is the same as it would be if the instrument in question described the boundary of the property sought to be conveyed. It is true that the information does not seek specifically to establish the boundaries, but it seeks [171] to establish something, the right to which depends on what the boundaries are. Upon the point of pleading, it is difficult to understand the case of *Hardman* v. *Ellames*, if there is any distinction between that case and this. The meaning of the defendant's statements in his answer is: "I have given my answer except so far as the deeds speak."

June 26th.—ALDERSON, B. I have looked at the information and answers in this case. I think the Crown is entitled to the production of the indenture of February, 1829.

The principles on which these cases depend are fully stated by the Court in *Hardman* v. *Ellames*. Here I think the document ought to be produced on two grounds: First, it is partially set forth in the answer, and the Crown ought to see it,

to ascertain the correctness of the answer; secondly, I think it is part of the Crown's title, for the Crown is jointly interested in the manor with the party granting, and any act done by that person would be an act of ownership, of which the Crown may take advantage.

Order as prayed.

GRANT *v.* GRANT. 1838.—Where residuary property was bequeathed to a woman, to be paid to her at 25, with a proviso that it should be put in settlement in the event of her marrying before that time, but no gift over of the property in the event of her dying before that time: Held, that upon her attaining 21 unmarried she was entitled to the income of it.

[S. C. 7 L. J. Ex. Eq. 20. See on another point, 4 Y. & C. 256.]

Mary Hay, deceased, by her will, after giving various legacies, bequeathed as follows:—"And, finally, I give and bequeath to my dear adopted child, Maria Hannay Grant, the youngest daughter of the late Colonel Alexander Grant, of Rea Castle, in the county of Inverness, the sum of 5000l., the whole of my plate, jewels, or trinkets of whatever description, all my household furniture, and property, whether real or personal, of whatsoever nature, to secure which, I hereby appoint her the sole residuary le-**[172]**-gatee to every thing I die possessed of, except those legacies I have devised away in the former part of my will and testament." After certain other bequests and directions the testatrix then expressed herself as follows:—"I do hereby also constitute and appoint Mrs. Jane Grant, of Lochletter, in the county of Inverness, Miss Mary Hastings Hannay, of Kirkdale, in the county of Galloway, Thomas Hogan Smith, of Forberry, in the county of Berkshire, and Mr. Thomas Anthony Teulon, of Mark Lane, London, joint executors of my whole property, and guardians and trustees of my adopted child, Maria Hannay Grant, whose property I should wish to be paid into her hands on the day she attains her 25th year, and not till then, unless she marries, her whole property then to be settled upon her and her children, in the event of her husband's death before hers; but if there are no children, then either the whole, or the largest part of her property, as shall seem best to her guardians, to be at her own free and uncontrolled disposal."

Maria Hannay Grant, having attained the age of 21, now presented her petition, praying that the accumulations of so much of the income of the residuary estate as had not been hitherto applied to her maintenance, and also the future income of the residuary estate, might be paid to her until the further order of the Court.

Mr. Simpkinson, for the petitioner, said that as this residue was not given over, in the event of the petitioner dying before 25 she would be entitled to receive the principal immediately, but for the clause contained in the will as to her marriage. That clause, however, did not affect the income of the residue, and he should therefore ask for that, the party being able to give a legal discharge for it. He referred to a manuscript note of *Devisme* v. *Mellish* (in Ch., July 16th, 1808), in which specific legacies were given abso-**[173]**-lutely to the testator's daughter; then followed considerable bequests to her upon attaining 25, which were given over in the event of her dying before that time; then a general direction that she should not be considered of age to any intents before 25. Upon attaining 21 she petitioned for the specific legacies, and Lord Eldon thought her entitled to them at that time, as they were not given over, and she clearly at that age might discharge the executors.

The Court made the order as prayed.

BAKEWELL *v.* TAGART. May 17th, 1838.—The next of kin of a party who died leaving a codicil but no will allowed to take the residue, upon giving recognizances to refund in case a will should be found.—In a suit for the distribution of the estate of a person who died partially intestate, certain persons, not parties to the suit, who had proved themselves next of kin before the Master, were allowed their costs of so doing out of the estate of the deceased.

[S. C. 2 Jur. 699.]

This was a suit for the distribution of the estate of a person who died leaving a paper writing, purporting to be a codicil, by which he bequeathed a legacy to a person of the name of Squire. No will had been found, nor was any executor appointed by the codicil. The codicil was propounded in the Ecclesiastical Court, and the party proving it was called upon to justify the amount of the administration bond. The Master having ascertained the next of kin, the cause now came on for further directions.

Mr. Purvis, for the administrator, said that before the Court would hand over any of the residue to the next of kin, it would require them to enter into recognizances to refund the money in the event of a will being found: *Bailey* v. *Hammond* (7 Ves. 590). He therefore asked for a reference to the Master to settle the proper recognizances.

Mr. Boteler, Mr. Eade, and Mr. Walpole, for the next of kin, did not oppose the application.

[174] Mr. Calvert, for Squire the legatee, submitted that his client was not bound to enter into any recognizances.

Mr. Gordon, for a personal representative of one of the next of kin, likewise submitted, that his client could not be required to enter into any recognizances.

ALDERSON, B. In that case let the Court constitute itself a personal representative as to that share, and let the money arising from that share be paid into Court to a particular account. Let the Master settle the form of the recognizance for the other next of kin. As to Squire, there is no reason he should give any recognizance; for, if the will should be found, he would not be obliged to refund.

Mr. Eade, for one of the next of kin who were not parties to the suit, now asked that his client and the other persons similarly circumstanced might be allowed their costs of proving themselves the next of kin before the Master. He cited *Bennett* v. *Wood* (7 Sim. 522).

Mr. Purvis. That case is inconsistent with previous authorities, and if followed, will lead to much inconvenience. The costs of one party may be only five shillings, while those of another may be five hundred pounds.

ALDERSON, B., after expressing some surprise at the case which had been cited, said that he could not distinguish it from the present, and that the costs must therefore be allowed.

[175] DESBOROUGH *v.* CURLEWIS. June 8th, 1838.—In this Court, if a prayer for relief be added to the ordinary prayer in a bill for discovery in aid of a defence to an action at law, the defendant is not bound to give any further discovery than is incidental to the relief sought by the bill.—Semble, that a Court of Equity will not entertain a bill for the delivery up of a policy of insurance, on the ground of want of insurable interest.

[S. C. 1 Jur. 740.]

The bill was brought by an Insurance Company, against the holders of a life policy, praying for discovery of the several matters and things charged in the bill, an injunction to restrain an action which had been brought on the policy, and that the policy might be delivered up to be cancelled. The bill charged fraud in effecting the policy, by means of misrepresentations as to the health of the assured, and also that the defendants had no interest in the insurance at the time it was effected, or if they ever had, that their interest in it had ceased. The bill contained no offer to repay the premiums which had been paid to the plaintiffs.

The defendants having omitted to answer the charge of want of interest, an exception was taken to the answer in that respect.

Mr. Swanston and Mr. James Russell, for the exception.

Mr. W. M. James, contrà. This is not in form a bill for discovery in aid of a defence to an action, but for discovery incidental to relief, and the relief prayed is the delivery up of a policy of insurance. Now, upon the ground of positive fraud or forgery, a Court of Equity will no doubt order the delivery up of an instrument; and here, as far as the bill seeks to have it delivered up on the ground of fraudulent representations as to the health of the assured, it may possibly be sustained. But there is no case in which the Court has ordered a policy to be delivered up on the

ground of want of insurable interest; and therefore a charge which merely goes to discovery on that point need not be answered. *Simpson* v. **[176]** *Lord Howden* (3 M. & K. 97). This case is analogous to those of *Threlfall* v. *Lunt* (7 Sim. 627) and *Gutteridge* v. *Arkwright* (not reported). In the former of these cases a demurrer was allowed to a bill for the delivery up of a bill of exchange, the amount of which the defendant had recovered at law, and had received from the plaintiff. In the latter, a bond which had been given had by a subsequent transaction been satisfied, and upon demurrer to a bill filed for the delivery up of that instrument, the Vice-Chancellor allowed the demurrer, observing that if he decided otherwise we should never have bills for discovery, but bills for the delivery up of instruments, going into the legal defence. [The Lord Chief Baron. It seems to me, too, that the plaintiffs, if they rely on the objection of want of interest, ought to offer to pay the money which they have received for premiums into Court.] That is another objection to the form of their bill. The truth is, that by turning their bill into a bill for relief, they are seeking to obtain discovery for their defence at law, without the usual terms of paying costs for a full answer. That it is not too late for the defendants to take this objection, but that in this Court they may do so without plea or demurrer is apparent from *John* v. *Dacie* (13 Price, 632), and *Capel* v. *Miles* (id. 767).

Mr. James Russell, in reply. The objection to this policy is undoubtedly its legal invalidity, and this Court will be auxiliary to a court of law in carrying that objection into full force. The policy is alleged to be fraudulent in two respects; one is that the defendants falsely represented the life to be a good one; the other, that they falsely represented that they had an interest; and clearly there is no greater fraud than either of such representa-**[177]**-tions. Now if either of these allegations be made out, the plaintiffs are not only entitled to stay the action, but to have the policy delivered up: *Wilkinson* v. *L'Eaugier* (2 Y. & C. 366). The case of *Simpson* v. *Lord Howden* has no application here, for no invalidity appears upon the face of the instrument. But even supposing the bill wrong in praying for the delivery up of the instrument, it prays for an injunction, and for that we are entitled to discovery. [The Lord Chief Baron. The objection to that is that you get the discovery without paying the costs.] If we succeed we come back here and get the costs of the suit. If they succeed at law the bill will be dismissed here. As to the payment of the money into Court, that is not a question on exceptions, but depending on the injunction. It may be made the terms of an injunction, but cannot be made available on this occasion.

THE LORD CHIEF BARON. It was decided, in *Simpson* v. *Lord Howden*, that the mere illegality of the instrument itself is no ground for relief in a Court of equity, although the fraud which may make it void, independently of the instrument, is properly discoverable in a Court of equity, and relief follows such discovery. But we are not dealing with that question in this case. Certainly if a party who grants a policy has a right to relief in equity, on the ground that the party insuring has no insurable interest, he has a right also to the discovery which is incidental to that relief. But here the bill is not framed with a view to that particular relief, but for another purpose. It does not even contain any offer to repay the premiums received, and on that ground alone I should say that it gives no title to relief on the ground of want of interest. If that be so, the discovery fails also if it be, as it ought to be, adapted to the relief prayed for. If it be not so **[178]** adapted, but is introduced for the purpose of raising a legal defence, it is clear it ought not to be included in a bill for relief, for which the plaintiff does not pay the costs.

Bills of discovery are of great utility, and ought not to be abused. One of the terms of obtaining this remedy is that the party who seeks it must pay the costs of it. Now here the plaintiffs introduce statements and charges for which the bill, though praying relief, is not framed to obtain relief in equity, and by these means they seek discovery upon the whole matter, which can only be used at law. If they succeed in that it is obvious that they get a discovery without paying the proper price for it. I think, therefore, that that part of the discovery which does not help the relief as the bill is framed is impertinent, and that the defendants are not bound to answer that part of the bill.

Exception overruled.(*a*)

(*a*) See *Butterworth* v. *Bailey*, 15 Ves. 358.

JENKINS *v.* PERRY. June 8th, 1838.—A. by indenture assigned certain rents to which he was entitled for life to a trustee, upon several successive trusts, for the benefit of certain of A.'s creditors who were parties to the deed, and subject thereto upon trust, to pay the surplus to A. By the terms of the deed the trustee was directed to pay to some of the creditors their debts, and to others their debts with interest: Held, that the latter creditors had a priority over the former in regard to interest, although the former might be entitled to interest as against the surplus of the estate.

By an indenture of assignment, bearing date the 14th of July, 1799, and made between Sir Watkin and Lady Lewes of the first part, Winter and Kaye of the second part, Fisher and Blew, executors of one Perry, of the third part, and James Meadowcroft of the fourth part, reciting certain proceedings and a decree in Chancery, under which Sir Watkin and Lady Lewes became entitled to certain rents for their joint lives, and the life of the survivor; and reciting that there were due from Sir W. Lewes to certain persons of the name of Morgan the sums of **[179]** 1000l. and 300l., secured respectively by deeds poll of July, 1776, and March, 1777; and further reciting that Winter and Kaye had been concerned in various suits for Sir W. Lewes, and had in their possession papers relating to those suits, and that they had incurred costs for Sir Watkin Lewes to the amount of 573l. 3s. 10d., which they had agreed to forego "on the same being secured as thereinafter mentioned;" and further reciting two bond debts due from Sir W. Lewes to Perry, and that Perry had died leaving Fisher and Blew his executors, and that there was 411l. due for principal and interest on these bonds; and reciting other demands upon Sir W. Lewes, and that, for securing repayment of the several debts before mentioned, it had been agreed that the said rents should be assigned by Sir Watkin and Lady Lewes in manner thereinafter mentioned: It was witnessed that, for the considerations therein expressed, Sir Watkin and Lady Lewes assigned to the said James Meadowcroft, his executors, &c., all the said rents to which they were so entitled as aforesaid, to hold to Meadowcroft, his executors, &c., in trust, in the first place, to pay and discharge thereout the expenses of this trust, and, in the next place, to pay the Morgans the said sums of 1000l. and 300l., with legal interest thereon respectively, and after payment thereof, in trust to pay Winter and Kaye, their executors, administrators, and assigns, the said sum of 573l. 3s. 10d. so due to Winter and Kaye as aforesaid, and in trust in the next place to pay to the said Fisher and Blew the said sum of 411l. so due to them as aforesaid, with legal interest thereon at the rate of 5l. per cent. per annum, and after payment thereof, in trust to pay other specified creditors, and the surplus if, any, to Sir W. Lewes, his executors, administrators, and assigns.

Sir Watkin Lewes and Meadowcroft being both dead, the present bill was filed by the personal representative of the former against the executors of the latter, praying an **[180]** account of the trust monies received and applied in the lifetime of Meadowcroft, and that the surplus might be secured for the benefit of Sir Watkin Lewes's estate.

Under the decree made in the cause it was referred to the Master to inquire whether any, and what part, of the monies received by the defendants as executors of Meadowcroft were subject to the trusts of the indenture of the 14th of July, 1799; and if he should find any monies to have been so received, he was to state what persons were entitled, and to what amount, to the benefit of the trusts.

The Master having, by his report, found that the defendants had received certain sums of money upon the trusts of the indenture, and that the debts provided for by the deed, except that of the Morgans, were still due, and that there was no personal estate, the question now, upon further directions, was whether Winter and Kaye, the parties provided for next after the Morgans, were entitled to interest on their debt, before any payment should be made to the subsequent incumbrancers.

It was stated at the bar that the deed contained a covenant for payment of Winter and Kaye's debt, but the form of the covenant did not appear, the deed not being in Court.

Mr. Dixon, for the plaintiff.

Mr. Simpkinson and Mr. Messiter, for the executors of Meadowcroft, and also for Winter and Kaye. Although the debt as to Winter and Kaye, as originally constituted, did not bear interest, yet considering the terms of the deed, and that the fund has been

fructifying in the hands of these executors, this is one of those excepted cases in which the creditor will be held entitled to interest, though he did not originally contract for it. In the first place, the deed contains a covenant for the **[181]** payment of the debt. [The Lord Chief Baron. The form of the covenant does not appear.] Admitting that to be so, we are entitled to interest under the trusts of the deed. In *Lady Kildare* v. *Hopson* (4 Bro. P. C. 550, ed. Toml.), Lord Ranelagh being indebted to Sir Charles Hopson in 800l. on a stated account, entered into articles for the payment of this debt by instalments of 80l. per annum. Lord Ranelagh afterwards, by deed, created a term of years for the payment of his debts out of the rents and profits of his estate, though not by sale or mortgage. Only two of these instalments being paid, a bill was brought for recovering the rest, and on a question whether they carried interest, it was held that they did; and they were accordingly decreed to be paid with interest at 4l. per cent. In that case there was no contract for interest. There was a stipulation that the instalments should be paid, and the property out of which they were to be paid was specified. In *Barwell* v. *Parker* (2 Ves. sen. 364) Lord Hardwicke said: "If a man in his life creates a trust for payment of debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, that will make these, though simple contract debts, carry interest." Now, all the circumstances mentioned by Lord Hardwicke occur in this case. Here is a trust created by deed for payment of debts which are specified. The circumstance that the debts are not specified in a schedule, but in the body of the deed, can make no difference. [The Lord Chief Baron. Some of the debts are specified by the deed as bearing interest, others not.] Those which are mentioned as bearing interest certainly bore interest originally, and this did not. But still the question is whether the assignment of this trust fund for specified creditors does not come within the principle of *Barwell* v. *Parker*. This is not a trust for payment of debts generally.

[182] Mr. Spence and Mr. Kenyon Parker, for Blew, the surviving executor of Perry. Blew has a stipulation for interest contained in the deed itself. The debt likewise carries interest, being a bond debt. The stipulation was to pay Winter and Kaye their debt; but to pay us our debt with interest. Can they claim interest who did not stipulate, against us who did? If it be a covenant to pay the debt, which is at least doubtful, that will not affect our prior right to interest. The covenant is only a personal remedy against Sir Watkin Lewes or the trustee, and not a charge on the fund. The cases which have been cited are distinguishable from the present. That in Brown was a question between a debtor and creditor, and not one of priorities between creditors. The question was whether a person having executed a trust deed in trust to secure a sum of 800l. payable by quarterly instalments (which carried interest at law, being payable at fixed periods)—whether the debt so constituted should carry interest; and no doubt it did: but that was not this case. The other authority is merely a dictum of Lord Hardwicke, his decision being the other way. He, however, only speaks of debtor and creditor, and not of third persons, though what is there stated may possibly be good law as against persons entitled to the surplus. In *Hamilton* v. *Houghton* (2 Bligh, 186, 190) Lord Eldon said that the mere direction by deed to pay a debt did not infer either contract or trust to pay interest upon debts by simple contract. And Lord Redesdale stated it to be perfectly clear that the deed in that case, which, like the deed here, provided interest for some debts and not for others, did not alter the nature of the debts, but merely provided for their payment. It is doubtful, therefore, whether interest could be recovered in this case even against the surplus; but clearly it cannot against persons who have contracted for the payment of **[183]** interest. No time is fixed by this deed for payment of the principal.

Mr. Teed, for subsequent incumbrancers.

Mr. Simpkinson. In *Hamilton* v. *Houghton* the creditors did not sign the deed, and that was the main ground of the decision. It is true that in that case Lord Eldon, in reference to *Shirley* v. *Ferrers* (1 Bro. C. C. 41), said that a mere direction by deed did not infer either contract or trust to pay interest; but he adds, "As to contract, the creditors did not execute the deed." Here the creditors executed a deed, and they agreed to forbear suing their debtor in consideration of being paid their debt out of the trust fund. With respect to the covenant contained in the deed, supposing that it was not entered into by Sir Watkin Lewes, but merely by the

trustee, if it was for payment of the debt as soon as he got the trust fund, it would be a covenant to pay at a specific time, and that would give interest.

THE LORD CHIEF BARON. I think that this deed, as the terms of it are represented to the Court, made no alteration in the debt as between Sir Watkin Lewes and Winter and Kaye, although if, as has been suggested, there was a covenant for payment by the trustee, it would be converted into a specialty debt. Even then, however, it has not been said that the covenant made the debt payable at a fixed time, so as to give a claim to interest. As the deed, however, was probably prepared by Winter and Kaye, I think they would have taken care, if they had intended it to carry interest, to have so worded it. In the cases upon this subject there seems to be some little difference in the dicta, which may be reconciled, I think, by saying that if a man execute a trust of a term for the bene-**[184]**-fit of his creditors, the deed makes them mortgagees of the estate if they execute it, and so gives them a right to interest; but that a mere covenant to pay the debt does not give them that right. Assume that in this case there was a covenant by the trustees to pay the debt; it is admitted that it was not a covenant to pay the debt with interest. If, without expressly mentioning interest, it was a covenant to pay at a particular day, taking charge of the fund in the meantime, that might give a right to interest; but there is nothing in what has been stated to the Court to lead to the conclusion that the covenant was in that form, and I think the deed ought to be interpreted as we find it. Now there is a direction to the trustee to pay the interest of some of the debts, but not of the others; therefore I think, on that head, the deed must be supposed to explain itself. I will not say what the result might be if the question were solely between Winter and Kaye and the remaindermen, and there was a sufficient fund.(*a*)

KIRBY *v.* CARR. July 5th, August 3rd, 1838.—This Court will entertain a bill for the dissolution of a partnership on the ground of the insanity of one of the partners; but as such a bill proceeds on the principle that the insane partner is incapable of receiving notice of dissolution, strict evidence of insanity, and not merely evidence of incapability, will be required.

[S. C. 8 L. J. Ex. Eq. 31; 2 Jur. 741. See *Besch* v. *Frolich*, 1842, 1 Phillips, 172.]

The plaintiff and defendant were for some years previous to 1834 in partnership together, in the business of conveyancers, under a mere parol agreement, without any stipulated term for the duration of the partnership. In the month of July, 1834, the defendant became lunatic, and in August, 1837, the plaintiff filed his bill, praying that the partnership might be dissolved on the ground of insanity, as from the time of filing the bill.

The evidence for the plaintiff was that since July, 1834, the defendant had never attended the office, or taken any part in the business of the partnership; that in 1834 and 1835 he was for some months in a lunatic asylum, where he had made several attempts to destroy **[185]** himself, and had refused to engage in the employments provided for the patients; and further that for fourteen months previous to April, 1838, he had likewise been in a lunatic asylum. Two medical men, who were examined, gave it as their opinion that he was decidedly insane, and that the malady was likely to be permanent. There was, however a chasm in the evidence of insanity during the latter part of the year 1835 and the year 1836; and the surgeon who was examined as to the party's insanity during the fourteen months previous to April, 1838, could not depose as to two months of that time, during which the defendant was under the care of another surgeon.

Mr. Collyer having opened the case for the plaintiff, the Lord Chief Baron expressed doubts: first, as to the jurisdiction of the Court to interfere in such a case, and, secondly, as to the sufficiency of the evidence.

Mr. F. J. Hall, for the defendant. We shall not dispute the jurisdiction of the Court, if your lordship is of opinion that the evidence is sufficient. In *Waters* v. *Taylor* (2 Ves. & B. 299) Lord Eldon said, "If a case arose in which it was established, as far as human testimony can establish, that the party is what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged

(*a*) See *Pearce* v. *Slocombe*, ante, p. 84.

in the partnership, and it was therefore as clear as human testimony can make it that he could not perform his contract, there could be no damages for the breach in consequence of the act of God. But it would be very difficult for a court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it." From these observations of Lord Eldon, there seems no doubt as to the jurisdiction of all courts of equity in such a case; but the [186] question here is whether the evidence of incurable insanity is established as far as human testimony can establish it.

Mr. Collyer, in reply. It seems difficult to say, after the evidence which has been produced in this case, that the party is not a confirmed lunatic. But supposing him not to be so, the question is whether the Court will not decree a dissolution upon the ground of his general inability, and his continued omission to perform the duties of the partnership. It has been proved that the defendant has never attended at the office since July, 1834, and that during a great part of the interval he has been in lunatic asylums. It is submitted that that is sufficient evidence for the Court to act upon, without resorting to the same strictness of testimony as would be required under a commission of lunacy. [The Lord Chief Baron. If the party were not insane, some notice to dissolve would be necessary, although the partnership is not under articles. But you proceed on the ground that you cannot give notice, the party being insane. You must therefore prove him insane.] If the evidence is insufficient, the Court may refer the question of insanity to the Master: *Sayer* v. *Bennet* (1 Cox, 107; Wats. Partn. 382). Upon the jurisdiction of Courts of equity in general to deal with this question there can be no doubt: *Jones* v. *Noy* (2 M. & K. 125).

THE LORD CHIEF BARON. My opinion is that the evidence in this case is not such as would satisfy a jury of the defendant's permanent insanity. But on the authority of Lord Kenyon in *Sayer* v. *Bennet*, I shall refer it to the Master to inquire as to the present and past state of mind of the defendant, and if he be insane, when he first became so; and the Master may receive any evidence, in addition to what has been read, that he may think neces-[187]-sary. The jurisdiction of Courts of equity in these cases seems to be well established, although in this particular court no such cases seem hitherto to have occurred.

August 3rd.—On this day the cause came on for hearing, on further directions; and the Master having received further evidence of the incurable lunacy of the defendant, it was decreed that the partnership should be dissolved as from the filing of the bill.

Decree accordingly.

CLARKE *v.* HENTY. June 2nd, 1838.—A father gave a bond to secure the repayment, within four years, of a simple contract debt due by his son. The father died, and the creditor commenced proceedings against his estate for the recovery of the bond debt, but subsequently took a fresh bond from the son, who was the father's heir at law, and from the personal representative of the father, conditioned for paying the same debt by instalments; the creditor, at the same time, retaining the original bond: Held, that the original bond was discharged: 1st, on the ground that the father was only surety for the son, and that the creditor, by giving time to the principal debtor, had discharged the surety; and, 2ndly, because the second bond must be considered, under the circumstances, as having been given in satisfaction of the first.

[S. C. 2 Jur. 918.]

John Henty being indebted to White by simple contract, prevailed upon his father, Thomas Henty, to become security for the debt. Accordingly, Thomas Henty executed a bond to White, by which he bound himself, his heirs, executors, &c. to pay the debt in four years. Thomas Henty afterwards died, having, by his will, devised all his real estate to trustees upon trust to pay the rents to his son John Henty (who was his heir at law), for his life, and after the decease of John Henty to the use of his children as tenants in common in fee. Upon Thomas Henty's death, White filed his bill in Chancery for payment of the bond out of Thomas Henty's estate, but he afterwards stayed those proceedings upon taking a fresh bond from John and Amelia Henty, the latter of whom was Thomas Henty's widow and personal

representative, by which the original debt was made payable by instalments of 20*l.* a year. White, however, retained possession of the former bond.

The present being a creditors' suit for the administration of the estate of Thomas Henty, White put in a claim [188] before the Master, under the first bond. The Master having reported against such claim, an exception was taken to the Master's report in that respect.

Mr. Bethell, for the exception. The original debt by simple contract cannot be taken into consideration. The only specialty debt was Thomas Henty's, and while that was in the progress of being enforced, his heir at law and personal representative agreed to strengthen the security. That is not a relinquishment of the former security. No doubt if a man has the security of a principal debtor and his surety, and enters into a new contract for giving time to the principal, the surety is discharged; but here the form of the second bond was to relieve the testator's estate. There is no contract to forbear enforcing the original bond, and the creditor is still in possession of it.

Mr. Temple and Mr. West, for the devisees of the testator's estate. Here there has been given time to the principal, which releases the surety's devised estate. It is not necessary that the suretyship should appear on the instrument. John Henty was the principal debtor, and the father gave his bond as surety for his son. Afterwards the principal debtor asks for time, and offers the joint bond of himself and his mother to secure payment of the original debt by instalments. She then becomes his surety. Is not that giving time to the principal? Could White carry on the suit in Chancery after the second bond? The second bond was a substitution for the other. If John Henty did not give it as heir at law, he gave it as principal debtor; and, therefore, quâcunque viâ datâ, the Master is right.

Mr. Simpkinson, for other parties interested in the real estate. It is impossible to say that the transaction with the father merged the remedy against the son. If the father had been sued in his lifetime he would have had a right to have enforced all the remedies against the son. [189] [The Lord Chief Baron. He might have defended himself by shewing payment by the son.]

The Lord Chief Baron. It appears to me that the Master is right in refusing to treat the claim under this bond as one which can now be enforced against the testator's estate. The facts are that John Henty being indebted by simple contract to one White, his father gave a bond obliging himself to pay the amount within four years. It is not suggested that there was any other consideration for this bond than the son's debt. In the nature of things, therefore, the father was surety for the son. After the father's death the son himself gives a bond to White, by which he was bound to pay the same original debt, by instalments of 20*l.* a year. What, then, is the situation of the parties? By a rule of equity and law too, if a party gives credit to his principal debtor, he discharges the surety. Suppose, between living parties, that A. owes B. a debt, and C. gives his bond for the payment of it at a particular time, without any agreement that the original contract shall be given up; and afterwards A. gives his bond to B., conditioned for payment of the same sum at a different period, it is clear that the original bond could not be enforced at law. It is argued, however, that upon the first bond being given, the debt is merged in that security. I do not agree with that doctrine. The rule of an obligation of a higher nature merging inferior obligations only exists as to contracts between the same parties. It cannot be contended that a contract by an original debtor is put an end to, because some surety gives a bond for it. It is clear that White could have brought his action against John Henty upon the simple contract, notwithstanding the father's bond.

But even supposing the original debt to have been discharged by the father's bond, the father becoming the principal debtor, and that, upon the father's decease, the [190] creditor took a bond from his executor and heir at law for the same debt, payable by instalments; could the original bond be enforced? It might be so if that had been the subject of special arrangement, but otherwise the circumstances would afford matter for a plea of accord and satisfaction. If, in addition to those circumstances, it appeared that the bond had been given up, that would no doubt be stronger evidence of satisfaction, but it would be by no means conclusive.

Now, here I find it was arranged that payment should be made by instalments of 20*l.* per annum, and that is all that is said. The agreement was not put in writing, and it is difficult to say what were its terms. It is therefore a question of fact. In

cases of bills of exchange negotiated between persons who are not merchants, the circumstance of a bill not having been given up at the time of payment is often matter of consideration for a jury, and I have known that circumstance to operate by no means to the disadvantage of the party sued. So, here, the retaining the first bond is a circumstance, but not a conclusive circumstance, against the devisees, and in favour of the present claim. On the other hand, it is observable that, under the original bond, White could only have sued the heir or executor of the testator—one or the other. Now, however, a bond is given by two persons, one only of whom could have been the subject of an action under the former bond, to pay the debt at a future day. Could it be intended that White should have power to proceed upon both bonds? It seems to me that, upon the facts as presented to the Court, the second bond was a satisfaction of the first; and, therefore, assuming that this was not a case of principal and surety as between the son and the father, the exception must be overruled: but I think it is a case of principal and surety, and that is sufficient to decide it.

Exception overruled.

[191] HALL *v.* LAVER. May 17th, June 5th, July 5th, 1838.—Purchaser, after long possession and vexatious objections to complete the purchase, held to have waived his right to an investigation of the title, and decreed to perform the agreement specifically, to pay interest at 4*l.* per cent. on the unpaid purchase-money from the time of taking possession, and to pay the costs of the suit.—Mortgagee of an equitable estate not a necessary party to a bill filed by the mortgagor and his trustee against a purchaser for the specific performance of the agreement to purchase.—Original vendee of an estate not a necessary party to a bill against his assignee for specific performance of an agreement to purchase.—An executor in trust, who has not proved the will, is a competent witness in equity as well as at law to increase the testator's estate.

[See further, 4 Y. & C. Ex. 216.]

Robert Barnevelt, by his will, devised all his freehold, copyhold, and leasehold estates to trustees, of whom the plaintiff Hall was the survivor, and their heirs &c., in trust for the testator's three grand-children, Robert Woolley, Jane Sanders, and Richard Woolley, equally to be be divided between them as tenants in common, their heirs, executors, and administrators.

In June, 1814, the whole property was, under proper authority (as it appeared by the bill, though not expressly stated), put up for sale by auction, in various lots, and in consequence of a mortgage which had been made by Robert Woolley, of his undivided third part, the following was one of the conditions of sale:—"One-third of the property is subject to a mortgage in fee of the equitable estate therein, and a decree was pronounced by the Court of Exchequer, for the foreclosure of the equity of redemption, unless the mortgage-money should be paid on an appointed day. The money was ready on the appointed day, and is now invested in the names of the solicitor for the mortgagees, and the solicitor for the defendant, the owner, but it could not be paid at the time, because one of the mortgagees has gone into foreign parts, and his residence has not been discovered; till, therefore, the title to this third part can be rendered complete, or the purchaser shall be satisfied with the title in its present state, the payment of the purchase-money for this one-third part shall be deferred, and in the mean time the purchaser shall hold and enjoy this one-third part, paying in lieu of rent interest for the purchase-money of this share, at the rate of 5*l.* per cent. per annum."

Lot 7, which was the subject of the present suit, was purchased by one Dearne, who paid a deposit in part of his purchase-money, had abstracts delivered to him of **[192]** the title, and was let into possession. Dearne afterwards sold his interest to Clarke, who again sold to the Misses Beauchamp, one of whom afterwards married the defendant, Laver. The latter purchase took place in 1818, and the Misses Beauchamp were then let into possession of the property, and also of the abstracts originally delivered to Dearne; and they or the defendant Laver had remained in such possession ever since, without paying any further part of the purchase-money or

any interest. In 1822 the difficulty referred to in the 8th condition of sale was cleared up; the parties representing the mortgagee having been ascertained.

In 1830 the plaintiff's solicitor wrote to the defendant, Laver, requesting him to return the abstracts in his possession, that he might, if necessary, further elucidate the title. No satisfactory answer being returned to this letter, applications were made to him to complete the purchase. These applications were met by a schedule of objections, which were afterwards, by the admission of the defendant's own counsel, duly answered on the part of the plaintiff. Ultimately, in 1833, the defendant's solicitor referred the plaintiffs' solicitor to the defendant himself. He, however, refused to admit any discussion on the subject, observing that he had no objection to a Chancery suit. In consequence of this refusal the present bill was, in December, 1833, filed by the trustee and the parties beneficially interested in the testator's estate, against Laver and his wife and her sister, for the specific performance of the contract of 1814. The defendants relied on certain objections which are referred to in the arguments for the plaintiffs.

Mr. Swanston and Mr. Koe, for the plaintiffs. The defendants admit the contract, the possession, and their liability to pay the balance of the purchase-money, but require a proper conveyance. One objection which they make to the performance of the contract is, that there is not a proper identification of the property comprised in lot 7, **[193]** there being a difference in the quantity of it as stated in various conveyances. The difference consists of two roods. Another objection is that a mortgage was executed by Robert Woolley, of his share in the property to one Taylor, and that the mortgagee is not a party to this suit. It is too clear, however, for argument that that is a mere matter of conveyance, and not an objection to a decree for a specific performance. Then it as alleged that Dearne and Clarke should be parties to this suit, but it is clear, on the authority of *Holden* v. *Hayn* (1 Mer. 47), that that is unnecessary. Upon the whole, objections raised to the performance of this contract are of the most trivial nature, and the Court will decree for the plaintiffs, on the ground of the length of the defendants' possession. The defendants have been in possession, and in receipt of the rents and profits since 1818; and the Court has invariably held that possession unexplained is an acceptance of title: *Fleetwood* v. *Green* (15 Ves. 594), *Burnell* v. *Brown* (1 J. & W. 168), *Margravine of Anspach* v. *Noel* (1 Madd. 310). In those cases it was part of the contract that the defendant should have the possession of the property; and yet a reference as to the title was refused. This case is much stronger in favour of the plaintiff, inasmuch as he was not bound by his contract to let the defendant into the entire possession. It is submitted, therefore, that he is entitled to a decree for specific performance, with interest, from the time the contract was entered into, with rests in the calculation of it.

Mr. Simpkinson and Mr. Stuart, for the defendant. It does not appear on the face of the bill who is the party entitled to the specific performance of this contract, or against whom the purchaser might have filed his bill for that purpose. It does not even appear who gave the instructions for the sale, or from whom the auctioneer had **[194]** his authority. The agreement, therefore, for any thing that appears on the bill, may be altogether futile and void, and it is not competent for the party in whom the fee is vested to adopt a bad agreement, and file a bill for specific performance of it: *Armiger* v. *Clarke* (Bunb. 111); and it is clear that bills will be dismissed for want of shewing mutuality of remedy as to the agreement sought to be enforced: *Bromley* v. *Jefferies* (2 Vern. 415), *Lawrenson* v. *Butler* (1 Sch. & L. 13), *Flight* v. *Bolland* (4 Russ. 298).

Admitting, however, the correctness of the pleadings, the question is whether the possession of the defendant, in this case, is a waiver of his right to have the title examined. Now, here we say that possession was taken under a strict understanding or agreement that the title should nevertheless be examined. No one can contend that the possession was an acceptance of title, when, afterwards, abstracts and further abstracts were delivered, and negotiations carried on respecting the title till near the time of filing the bill. *Fleetwood* v. *Green* is distinguishable from the present case because there no objections were made to the title. The general rule upon this subject is laid down by Lord Eldon, in *Jenkins* v. *Hiles* (6 Ves. 646), namely, that the Court will not decide upon a title without a reference to the master, unless objections to the title be unequivocably, and without fraud or surprise, waived; because a plaintiff seeking specific performance is entitled to the opportunity of making out a better title

before the master, and a defendant has a right to further inquiry beyond the objections arising on the abstract, upon the principle that the bill seeks relief beyond the law. Then, is there in this case any distinct or unequivocal waiver of title on the part of either party? The evidence of the plaintiff shews any thing but a waiver, and the defendant positively objects. In *Burroughs* v. *Oakley* (3 Swanst. 159) a pur-
[195]-chaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership, and a preparation of the conveyance. In the late case of *Bell* v. *Saunders* (*a*) a reference as to title was directed by the Lord Chancellor, although the purchaser had been in possession beyond the time sufficient to bar an ejectment, namely, thirty years.

Mr. Parker, Mr. W. C. L. Keene, and Mr. Collyer appeared for the other defendants.

Mr. Swanston, in reply. It is not disputed that possession may be taken subject to a right to investigate the title. But the authorities establish that a long continuance of possession amounts to a waiver of objections to title. The waiver is inferred, not because the party has taken the possession, but because he has continued it. Here the solicitors of the vendors make continual applications to the solicitor for the purchaser for a completion of the contract, thinking all objections at an end. They are ultimately referred to the purchaser himself. The object of the proposed interview with the purchaser was to see whether he had any further objections; but he positively refuses communion with them, and says he has no objection to a Chancery suit. His possession, therefore, is a possession holden after all ground for investigation has ceased, and is a dishonest holding.

July 5th.—ALDERSON, B. The question which remains for my decision in these cases (*b*) is, whether, taking all the evidence into consideration, I ought to refer it to the Master to examine into the plaintiffs' title; or whether I ought to direct him, the Court being satisfied that the title has been accepted, to settle a conveyance of the premises sold to the defendants.

[196] This was a bill for a specific performance of a contract entered into so long ago as 1814; and it appears, and is indeed not disputed, that the defendants entered into possession of the premises shortly after the contract, and have remained in possession ever since. Repeated applications have been made to the parties, without success, either to complete the purchase or to state their objections to the title.

In the first case some objections have been mentioned, but on looking at them they appear to be wholly without foundation; and I think the conduct of the party there has been such as to induce the Court to think that they are not serious objections to the title, but rather excuses from time to time made for not completing a purchase of premises, to the title of which the party had no real objection; and the end of the correspondence, in which the defendant's solicitor refers the plaintiff's solicitor to his client, apparently not choosing himself to offer further objection, confirms me strongly in that conclusion. In that case, after all these frivolous objections had been made, and after the party had refused to have any further explanation of them, he still continues in possession of the premises. I think his so continuing, under such circumstances, amounts to a waiver of his objections to title, and that he must be considered as having accepted the title of the plaintiffs. I purpose, therefore, to direct a reference to the master to settle the conveyance, and to consider who will be the proper parties to join in it. This will give an opportunity of removing one of the defendant's difficulties, if, indeed, there be any foundation for it.

As to both the other cases, I have also come to the same conclusion. There, also, there is no objection to the title; the parties have mentioned none; and I think the fair result of the evidence leads to the conclusion that they have undertaken to complete the contract, and have accepted the title.

[197] In cases like the present, the length of possession, without material objection to the title, is of the greatest weight. It cannot be permitted, I think, to parties, after enjoying the premises for upwards of twenty years, under such circumstances, to put the plaintiff to the further expense and delay, by an inquiry into title in the Master's office.

In all the cases, therefore, I propose to decree, as prayed by the plaintiffs, that it

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(*a*) Not reported.

(*b*) There were other suits against the purchasers of the other lots.

be referred to the Master to settle the form and parties to the contract, and that he do calculate interest at 4 per cent. on the purchase-money from the time the defendants respectively entered into possession, and that they do pay the same to the plaintiffs, and also the costs of the suit.

Decree accordingly.

On the hearing of the foregoing cause, the evidence of George Woolley Poole, the solicitor of the plaintiffs, was allowed to be read on their behalf under the following circumstances:—

After the bill had been filed, Robert Woolley, one of the plaintiffs, who was entitled to one-third of the property in question, died, having devised all his real estates to George Woolley Poole and Robert Pitcairn, their heirs and assigns, in trust to sell and invest the produce, and stand possessed of the funds produced by the investment upon various trusts for the benefit of the testator's widow and children.

In consequence of Robert Woolley's death, a bill of revivor and supplement was filed against George Woolley Poole and Robert Pitcairn and other parties, and George Woolley Poole, by his answer, admitted the following allegation in the bill of revivor and supplement:—That the defendants, G. W. Poole and Robert Pitcairn, have declined probate of the will of the said Robert Woolley, but have not executed any deed or deeds of disclaimer or **[198]** renunciation of the trusts thereof; and that the plaintiff, Richard Woolley, the eldest son of the said Robert Woolley, hath obtained letters of administration, with the will annexed, of all the goods, rights, chattels, and effects of his said late father, &c., and hath thereby become his legal personal representative.

Mr. Simpkinson and Mr. Stuart, for the defendants, objected to the reception of G. W. Poole's evidence, on the ground that he had not renounced probate, and that, until renunciation, he was not a competent witness to increase the estate of his testator: *Croft* v. *Pyke* (3 P. W. 180). [Alderson, B. I doubt the law of that case as stated, but it does not apply here, because the party is not suable.] They then referred to *Mabank* v. *Metcalf* (3 Atk. 95), *Fotherby* v. *Pate* (3 Atk. 603), and *Bellew* v. *Russell* (1 Ball & B. 96) [Alderson, B. How can this party be answerable for a devastavit until he has proved the will?] They then contended that law and equity differed upon this point, a man being considered in equity liable for a devastavit before probate, and cited *Mulvany* v. *Dillon* (1 Ball & B. 413). They also insisted that the circumstance of the party being a defendant was primâ facie evidence of his incompetency as a witness. [Alderson, B. A man is a competent witness till he is shewn to be otherwise.]

The plaintiffs' counsel were stopped by the Court.

ALDERSON, B. The rule is, not that an executor who has not renounced, but that an executor is not a competent witness to increase his testator's estate. Now, although this party has a right to become executor, he is not so at present; and until he is an executor he is not liable for a devastavit. He is, therefore, a competent witness for the plaintiffs.

[199] ROME AND ANOTHER *v.* YOUNG. ROME AND ANOTHER *v.* YOUNG AND OTHERS. MOUNSEY AND OTHERS *v.* YOUNG AND OTHERS. June 9th, 1838.—Vendor of an estate obtained a decree for specific performance, with a declaration that, if the purchase-money was not paid by a given day, the estate should be sold, the proceeds paid to the vendor, and the purchaser be made personally liable in the event of any deficiency. The Master fixed the day of payment, but the purchaser died before that day insolvent, and a creditors' suit was instituted for the administration of his assets. Upon a bill of revivor and supplement filed by the vendor, praying to have the benefit of the creditors' suit as well as his own: Held, that he was not entitled to prove against the general assets of the testator, and at the same time to reserve his lien on the estate contracted to be sold; in case of a deficiency in the general assets. Quære whether in this case he had any claim on the general assets until after the estate had been sold, and, if he had, whether he was entitled to prove for the whole amount, or only the deficiency, after sale of the security.

[S. C. 2 Jur. 963. See further, 4 Y. & C. Ex. 204.]

The petitioners, who were the plaintiffs in the first two suits, in July, 1831, entered into a written agreement with John Young for the sale to him of a messuage and lands for 1750l. Young having paid part of his purchase-money, but having failed to complete the contract, the petitioners filed their bill against him and obtained a decree for specific performance. Under that decree the Master was to compute interest on the unpaid residue of the purchase-money from Candlemas Day, 1832, to the 1st of March, 1837, and to tax the petitioners their costs of the suit as between solicitor and client up to that time; and to certify the amount of what was due for principal, interest, and costs, and to appoint a time and place for the payment thereof, and in default of such payment, the Master was to proceed to a sale of the premises for the purpose of satisfying such principal, interest, and costs; and in case of a deficiency, the defendant was to be charged with such deficiency.

In pursuance of this decree the Master made his report, certifying certain sums to be due for principal, interest, and costs, and appointing that those sums should be paid at his chambers on the 1st of March, 1837. Before, however, that day arrived, and before the report was absolutely confirmed, namely in January, 1837, John Young died, having, by his will, devised various real estates (but not the estate contracted to be purchased) to different persons; and having devised the residue of his real and personal estates (including therefore the estate contracted to be purchased) after payment of his debts, [200] legacies, and funeral expenses, to his nephew and heir-at-law, W. B. Young, whom he appointed his sole executor.

Upon the death of the testator, his devisees took possession of the respective real estates devised to them and received some of the rents. A creditor's bill, however, was afterwards filed in this Court for the administration of the testator's assets, and a receiver appointed; and by the decree in that suit, dated in March, 1838, the deficiency (if any) of the testator's personal estate for the payment of his debts was ordered to be raised by sale or mortgage of his real estates, and an enquiry was directed as to mortgages and incumbrances affecting such estates and their priorities, and such sale or mortgage was to be subject to the mortgage or incumbrance of such of the prior mortgagees or incumbrancers as should not consent thereto; and in case of a deficiency of the real estates for the purposes before mentioned, it was declared that the rents and profits of the estates which had been received by the devisees should be applied to make good the deficiency.

In consequence of this decree, the petitioners amended their original bill, making it also a bill of revivor and supplement, by introducing the same parties defendants as were defendants to the creditors' suit, and by praying relief in the creditors' suit, without prejudice to the relief sought by their original suit. The relief so prayed was made the subject of the present petition, which was entitled in all three causes, and which contained a prayer in part to the following effect:—That the receiver might be ordered to keep a separate account of the rents and profits of the estate comprised in the contract, and that the same might be laid out, and invested, and accumulated as part of the security belonging to the petitioners; that the Master's report of the 1st March, 1837, might be confirmed and that he might calculate subsequent interest for the prin-[201]-cipal money from that time, and that such subsequent interest might be added to the principal; and that the petitioners might be at liberty to go in before the Master under the decree in the third-mentioned suit, and prove the amount thereof as creditors upon the real and personal estates of the testator, and to rank as creditors by decree against the said estate with his other creditors, and receive the amount of the said debt; and that the petitioners might be declared and treated as having a mortgage or lien on the said estate, comprised in the said written agreement and decree in the said first-mentioned suit, and on the rents and profits thereof, for the deficiency (if any) of the monies to be received under the said proof; or that the order to be made on this application might be without prejudice to the relief prayed or to be given in the said second-mentioned suit, &c.; and that the receiver in the third-mentioned cause might be appointed receiver in the first and second-mentioned causes, &c.

Mr. Wray, for the petitioners. The question is whether the petitioners are bound to sell the estate in the first instance and prove for the difference, or whether they are entitled at once to stand as creditors under the decree in the last suit. [The Lord

Chief Baron. Is it not a rule that when a creditor has a specific lien he must make the most of it before he can do any thing more?] The petitioners having a claim on both funds, it is submitted that they can go and prove the whole debt against the personal estate, reserving their lien to satisfy any deficiency. The question came before the Lord Chancellor in *Mason* v. *Bogg*,(*a*) and his Lordship took occasion to dissent from the judgment of Sir John Leach in *Greenwood* v. *Taylor* (1 Russ. & Myl. 185), in which his Honor had held that, in equity as well as in bankruptcy, a mortgagee must [202] first sell his security before he can resort against the common fund.

Mr. Purvis, for the plaintiffs in the creditors' suit. In *Mason* v. *Bogg* the party who contracted had two rights, namely, as mortgagee and under a covenant; and the Court said it was not the duty of equity to interfere with those legal rights; and though *Greenwood* v. *Taylor* had decided otherwise, the Lord Chancellor differed in opinion from that decision. This case is altogether different from *Mason* v. *Bogg*. Here the contract for sale of the estate created a simple contract debt only; but then there being a right to a lien in equity for the purchase-money unpaid, the petitioners got a decree for specific performance, and an account, and the Court decreed that if the purchase-money was not paid by the time fixed by the Master, the lien should be resorted to. The petitioners now ask your Lordship to reverse that decree, and to give them an execution, as it were, against the personal property, with liberty to work out the deficiency by treating the lien as the last resource. [The Lord Chief Baron. It may be urged that if there were no creditors' suit the executor would be liable to pay the whole in the first instance.] The personal estate is insolvent; and, considering the case with reference to that circumstance, it is clear the petitioners have no right to prove for the whole but only for the deficiency, and for that they might have entered their claim before the Master without resorting to this petition.

Mr. Romilly, for one of the devisees. Assuming that the petitioners are entitled to prove for the whole of their debt against the personal estate, yet there being two ways in which they may receive payment, the Court, without reference to any rule in bankruptcy, will direct them to take that mode which is the easier and less expensive. The practice in equity is that a creditor having security [203] shall sell his security first, and then prove; and, generally speaking, he proves for the whole debt. Any other course would be attended with great inconvenience. If these petitioners had followed that course, this petition would have been unnecessary, for they would have gone in at once before the Master. In the case of a mortgagee, where the estate has been sold, and there is a deficiency, did any one ever hear of his presenting a petition to go in under a creditors' suit. He would go in at once. It may be doubted whether the petitioners should prove for the whole or a part: but this is not the time for discussing that question. The decree certainly says that if Young or his executors do not or cannot pay the money by a certain day, then the estate shall be sold, and the testator shall be liable to pay the deficiency, which seems to amount to a declaration by the Court that the deficiency only was to be the debt.

Mr. Bagshawe, for another devisee. The question is what remedy these petitioners would have had if this party had never died. They ask to prove for the whole amount against the general assets and then sell their security. We say they have no right so to do, and that the decree is precise on that subject. By the terms of the decree when the estate is sold, then and then only is the purchaser personally liable. Could they, at any moment, have come against the purchaser for the whole amount under the decree? If in that case they could have got no more than the deficiency, will your Lordship give them more on administering the assets? [The Lord Chief Baron. There was a debt at law. You must qualify your proposition.] They might certainly have proceeded at law, but they would have lost their remedy in equity. Besides, they do not come here on general rights, but as creditors by decree. They make the decree the measure of their rights. There is no case like this. The course should have been by further directions.

[204] Mr. Wray, in reply, observed that specific performance of the contract had been decreed, and the decree involved a complete obligation to pay. The mere accident of the party dying before the day fixed for payment ought not to deprive the petitioners of their remedy.

The Lord Chief Baron. It is quite clear that if, by the contract between the

(*a*) 2 M. & C. 445. See *Davis* v. *Dowding*, 2 Keen, 245.

parties, the creditor has two specific securities, one the personal covenant of the debtor, and the other by way of mortgage, a court of equity cannot disturb either one or the other. It is not the business of a court of equity to alter the contracts of parties, but to enforce them. A party is entitled to both remedies as soon as he can enforce them. Here, by the contract, there was nothing but a personal engagement to pay; there was no specific security. Such security could only be obtained by the intervening power of a court of equity. We must look, then, at the security, as it has been shaped by a court of equity. The bill was filed to ascertain the amount of principal, interest, and costs due on account of this purchase; and the defendant was ordered to pay the amount. Well, but the order to pay is not followed up by any immediate proceedings. It is only upon the party's refusing to pay on a given day that the equitable lien is to be enforced. Supposing the parties had all lived, and the estate had come to be sold, the debtor not paying in time—upon the estate being sold, and a report made of the amount of the proceeds, the plaintiff would have had a right immediately to an order for payment of the balance. But, till then, he would not have had that right: so that, in this particular case, the court of equity does not give him a lien except under certain circumstances. So, again, supposing (as has happened here) that the debtor had died before the day of payment, and no order of sale had been made, the plaintiff must have revived the suit against the debtor's executor, praying payment of principal, interest, and costs, as before, and **[205]** in default of payment, claiming a right of lien upon the same terms as before. Now, then, under these circumstances, suppose a creditors' suit to have been instituted against the debtor's estate, not in this court, but in Chancery; what order could be made in this court? Of course, no other than could have been made if the creditors' suit had not existed. This court could only continue to act on the executor, and could, in no way, affect the proceedings in Chancery. That being the case, if the party chose to exercise his equitable lien, he could come to this court and ask for the order for sale, but he could obtain no other order; and, therefore, I do not see how I can make any other order, merely because the creditors' suit happens to be in this court.

I cannot, however, say that the petitioners were altogether wrong in presenting a petition to see what could be done. They clearly could present it in their own cause with a view to fixing the time of exercising their lien. My doubt is what order I can make upon it. I certainly cannot allow the estate to be sold, reserving their right. They had no security in the estate, except what a court of equity gave them; and though I agree with what the Chancellor says in *Mason* v. *Bogg* I do not see how it applies here. Let the estate be sold immediately, with liberty to the petitioners to prove, and let the question whether the proof shall stand for the whole or the difference be reserved.

Order accordingly.

BLENKINSOP *v.* FOSTER. June 2nd, 1838.—Where an order had been made, directing the costs of certain residuary legatees to be taxed as between solicitor and client, the Court refused to vary the order on the mere ground that it had been obtained without the consent of all the residuary legatees.—An executor having been ordered to pay money into Court is not thereby deprived of his lien on the fund for his costs.

[S. C. 8 L. J. Ex. Eq. 8.]

The bill was filed by one of four residuary legatees against the others, and against a person who was executor **[206]** and trustee under a will, calling upon the latter party to account for the property of the testator. The usual decree was made, and the cause came on for further directions, when it was contended, on the part of the defendants, the co-residuary legatees, that the suit was useless, and that the plaintiff ought to pay the costs of it. The Court, however, was of opinion that the plaintiff was justified in filing the bill, and ordered the costs of all parties to be paid out of the fund in court.

The order having been framed at the instance of the plaintiff, so as to give all parties their costs as between solicitor and client—

Mr. Simpkinson and Mr. Bayley, for the defendants, the co-residuary legatees, moved that so much of the order as related to the above-mentioned costs might be expunged, observing that as directions for costs as between solicitor and client had

only been recently introduced into this court, it would be well to follow the practice in Chancery in regard to them; and that, in Chancery, it is well settled that costs will not be taxed for a residuary legatee as between solicitor and client, without the consent of the co-residuary legatees: *Fenner* v. *Taylor* (6 Madd. 3). Here, the co-residuary legatees did not consent.

Mr. Piggott, for the executor, supported the motion.

Mr. Temple and Mr. Elderton, for the plaintiff, contended that their client, having succeeded in establishing his right to file the bill, was entitled to the order which had been made; but that, at all events, this court, following the practice of Chancery, would not allow a cause to be reheard on account of costs. *Fenner* v. *Taylor* was a mere memorandum.

[207] ALDERSON, B., said that upon examining the Master's minute, he found that it corresponded with the order; and therefore, as under such circumstances it required a strong case to authorize the Court to vary the order, he was of opinion that a sufficient case had not been made out for that purpose.

Dec. 7th.—In this case the executor had been ordered to pay into court a balance found due from him in respect of the testator's estate. By the terms of the order, all parties were to be paid their costs out of the fund, and in case it should not be sufficient for that purpose, liberty was given to all parties to apply to the Court as they might be advised.

The plaintiff now presented his petition to have the balance found due from the executor paid into court; and the fund already in court, together with that balance, being insufficient for payment of all the costs, the question was whether the executor was entitled to have his full costs, or was only to take his share of the costs pari passu with the other parties.

Mr. Temple and Mr. Elderton, for the petitioner, contended that, upon the construction of this order, the executor was to come in pari passu with the other parties, and was not entitled to have his full costs paid in the first instance; and that this was the intention of the order was manifest from the circumstance of the executor having been ordered to pay his balance into court.

Mr. Simpkinson, contrà. An executor cannot be deprived of his priority and lien for costs by reason of his having been ordered to pay money into court. Payment into court merely alters the hand that holds the fund, but [208] does not deprive an executor of his lien on the fund. *Bennett* v. *Going* (1 Molloy, 529), *Young* v. *Everest* (1 Russ. & M. 426).

ALDERSON, B. I cannot adopt Mr. Temple's construction of this order. It seems to me that it was only intended to postpone the application of the fund to the payment of costs until such time as the fund should be ascertained, when the court on the application of any party was to apportion it. I cannot think that the executor was intended to be prejudiced by the order. My only difficulty is that he has not presented a petition; but, as the other parties make no objection on that ground, I think he is entitled to the usual costs.

WILLIAMSON *v.* NAYLOR. June 22nd, 23rd, 1838.—Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors, and the debts due to them respectively: Held,—1. That the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, and, consequently, that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will.—2. That the direction so given for payment of these debts prevented the operation of the Statute of Limitations.—3. That the fund being insufficient to pay the debts in full, and many of the creditors having failed to answer the Master's advertisement, their shares were to be applied in further satisfaction of the demands of the creditors who had come in, and were not to be distributed amongst the testator's next of kin.—Where a testator revives debts which have been barred by the Statute of Limitations, he may appropriate a specific fund for their payment, and, if the fund is not sufficient, the creditors must take rateably.

[Discussed and applied, *Philips* v. *Philips*, 1844, 3 Hare, 290; *Turner* v. *Martin*, 1857, 2 De G. M. & G. 432; *Wild* v. *Banning*, 1866, L. R. 2 Eq. 581. Not applied, *Ashley* v. *Ashley*, 1877, 4 Ch. D. 770. Applied, *Stevens* v. *King*, [1904] 2 Ch. 30.]

Two persons of the name of Lockey and Gamon were, in and previously to the year 1805, in partnership together. Having become greatly embarrassed, they, in 1806, executed a deed of composition with their creditors, under which the latter received 10s. in the pound on the amount of their respective debts. This deed contained no release by the creditors of any portion of their debts. After this arrangement Lockey went to South Carolina, where he acquired a considerable property, and returned to Eng-**[209]**-land in 1808. After his return he made his will, and died in 1810, leaving a widow and three children.

Lockey, by his will, devised and bequeathed all his property, both real and personal, in South Carolina, to trustees, upon trust, within two years after his decease, to sell the same, and to remit the proceeds thereof, together with all monies arising from his stock in the American funds, &c., to his executors in England; "to be applied," to use the language of the testator "(allowing sufficient for the maintenance of my family), to the immediate payment and discharge of all my lawful debts, which debts are due to the following persons, and amount to the sums hereinafter stated: (that is to say) about 2000l. due on two several bonds, to the trustee of the late William Purday; and the principal and interest on a bond for 300l. due to Mrs. Ann Beard, or the estate of the late John Beard; also a bond amounting to 1365l. to the Rev. Richard Lockey, as a new assumption of the balance of an old debt; also a certain bond given by me to Charles Beard, for securing an annuity of 72l. a-year during his life. The above several items include all the lawful debts I owe, as far as my recollection extends. In the next place, I desire that 500l. be divided amongst the children of Simon Crook, agreeable to the will of my deceased friend, Edward Crook, notwithstanding the insolvency of the estate of the said Edward Crook, for which sum a bond is executed to Simon Crook and Charles Bradford, in trust for the said children; and after the above payments are completed, and the exact amount of the balance of my remaining effects is ascertained, it is my desire that the said remainder be divided into five equal parts or shares and applied in manner following: (that is to say), one-fifth part of the said residue I desire may be divided and paid by my executors equally between such of the creditors of Lockey and Gamon as are contained in a schedule hereunto annexed, according to the amount of such cre-**[210]**-ditors' debts, the other creditors of the said concern having been already satisfied by me." The testator then bequeathed the other four-fifth parts of such residue for the benefit respectively of his wife and his three children. The schedule to the will contained the names of fifty-two individuals or firms to which the house of Lockey and Gamon were indebted; the amount of each debt being set opposite the respective names, and the total amount of debts being 7190l. Amongst the names of the creditors appeared that of the plaintiffs, Williamson & Co., to the amount of 448l.

After the decease of the testator, the present suit was instituted by the plaintiffs on behalf of themselves and all others, the creditors of Lockey and Gamon, for the purpose of having the will carried into execution. At the hearing of the cause before Lord Lyndhurst, C. B., in June, 1834, the principal question was whether the creditors named in the schedule to the testator's will were to be considered in the light of legatees, or strictly as creditors; it being necessary to determine whether the benefits apparently provided for such of the creditors as had died in the testator's lifetime had lapsed (which would be the consequence of the former hypothesis) or had descended to their personal representatives. Lord Lyndhurst, after hearing the arguments of counsel upon this point, was of opinion that the parties named in the schedule were not the mere objects of the testator's bounty, but were creditors whose debts were revived by the will.(*a*) **[211]** His Lordship, therefore, decreed the usual accounts to

(*a*) The following was Lord Lyndhurst's judgment according to a note taken by Mr. Keen:—

LORD LYNDHURST, L. C. B. The debts enumerated in the schedule were subsisting debts at the time when the will was made, and when the testator directed this portion of his residuary estate to be divided among the creditors named in the schedule in proportion to the amount of their original debts, I cannot consider this as

be taken, and that the Master should ascertain the clear residue of the testator's estate, and should advertise for the creditors of Lockey and Gamon named in the schedule, to come in before him and prove their debts by a certain day, or be excluded from the benefit of that decree. And the Master was to inquire whether any and which of such creditors were dead at the time of the decree, and if dead, who were their personal representatives.

The cause now coming on for further directions, it appeared by the Master's report, dated the 30th May, 1836, that, out of the 53 creditors named in the schedule to the testator's will, 22 only had by themselves or their representatives come in to prove their debts before him. It appeared, also, that the one-fifth of the residue to be appropriated among the creditors amounted to 3999l. 2s. 10d., **[212]** while the amount of debts proved was 5367l. 8s. 6d. The principal question, therefore, now was whether the sums set apart for the creditors who had not proved should be paid to the creditors who had proved, in further satisfaction of their debts, or should go to the testator's next of kin as residue undisposed of. The other question was the same which had been argued before Lord Lyndhurst, namely, whether the representatives of creditors who had died in the testator's lifetime were entitled to prove.

Mr. G. Richards and Mr. Keen, for the plaintiffs. As the deed of 1806 contained no release by the creditors of their respective debts, the only question before Lord Lyndhurst was that which depended upon the effect of the statute of limitations. Upon that his Lordship was of opinion that the will revived the debts out of the statute, and had not the mere effect of making the creditors legatees. [Alderson, B. In *Foster* v. *Ley* (2 Bing. N. C. 269), which was very like this case, the Court treated the creditors as legatees and made them pay the legacy duty.] In this case Lord Lyndhurst decided the other way; holding that the parties named in the schedule were not legatees, but revived creditors. The right, therefore, of the representatives of those creditors who died in the testator's lifetime is settled by his decree; and all the creditors who have come in are entitled to be paid in full. *Burke* v. *Jones* (2 Ves. & B. 275) and *Jones* v. *Scott* (*c*) are authorities to shew that this will creates a trust for the payment of all the testator's debts. [Alderson, B. It applies only to one-fifth part of the residue.] Admitting that to be so, it revives all the debts. [Alderson, B. That is creating a trust contrary to the intention of the testator.] At all events, the creditors who have come in are entitled to be paid out of one-fifth of **[213]** the residue as a creditors' fund, which is to be distributed amongst them, as far as it will go, in satisfaction of their debts.

Mr. Boteler and Mr. Benson, for the next of kin. The testator, by his will, directs his private debts to be paid, and specifies these debts. He then gives various legacies,

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a mere voluntary bounty on the part of the testator, but I must consider that the testator meant this money to be applied in satisfaction, or part satisfaction, of an obligation in reduction of those debts, which, though they could not be enforced against him at law, were, nevertheless, subsisting debts. This is not a legacy subject to the payment of legacy duty, but a trust created by the testator in satisfaction or reduction of debts, the remedy for the recovery of which was barred by the statute. This case is clearly distinguishable from *Coppin* v. *Coppin*, for there the creditors had accepted a composition in satisfaction of their demands; they had released their debts, and the debts were, consequently, extinguished. But here there was no release, no extinguishment of the debts, no obstacle to the recovery of them, except the bar to the remedy raised by the statute, which bar the testator has removed. The statute bars the remedy, but does not extinguish the debt. The debtor may, at any time, pay the debt; and even his executor may pay it in spite of the statute, and in that way satisfy in his representative capacity the conscience of his testator. In this case the testator has manifested an anxious desire to fulfil his just obligations; and it was plainly his intention not to make a gift to the persons named in the schedule, but to waive the legal bar to the recovery of his debts, and to satisfy or reduce his debts as the case might be, for the amount of the residue was uncertain. I am clearly of opinion, therefore, that the plaintiffs are to be considered as creditors; and that they are, consequently, entitled to the decree prayed by their bill.

(*c*) 1 Russ. & M. 255; reversed in Dom. Proc. 16th August, 1838; and see *Freake* v. *Cranefeldt*, 3 M. & C. 499.

and divides the residue in fifths; and directs one-fifth to be paid by his executors equally among such of the creditors of Lockey and Gamon as are named in the schedule, according to the amount of their respective debts, "the others having been satisfied." About four-fifths only of those creditors have come in; and we contend that the rest of the fund has lapsed and belongs to the next of kin. The whole of the creditors' claim depends on this particular clause of the testator's will, and not on a general revival by the testator of his debts. If the creditors come in under the will, they must come in according to the language of the will. [Alderson, B. They contend that the testator revived his debt generally; if so, they are payable out of the general assets.] There is nothing in Lord Lyndhurst's decree, whatever there is in his judgment, which shews that they should come in as general creditors. They are called in the decree creditors of Lockey and Gamon, which was the language of the will. *Coppin* v. *Coppin* (2 P. W. 291). However, there is no reason to say that the testator did not intend these persons to take as legatees. If so, the words of the will create a tenancy in common among them, and there is, therefore, a resulting trust in the shares undisposed of for the next of kin: *Jolliffe* v. *East* (2 Bro. C. C. 25), *Bishop of Cloyne* v. *Young* (2 Ves. sen. 91), *Bagwell* v. *Day* (1 P. W. 700), *Robinson* v. *Taylor* (2 Bro. C. C. 589), *Dawson* v. *Clarke* (18 Ves. 247), *Skrympsher* v. *Northcote* (1 Swanst. 566).

[214] Mr. Richards, in reply. The next of kin could only be entitled in the event of no creditors having come in before the Master. The decree treats the creditors as creditors, not as legatees. It comprehends creditors who died both before and after the testator. Many of the persons who came forward were the personal representatives of persons who died in the lifetime of the testator. If they are creditors, and not legatees, what is not taken by the omission of parties coming forward must be divided among those who do come forward, according to general principles of law: and that, whether they take out of the general assets or out of a particular part. They are directed to prove in the ordinary way. A testator may apply the general rules of law to a particular part of his estate. No release was ever given by the creditors, and the greatest anxiety has been expressed by the testator in his will to pay all his debts—first, his private debts, and then his joint debts. The words "equally between" have been relied on as creating a tenancy in common amongst the creditors as legatees, but it is obvious that such was not the intention of the testator. [Alderson, B. "Equally" means "rateably."]

June 23rd.—ALDERSON, B. It seems to me, upon considering this case, not only that, under the circumstances in which it has come before me, I ought to consider the judgment of Lord Lyndhurst as binding upon me, but that, if I had been called upon to give judgment upon it at the hearing, I should have come to the same conclusion as his Lordship did upon the construction of the will of this party. It appears that Mr. Lockey had incurred a variety of debts in the early period of his life, and afterwards came to a settlement, by composition, of such of those debts as were incurred by him jointly with his partner Gamon. That composition was paid by the trustees of Lockey and Gamon. The debts, however, remaining unpaid in full, Mr. Lockey, like an honest man, thought it right to make a **[215]** bequest whereby they should, to a certain degree at least, be satisfied, and accordingly, after giving by his will certain legacies, he divided the residue of his property into five parts, one of which parts he directed to be paid equally, that is, rateably, among the creditors of Lockey and Gamon, whom he names in the schedule to his will; "the others," as he says, "having been already satisfied." There are a variety of debts mentioned in the schedule as being due to firms, and to the executors of different persons. Obviously, therefore, the schedule refers not to individuals but debts: it points to the debts rather than to the persons of the creditors. It is a devise, therefore, in trust to pay such persons as should reasonably appear to be the creditors of Lockey and Gamon at the testator's decease. That was the view of Lord Lyndhurst; and, although to a certain extent the gift to these creditors may be considered as a tenancy in common, the question is, of what body do the tenants in common consist? Why, of such creditors as prove their debts before the Master, and therefore one-fifth of the residue is to be divided among those persons. Some of the creditors have not proved. Whether their debts have been satisfied, or the evidence of their debts has been lost by time or accident, I do not know; but I find that, after the usual advertisements have been issued by the Master, a limited portion of the creditors only came forward.

Those, then, are the parties amongst whom this share of the residue is to be divided rateably.

Order accordingly.(*a*)

[216] THOMAS FENN, WILLIAM PRATT, AND FOSTER REYNOLDS, *Plaintiffs;* AND SIR JAMES GIBSON CRAIG, BART., JOHN ANDERSON, THOMAS DUNCAN, AND EAGLE HENDERSON, AND THE HONORABLE WILLIAM FRAZER, MAJOR-GENERAL SIR JAMES LAW LUSHINGTON, GEORGE PALMER THE YOUNGER, FRANCIS KEMBLE, CHARLES WILLIAM HALLETT, WILLIAM EDMUND FERRERS, AND GEORGE FARREN, *Defendants.* June 29th, 1838.—A bill in equity will lie at the suit of a life assurance office to have a policy delivered up to be cancelled on the ground of fraud in effecting the insurance, where the instrument is not void on the face of it; and, in such case, the plaintiffs have a better equity if they bring their bill in the lifetime of the assured than if they wait till after his decease.—Where a bill was filed on behalf of an assurance company, for the delivery up of a policy of assurance: Held that the trustees of the company who were not interested in the profits, and were liable to be sued alone in an action on the policy, were properly made sole plaintiffs to the bill, the shareholders of the company being made defendants.—Where a bill is filed by the trustees of a fluctuating company against third persons, for the benefit of the company, it is not necessary to make every individual member a party to the suit, if the bill allege that the plaintiffs do not know and are unable to ascertain the names of such members.

[S. C. 3 Jur. 22.]

The plaintiffs were trustees and also directors of the Asylum Life Assurance Company. The defendants Craig, Anderson, Duncan, and Henderson, were trustees of the Northern Reversionary Company, and the other defendants were the remaining directors, and also shareholders of the Asylum Life Assurance Company. The bill prayed that a policy of assurance, subscribed by the plaintiffs, and effected with the Asylum Company on the life of the Honorable George Talbot by the defendants, the trustees of the Northern Reversionary Company, might be delivered up to the plaintiffs to be cancelled, the plaintiffs offered to deal with a premium which they had received for such insurance, as to the Court might seem just. The bill likewise prayed an injunction to restrain the sale or mortgage of the policy, &c.

[217] The bill alleged, as grounds of equity for setting aside the policy, that it had been obtained from the plaintiffs by means of fraudulent representations as to the habits and conduct of the assured, it having been stated that the assured, though formerly addicted to intemperate living, had become an altered man, and was, at the time of the effecting the policy, of temperate habits; whereas the plaintiffs charged the contrary to be the truth, stating many minute circumstances in support of the general charge.

With respect to the number and character of the parties to the bill, it stated that the plaintiffs are the three trustees of the said Asylum Life Assurance Company, being also three of the directors, and not being shareholders nor beneficially interested in any assurance granted by the said company, and are duly appointed in pursuance, and by virtue of the deed of settlement of the said company; that the other persons, besides those whose names herein appear, who are shareholders, or claim an interest in the said Northern Reversionary Company, as also the other persons, besides those whose names herein appear, who are shareholders, or claim an interest in the said Asylum Life Assurance Company, are so numerous that it would be impossible if the plaintiffs could discover who such other persons are, that the plaintiffs could make them parties defendants to this suit. But the plaintiffs shew that the names of such other persons, and their places of abode are wholly unknown to them; and that the plaintiffs have not the means of discovering the names and the places of abode of such other persons. That the defendants, the directors of the said Asylum Life Assurance

(*a*) For cases in which it has been held that particular portions only of a testator's estate are liable to the demands of a certain description of creditors, see *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck. 202; *Thompson* v. *Andrews*, 1 M. & K. 116; *Cutbush* v. *Cutbush*, Jurist, vol. 3, p. 142.

Company, are interested and concerned in the funds and profits of the said company, and have the management and direction thereof, and claim an interest in the said policy of assurance.

To this bill the defendants, the trustees of the Northern Reversionary Society, demurred on the following grounds:—**[218]** 1. That divers other persons besides the parties to the said bill are interested in the relief sought therein: and yet such other persons are not made parties thereto, nor is the said bill filed on behalf of themselves and such other persons. 2. That divers other persons besides the parties to the said bill are interested in the matters in question in this suit, and yet such parties are not made parties thereto. 3. That the plaintiffs are not entitled to the relief they seek by the said bill, in regard to the form and constitution thereof. 4. That the plaintiffs are not entitled to the relief sought by their said bill, or to any other relief against the defendants.

Mr. Walker, for the demurrer. Where parties, having a common interest, are so numerous as to make it inconvenient or impracticable that they should all be made parties to the record, a few may sue on behalf of themselves and all the other members of the association. But the bill must allege that the plaintiffs do sue in that character, it being a general rule that a party suing as trustee for others must, in some shape or other, bring the cestui que trusts before the Court: *Douglas* v. *Horsfall* (2 S. & S. 185), *Small* v. *Atwood* (1 Younge, 458), *Long* v. *Yonge* (2 Sim. 369). Here not a single cestui que trust appears as plaintiff before the Court. The plaintiffs expressly state that they are not interested in the funds and are bare trustees. [Alderson, B. They would be liable to all the costs of an action on the policy, if Talbot were to die.] At all events they seek relief, which might be obtained by other persons who are substantially interested. Those persons, except such as happen to be directors, are not made parties to the suit; the alleged ground of such omission being that their names and places of abode are wholly unknown to the plain-**[219]**-tiffs. But in *Davis* v. *Fiske* (Farren on Insurance, 128) Lord Eldon, in allusion to this sort of allegation, said: "Can it be said that a man does not know his own partners, nor the nature of the concern in which he is a member? There is no excuse, therefore, from the nature of the body, for their not naming them and bringing them before the Court." [Alderson, B. These plaintiffs are not partners: they are sole trustees.] They are interested with other persons in the relief sought by the bill. They are in the situation of creditors; a creditor being bound to file the bill on behalf of himself and all other creditors.

These remarks apply to the first two grounds of demurrer. The third ground of demurrer refers to the informality in the bill, in making some of the directors plaintiffs, and the others defendants. No reason is assigned for that mode of pleading. A party cannot stand both as plaintiff and defendant without some apparent reason. If it is alleged that all are interested in having the policy delivered up, why are the directors made defendants? It is not alleged that they refuse to join.

With respect to the demurrer for want of equity, it may be observed that a bill to set aside a policy of assurance is very unusual; indeed, it is very questionable whether such a bill will lie. Besides, the plaintiffs do not specifically offer to repay the premium. [Alderson, B. I presume they state a participation in the fraud by you.] They only allege generally that Talbot was our agent.

Mr. G. Richards and Mr. Farren, for the bill. The plaintiffs have not waited till the death of Talbot, and then turned round upon the defendants, with a view of defeating the policy, but have come here at once to have the policy delivered up to them; therefore, no doubt, the bill is unusual. The plaintiffs are trustees, and not share-**[220]**-holders in the Asylum Office. They say, we are personally responsible in an action on the policy, and, therefore, we have a right to the cancelment of it now, and not to have a cloud hanging over our title. No one can doubt that the action would be brought by the parties affecting the policy against the parties subscribing it. Judgment would be taken out against them, and they would be liable personally to the costs, let them recoup themselves as they might. It has, in 1838, come to our knowledge that in 1837 Talbot was of intemperate habits. If we had waited and taken the premiums, would not that fact be prejudicial to us in an action brought on the policy? *Bromley* v. *Holland* (5 Ves. 610), *Byne* v. *Potter* (id. 609), *Ex parte Shaw* (5 Ves. 620), and *Hoffman* v. *Cooke* (id. 623), are clear authorities to shew that the Court has jurisdiction to order the delivery up of this instrument. In *Simpson*

v. *Lord Howden* (3 M. & C. 97) the Court declined to give such relief, because the instrument was, on the face of it, illegal, which is not the case here.

Then as to the demurrer for want of parties. If the plaintiffs are interested in having the instrument delivered up, we go a great way to shew that they, and they alone, are entitled to have it delivered up. A court of law would look to them only. It is said that the bill ought to have been filed by the plaintiffs on behalf of themselves and all other parties interested in granting the policy. But the plaintiffs and the other parties have not the same interest. The plaintiffs have nothing to do with shares or profits, and, therefore, if the other parties had been joined with them, the record would have been erroneous from the inconsistency in the interests of the parties suing. It is argued, however, that at all events all those other parties should have been made defendants, the plaintiffs having **[221]** an interest in the contract only, and not in the profits. But here the question is not between partners, as it was in *Long* v. *Yonge* (2 Sim. 369). In winding up the affairs of a partnership all the members are equally interested; but here we go against a common enemy. Besides, there is an allegation in this bill that the names of the shareholders in the Asylum, except the directors, are wholly unknown to the plaintiffs; and can it be incumbent upon the plaintiffs to ascertain who are the members of a body which is constantly fluctuating? This observation is doubly forceable with respect to the Scotch Reversionary Society. [Alderson, B. It seems to me that that allegation is sufficient. You cannot make a man do an impossibility in a court of justice; or, rather, delay his remedy till that is done. In *Blain* v. *Agar* (id. 289), upon the second hearing, the demurrer was overruled on that ground.] If this allegation be correct, there would have been an obvious inconsistency in filing the bill on behalf of the shareholders.

Mr. Walker, in reply. The two sets of parties connected with the Asylum are perfectly identical. The plaintiffs are trustees having the funds of the society in their possession, and can indemnify themselves. If not, they can file a bill. There is an express direction in the policy that the funds shall be liable for their costs and expenses. The trustees are mere nominees; the only parties virtually interested being the shareholders. Why, then, should the trustees, without the consent of the others, come forward to institute this suit? They have really and substantially no personal liability. The affairs of the society are intrusted to the directors generally; why, then, are the directors both plaintiffs and defendants?

Again, the mere allegation that the plaintiffs do not **[222]** know the names of the shareholders is not sufficient. It ought to appear that they have used due diligence to obtain information on the subject. At all events, in order to prevent future litigation and to render the suit final, it ought to have been instituted expressly on behalf of the shareholders. A suit so framed renders the institution of other suits unnecessary, because the creditors who come in under the decree are not barred by the statute of limitations: *Sterndale* v. *Hankinson*.(*a*) [Alderson, B. The suit may be final, whether the parties are plaintiffs or defendants. It is another question whether or not persons are improperly made defendants.]

ALDERSON, B. It seems to me that this demurrer must be overruled. In substance, it rests on two grounds only, though many have been brought before the court. One is, that the plaintiffs are not entitled in equity to the relief they seek; and that turns on the question whether they were induced by the fraudulent representations of the defendants to enter into the contract in question; and if so, whether, by the rules of the Court, they are entitled to have the contract rescinded. It seems to me, that if the allegations in the bill are to be taken to be true, the contract ought to be rescinded; and that, with respect to that relief, the plaintiffs stand in a better position now than they would have done after the death of the party had occurred. I think also that this case is not within the rule laid down in *Simpson* v. *Lord Howden*, where the party, being considered to have equal means of relief at law as he had in equity, was refused equitable relief. There, the objection appearing on the face of the instrument, there could be no loss of evidence by lapse of time; and the question was triable at all times in the same way. Therefore, the Lord Chancellor decided that **[223]** the party had no right to come into equity to have that instrument delivered up. Here, the question in issue could not be equally well tried at all times, for it is

(*a*) 1 Sim. 393; but see *Berrington* v. *Evans*, ante, vol. 1, p. 434.

clear that it could never be tried on such just and equitable grounds as now. I think, therefore, that the plaintiffs have a right to redress against the defendants in equity.

Then as to the demurrer for want of parties, I think that also must be overruled. The rule of equity on this point is laid down in *Wilkins* v. *Fry* (1 Mer. 262), where it is stated by Sir William Grant that, though at law all persons who have a joint interest must join in an action, yet in equity it is sufficient that all persons interested in the subject of the suit should be before the Court either in the shape of plaintiffs or defendants. No doubt where parties have precisely the same equity they should sue on behalf of themselves and all others jointly interested with them, or else allege some reason why they cannot all join as plaintiffs. But here, the plaintiffs and the defendants have different interests. To a certain extent, indeed, the shareholders of the Asylum Office may have an interest in common with the plaintiffs, namely, in having the instrument delivered up to be cancelled; but the plaintiffs, as trustees, are interested beyond that, namely, in the action at law to be brought on the policy. No doubt, at the same time that the plaintiffs are so interested, the shareholders are likewise interested in the policy in one of two ways; namely, as retaining the instrument as a valid instrument, or as desirous in common with the present plaintiffs to have it delivered up; therefore, they may be made either plaintiffs or defendants to a suit of this nature; but it appears to me more convenient, considering the difference of interest to which I have adverted, that they should be made defendants.

It is then stated that the defendants, the directors of **[224]** the Asylum Office, are the only persons whom the plaintiffs know to be interested as shareholders. If it be true that they do not know the names of the other persons interested, and I am bound upon demurrer to take that allegation to be true, can it be an absurd conclusion for a court of justice to come to, that they are not bound to do an impossibility in bringing such persons before the Court? To come to any other conclusion seems to me so gross an absurdity that I am not disposed to make a precedent in favour of such a course. If it should afterwards turn out that there are other persons who ought to have been made parties to this bill and who are not made parties, that would be a ground of objection at the hearing, but upon demurrer I must take this allegation to be true.

Demurrer overruled.(*a*)

(*a*) The following is a succinct view of some of the leading authorities on the subject of the foregoing report:—

Chancey v. *May*, Prec. Ch. 592. Bill by the present treasurer and manager of the Temple Mills brass works on behalf of themselves and all others proprietors in that undertaking except the defendants, against the late treasurers and managers, about thirteen in number, calling them to account for frauds and embezzlements. Demurrer for want of parties overruled.

Cullen v. *Duke of Queensbury*, 1 Bro. C. C. 101. Bill by a tradesman against the committee of a club (being the annual committee at the time of the transaction), praying for an account and payment of monies expended in the purchase of a house, furnishing and attending it, and other incidental expenses. The bill charged that the plaintiff could not discover the several members of the club and procure a remedy against them, as they were very numerous, and many of them totally unknown to him. Objection, that he ought to have made the other subscribers parties, overruled.

Adair v. *New River Company*, 11 Ves. 429. Bill by a person entitled to a rent-charge out of the profits of the New River Company, against the company, as owners of one moiety of the profits, and against the company jointly with eight other persons as owners of the other moiety, praying for an account of certain deductions from the rent-charge which had been made by the company in respect of land tax. The bill alleged that the last-mentioned **[225]** moiety was vested not only in the company and the eight defendants, but other persons, amounting to upwards of 100, whose shares were so fluctuating &c. that it would be impossible, if the plaintiff could discover them, to bring them all before the Court. Lord Eldon seemed to think that this allegation was sufficient.

Good v. *Blewitt*, 13 Ves. 397 (overruling *Moffat* v. *Farquharson*, 2 Bro. C. C. 337, and *Leigh* v. *Thomas*, 2 Ves. sen. 312). Bill by the captain of a privateer against the owners for an account pursuant to articles which had been executed for a distribution of prizes made by the ship, allowed to be amended by introducing a statement that

[227] JONES *v.* THOMAS. July 2nd, 1838.—In order to re-examine before the Master a witness who has been examined in the cause, a party must obtain an order upon motion made with notice, and the notice of motion must state the names of the witnesses proposed to be examined.

[S. C. 3 Jur. 770. See further, p. 455, post.]

This was a motion on the part of the defendant for liberty to re-examine before the Master all or any of the witnesses who had been examined on his behalf in the cause, and that the Master might be directed to settle the interrogatories for the purpose of such re-examination. It appeared that the plaintiff had taken in a state of

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the bill was filed on behalf of the plaintiff and all other the mariners and other persons who had signed the articles and had not received their shares of the prizes.

Cockburn v. *Thompson*, 16 Ves. 321. Bill by several persons on behalf of themselves and all other the proprietors of the Philanthropic Institution, who shall come in &c. against the bankers and solicitor of the establishment, praying an account of monies received by the defendants, and that the institution might be dissolved. Plea of want of parties overruled.

Meux v. *Maltby*, 2 Swanst. 277. Bill against the treasurer and directors who were also shareholders of the East Country Dock Company, in the character of purchasers pendente lite, for the specific performance of an agreement to grant a lease of part of the purchased estate. The bill alleged that the shares of the stock being transferable at the pleasure of the holders, the plaintiffs were unable to discover who were the present holders other than the defendants. Objection for want of parties overruled.

Douglas v. *Horsfall*, 2 S. & S. 184. Bill by the trustees of the Portable Gas Company (without making any other members of the company parties to the bill, or stating the bill to be filed by some of them on behalf of the others), against the defendant for the specific performance of an agreement to grant a lease. Demurrer allowed.

Gray v. *Chaplin*, 2 Sim. & Stu. 267. Bill by two shareholders on behalf of themselves and all other the shareholders of the Louth Navigation except the defendants, against the acting commissioners and the assignee of the tolls, who was himself a commissioner, praying that an agreement entered into between the commissioners and the assignee relative to the tolls, might be set aside as being contrary to the provisions of the Louth Navigation Act. General demurrer overruled.

Van Sandau v. *Moore*, 1 Russ. 441. Bill by one shareholder in the British Annuity Company, against the directors and some, but not all, of the other shareholders of the company, praying that the defendants might be restrained from acting on the deed of settlement, and that certain directions might be given as to the mode of conducting the concern. Demurrer for want of parties allowed.

[226] *Blain* v. *Agar*, 1 Sim. 37; 2 Sim. 290. Bill by five persons, on behalf of themselves and all other parties to a certain indenture who were either originally or by assignment holders of 1690 shares in the Royal Stannary or British Mining Association against the directors (who were also shareholders), praying the repayment of the sums which had been paid by the plaintiffs on their shares. Demurrer for want of parties allowed. Bill amended by omitting all mention of the indenture, and alleging that the plaintiffs were ignorant of the names of all the shareholders except those who were parties to the suit. Demurrer for want of parties overruled.

Hitchens v. *Congreve*, 4 Russ. 562. Bill by five persons on behalf of themselves and all other shareholders in the Arigna Iron and Coal Company, against the directors of the company, for the purpose of compelling the latter to refund monies alleged to have been withdrawn by them from the stock of the company and applied to their own use. Demurrer to the bill, on the ground that all the shareholders were not parties, overruled.

Long v. *Yonge*, 2 Sim. 369. Bill by forty-seven persons on behalf of themselves and all other the members of and partners in the Norwich Equitable Insurance Company against the survivors of the original directors and trustees of the company, and certain other members of the company who had been appointed by them in the room of the deceased directors and trustees, and also against the executors of the late secretary or registrar, praying for a dissolution of the establishment in consequence

facts before the Master, and had read from the admissions in the defendant's answer, and from the depositions in the cause, such passages as he thought substantiated his case. The defendant also had taken in a state of facts with a view to discharge himself from certain sums with which the plaintiff had charged him; but upon his proposing to support his state of facts by affidavits, the plaintiff objected to that course of proceeding as excluding cross-examination, and the Master allowed the objection. The object therefore of the present motion was to supply the defect in the defendant's evidence in this respect.

Mr. Metcalfe, for the motion. Upon an order obtained with notice, a party has a right to have his witnesses in the cause re-examined before the Master, provided they are not examined upon the same points to which they were previously examined in the cause. [Alderson, B. This is a sort of case in which it would be better for the Master to see the witnesses.(*a*) Any question put before the Master might then be objected to as having been already put.] That objection will be provided for by the Master settling the interrogatories. [Alderson, B. That will be of very little use. If you put mere questions of fact, interrogatories will do, but not where you want to cross-examine.] The practice is settled by many author-**[228]**-ities. It is the clear right of the suitor to re-examine his witnesses before the Master, subject to the Master's settlement of the interrogatories: *Browning* v. *Barton* (2 Dick. 508), *Sawyer* v. *Bowyer* (1 Bro. C. C. 388), *Vaughan* v. *Lloyd* (1 Cox, 312), *Rowley* v. *Adams* (1 M. & K. 543). [Alderson, B. You have not named the witnesses you mean to examine. How can a party object to your motion unless he knows the names of the witnesses?]

Mr. Simpkinson and Mr. Roupell, contrà. There is no instance of such an order as that which has been asked for. It is essential to the ends of truth that the witnesses should be named, and that it should be stated what point is to be examined into. The Court would then be satisfied as to the necessity for the examination, and might then perhaps grant the motion: but a mere general notice of this nature unsupported by evidence is altogether nugatory. It is clear that the object of this party is to re-examine upon points that have been deposed to before, for otherwise he need not have applied to the Court. Upon points not deposed to at the hearing, the Master may examine without an order: *Swinford* v. *Horne* (5 Madd. 379).

Mr. Metcalfe, in reply.

ALDERSON, B. The practice is as stated by the Master of the Rolls in *Rowley* v. *Adams*, namely, that a witness who has been examined in the cause cannot be examined again before the Master without an order. The only case to the contrary is *Swinford* v. *Horne*. It appears to me, therefore, that this party is right in applying to the Court **[229]** to have his witnesses re-examined; but he must state the names of the witnesses whom he wishes to have re-examined, otherwise the other party cannot shew cause against the motion.

Motion refused with costs.

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of the misconduct of the trustees and secretary, and that the necessary accounts might be taken. The bill charged that the policy holders exceeded four thousand, and that therefore it would be impracticable to make them all parties to the suit; that a large proportion of them resided in various parts of the kingdom, and that the plaintiffs were ignorant of and had no means of ascertaining their names and residences. Demurrer, because all the partners in the company had not been made parties, and because several persons who appeared by the bill to have acted as directors, had not been made parties to the suit, allowed. See, also, 2 S. & S. 18.

Small v. *Attwood*, 1 Younge, 407. Bill by seventeen persons on behalf of themselves and all others members of the British Iron Company (amounting in all to about 400) against A. to set aside a contract for fraud. Bill held to be maintainable.

Evans v. *Stokes*, 1 Keen, 24. Bill by three persons on behalf of themselves and all other members or partners of the French Brandy Distillery Company except the defendants, against the directors and two shareholders who were not directors, suggesting that a dissolution of the company had been brought about by the fraud of three of the defendants, and praying that the partnership affairs might be wound up: Held. that all the partners must be parties.

(*a*) See the case reported ante, vol. 2, p. 498.

HANSON *v.* PRESTON. July 2nd, 1838.—After issue joined in a foreclosure suit, the plaintiff discovered that, prior to the creation of his mortgage security, the defendant, the mortgagor, had become bankrupt; whereupon the Court gave the plaintiff leave to amend his bill by making the assignees defendants, the bankrupt still being retained as a defendant on the record.

This was a foreclosure suit, the plaintiff being the assignee of the original mortgagee. The bill contained the usual charge that the defendant pretended that prior to the plaintiff's security there were divers other persons incumbrancers on the property, and interested in the equity of redemption. The defendant, by his answer, denied to the best of his belief that there were any such incumbrances. The plaintiff then filed his replication, and subsequently, upon a motion by the defendant to dismiss the bill for want of prosecution, gave the usual undertaking to speed the cause. After the undertaking had been given, the plaintiff discovered that, between the date of the mortgage and the assignment, the defendant had been found a bankrupt, and that his bankruptcy had never been superseded.

A motion was now made on behalf of the plaintiff that he might be released from his undertaking to speed the cause, and for liberty to withdraw his replication and amend the bill, by making the assignees under the bankruptcy defendants to the suit.

Mr. Simpkinson and Mr. Hurd, for the motion.

Mr. Lovat, contrà, said that as all the bankrupt's interest in the mortgaged property was vested in his assignees, the plaintiff had no right to prosecute the pre-[230]-sent suit against the bankrupt as well as the assignees (which would be the effect of granting this motion), but ought to dismiss his present bill, and proceed against the assignees solely. He referred to the authorities, in which it has been held that an insolvent or bankrupt mortgagor ought not to be made a party to a suit for foreclosing a mortgage: *Lloyd* v. *Lander* (5 Madd. 282), *Collins* v. *Shirley* (1 Russ. & M. 638), *Kerrick* v. *Saffery* (7 Sim. 317).

Mr. Simpkinson, in reply.

The Court, after observing that the bankruptcy might be disputed, granted the motion on payment by the plaintiff of the costs of this application, and of the proposed amendments.

BRETT *v.* GREENWELL. July 2nd, 1838.—Money in Court belonging to a married woman ordered to be applied for the benefit of herself and children, the husband having taken the benefit of the Insolvent Act.

[Disapproved, *Napier* v. *Napier*, 1841, 1 D. & War. 410. Followed, *In re Cutler's Trust*, 1851, 14 Beav. 220.]

A testator of the name of Elliot devised certain copyhold estates to the defendant Greenwell and others upon trust, after the decease of his wife Elizabeth Elliot (who took a life interest in the premises), to sell the same and divide the proceeds arising from such sale amongst his, the testator's children, by his said wife, in such shares and proportions as she should by will appoint, and in default of such appointment, unto and amongst such children in equal shares. Elizabeth Elliot died, having by her will appointed the fund amongst the seven children of the marriage equally, with the exception that Margaret, one of the children, was to have 330l. more than the others. The copyholds were sold, and the trustees, in pursuance of the widow's appointment, paid to six of the children their respective shares, but retained in their [231] hands the remaining share, in consequence of the child to whom it was appointed, and who was a daughter, having married George Brett, who had taken the benefit of the Insolvent Act. The present bill was, therefore, filed on behalf of Mrs. Brett, who had several children, praying for an account, and to have the share applied for her benefit, and that a settlement might be made upon her, no settlement having been made previous to her marriage.

Upon the hearing of the cause, it was ordered that the defendant Greenwell should pay into court the amount of Mrs. Brett's share of the fund, which having been done, the cause now came on for further directions. The Master had reported that, in his judgment, it was inexpedient that the fund in court should be diminished by the

expenses of a settlement. The question, therefore, was whether the fund was to be applied, either wholly or partially, for Mrs. Brett's benefit, and, if it was, in what manner it should be so applied.

Mr. Simpkinson, for the plaintiff, Mrs. Brett.

Mr. Jeremy, for the creditors of George Brett, said that primâ facie the whole fund belonged to the creditors, and he submitted that the plaintiff and her children had no equity: *Foden* v. *Finney* (4 Russ. 428). At all events, she was not entitled to the whole fund: *Beresford* v. *Hobson* (1 Madd. 362). [Alderson, B. I do not understand that case.]

ALDERSON, B. In a case of this nature, the situation of an insolvent is very different from that of a bankrupt. The wife of an insolvent may be in the workhouse with her children, and yet, if the insolvent afterwards acquires property, neither the wife nor the children will be benefited by it, but the whole goes to the creditors. A bank-[**232**]-rupt, on the other hand, after he has obtained his certificate, is a free man. It appears to me, therefore, that this insolvent's wife and her children are entitled to the whole fund; and if I am bound, by the practice of the Court, to take away from her any portion of it, I will take away a shilling.

Declare that the interest or dividends on the fund in Court which may accrue on the residue of the fund after payment of subsequent costs of the suit, ought to be paid to the plaintiff, Elizabeth Brett, wife of George Brett, on her separate receipt, during her life, or until further order; and that, upon her death, the principal ought to be divided equally amongst such children as she now has or may hereafter have, who may be living at the time of her decease.

SUCKLING *v.* MADDOCKS. Nov. 3rd, 1838.—The Court, although the merits of the case appeared to be considerably in the plaintiff's favour, refused to allow him to dismiss his bill without costs, he having filed the bill with knowledge of the defendant's embarrassed circumstances, and having prosecuted the suit after receiving notice of the defendant's bankruptcy.

Motion on behalf of the plaintiff for liberty to dismiss his bill without costs. The plaintiff's affidavit stated that the defendant, Charles Kenrick, made an assignment of his property to the defendants, Maddocks and Johnson, upon trust, in the first place, to pay the expenses of the assignment, and next to divide the property equally among the creditors of Kenrick. That the assignment was duly executed, and that Maddocks and Johnson entered into possession of the property. That the plaintiff, who was a solicitor, prepared the indenture of assignment and was employed in the sale. That his bill amounted to l., and ought to have been paid by Maddocks and Johnson out of the proceeds of the sale; but that being unable to obtain payment of it he had insti-[**233**]-tuted the present suit. That both Maddocks and Johnson were in insolvent circumstances, and that the former had taken the benefit of the Insolvent Act. That Maddocks upon his examination before the Insolvent Court had admitted that he had received 80l. of the trust monies and had applied them to his own use. That Johnson by his answer in the suit had likewise admitted that he had received 119l. by the sale of Kenrick's furniture, and that he had not stated how he had disposed of that sum.

The motion was opposed on behalf of the defendant Johnson, who was the only defendant who had appeared to the bill. The affidavit of his present solicitor in substance stated that on the 16th November, 1837, a fiat in bankruptcy issued against Johnson, of which event the plaintiff had notice in a letter written to him by the deponent. That in that letter the deponent proposed that a composition should be entered into as to the costs claimed by the plaintiff, and that thereupon the bill should be dismissed without costs; otherwise he gave the plaintiff notice that the defendant would move to dismiss the bill; that in answer to this letter, the deponent received a very angry note from the plaintiff, and also a notice that if the defendant did not put in his answer immediately, an attachment would issue: that the defendant accordingly, put in his answer on the 20th of November, 1837, and that he afterwards moved to dismiss the bill for want of prosecution, upon which the plaintiff filed his replication.

It was apparent from the tenor of the bill that the plaintiff must have had some notice of the embarrassments of the defendants before he filed the bill.

Mr. Hayter, for the motion. It must be admitted that there are many cases on which the Court has refused to accede to such an application as the present, when it has been made on the mere ground that the defendant has **[234]** become a bankrupt. But here the defendant is not merely a bankrupt but a defaulting trustee. By his own admission he has received trust monies which he has not applied to the purposes of the deed of trust; although under that deed the plaintiff's claim stands first. It is clear that upon a special case made, and this is a special case, the Court will permit a plaintiff to dismiss his bill without costs: *Van Sandau* v. *Moore* (1 Russ. 469), *Knox* v. *Brown* (1 Cox, 359; 2 Bro. C. C. 186).

Mr. Bethell, contrà. There is no parallel to this application. The defendant Johnson put in his answer after his bankruptcy, and also after that event was known to the plaintiff, and by reason of the compulsory process of attachment issued by the plaintiff. The plaintiff, therefore, compelled the party to employ a solicitor, thereby giving the solicitor a vested right to costs. [The Lord Chief Baron. Not a vested right to costs. They are in the discretion of the Court.] After the answer put in the plaintiff abandons the suit. The defendant then moves to dismiss for want of prosecution, and the plaintiff files his replication, thereby shewing his intention to go on with the suit. As to the trust monies received by the defendant, there is no ground for saying that he has misapplied them; but that is a question which must be dealt with at the hearing, not on an interlocutory application. *Fidelle* v. *Evans* (1 Bro. C. C. 267), *Rutherford* v. *Miller* (2 Anstr. 458), *Monteith* v. *Taylor* (9 Ves. 615), and *Pearson* v. *Belcher* (*f*) are authorities against the present motion. In *Knox* v. *Brown* it does not appear that any answer was put in. In *Van Sandau* v. *Moore* the decision was against the plaintiff, although Lord Eldon said that in special cases such a motion as the present might be made.

[235] Mr. Hayter, in reply.

THE LORD CHIEF BARON. I should be unwilling to say that a plaintiff was in no case competent to make such a motion as the present, or that one of the cases in which he might make it might not be the bankruptcy of the defendant. Suppose, for instance, a party to have filed a bill without knowledge of the insolvency of the defendant, and the defendant after putting in his answer to have become bankrupt, it would be a hard thing to say that the plaintiff should pay the costs of the suit, by reason of the conduct of the defendant. The practice might bind me to make him pay the costs, but I should be sorry for it, for the inclination of my mind would certainly be the other way. I cannot listen to the argument as to the vested interest of any solicitor in the costs. Causes must be decided according to the rights of the parties and not with reference to the rights of solicitors.

I think that in this case it would be unreasonable to allow the plaintiff to dismiss the bill without costs. The bill was filed after the plaintiff had had due notice of the insolvency of the defendant. That insolvency terminates in bankruptcy. The defendant is, nevertheless, obliged to put in his answer, which is the commencement of his costs. How is he to pay the plaintiff's costs? The plaintiff might have inferred that the suit was fruitless when he began it. I must be guided by what Lord Eldon did in the case that has been cited (*Monteith* v. *Taylor*), though this is not exactly that case.

Motion refused.

[236] HOLT *v.* HARDCASTLE. Nov. 3rd, 1838.—Where a sole plaintiff becomes bankrupt, and the defendant wishes to speed the cause, although he can obtain no direct order against the assignees to continue the suit, he may move that unless they file a supplemental bill within a given time the suit shall be dismissed.

After the answers were put in the sole plaintiff in this suit became bankrupt.

Mr. Blunt now moved on behalf of the defendants that the plaintiff's assignees might, within three weeks after service of this order, file a supplemental bill, or that the plaintiff's bill might stand dismissed. He cited *Wheeler* v. *Malins* (4 Madd. 171) and *Porter* v. *Cox* (5 Madd. 80).

Mr. Simpkinson, contrà. The Court is called upon to make an order on the

(*f*) 3 Bro. C. C. 87; but in this case the bill was dismissed without costs. See Belt's ed.

assignees who are no parties to the suit. Bankruptcy either does or does not abate the suit; if it abate, the consequences are the same as if the plaintiff had died, in which case an order to revive cannot be made on his representatives: *Canham* v. *Vincent* (8 Sim. 277). If the suit is not abated, it only becomes defective, and the plaintiff has a right, though he is a bankrupt, to prosecute the suit.

THE LORD CHIEF BARON. At law the assignees may continue the suit either in the name of the plaintiff, they undertaking to pay the costs, or in their own name. The object of this application is to put the assignees in such a position that they may be liable to pay the costs of the suit if they prosecute it. This party appears not to have asked for the proper order; but it seems to me that he may obtain some order.

It was then ordered (the counsel for the assignees not opposing) that the bill should be dismissed without costs, unless a supplemental bill should be filed by the assignees within six weeks.

[237] ACKLAND *v.* BRADDICK. Nov. 15th, 1838.—Where a decree not final in its nature, or which has only been partially acted upon, is in the opinion of the Court so erroneous that, if carried into execution, it would upon appeal be reversed in the House of Lords, the Court will grant a rehearing of the cause, notwithstanding the application for the rehearing be made after the ordinary time for that purpose.—Semble, that if the error be apparent on the face of the decree, the Court will not take into its consideration the conduct of any of the parties as a ground for refusing the rehearing.

[S. C. 3 Jur. 39.]

This was a petition for liberty to have a cause reheard, notwithstanding the lapse of six months since the decree was pronounced. The facts were shortly these: James Trotter being seised in fee of an estate subject to a lease for twenty-one years, made his will dated 2nd of May, 1811, and thereby devised the estate to his nephew, Robert Blackman, and William Braddick, upon trust to let and set the premises, and out of the profits, in the first place, to discharge a certain debt, and then to pay certain legacies; and subject thereto, he devised the estate to John Blackman, his heirs and assigns.

Upon the death of the testator in May, 1814, part of the debt mentioned in the will was satisfied out of the rents and profits, and John Blackman, with the consent of the trustees, entered into possession of the estate, and afterwards cut down timber, and exercised various acts of ownership upon it. The trustees, however, did not execute to him any release of the premises. Afterwards, John Blackman, by deeds of lease and release, conveyed the premises to the plaintiff Ackland in fee.

In May, 1824, the plaintiff filed his bill against John Blackman, the trustees, and other parties; stating that the trustees, though they had not interfered at the time of the purchase, had lately set up a claim upon the estate in regard to certain trusts which they alleged to be unsatisfied; and praying that the plaintiff might be declared entitled to the estate, subject to a certain legacy under the testator's will, and that an account might be taken of the rents and profits received by the trustees, and that the plaintiff might be paid what was due to him on taking the account, and that all proper parties might be decreed to convey, &c.

Robert Blackman afterwards died, having appointed the **[238]** petitioners, Edward Lutley and George Bradley, his executors, who were thereupon made defendants to this suit by bill of revivor. By their answer they admitted the will of Robert Blackman, but alleged that his personal estate was insufficient for the payment of his debts, and they submitted to act as the Court should direct.

By the decree made at the hearing of the cause on the 23d of June, 1830, it was ordered that the defendant, William Braddick, should convey the premises to the plaintiff; and it was referred to the Master to take an account of the rents and profits received by Robert Blackman and the defendant Braddick, and also by the petitioners or either of them, or by any person or persons, by their, or any, or either of their order, or for their, or any, or either of their use; and, in taking such account, the Master was to allow to Robert Blackman and Braddick all sums of money which he should find to have been paid by them on account of the said trust, and all sums were to be deducted from the amount of the sums so allowed which the Master should find

due from Robert Blackman and Braddick, or the petitioners, or some or one of them. And it was further decreed that the costs of the suit up to the hearing and all subsequent costs should be paid by Robert Blackman and Braddick, or the petitioners, or some or one of them.

In pursuance of this decree, the Master reported that the portions of rents and profits which had been received by Robert Blackman and Braddick jointly, or for which the estates of both were liable, amounted to 60l., and that the portion of rents and profits received by Braddick separately amounted to 200l.; and he did not find that any sum of money on account of such rents and profits had ever been received by the petitioners or either of them.

Braddick afterwards took the benefit of the Insolvent Act, and his assignees were brought before the Court by supplemental bill.

[239] In May, 1837, the cause came on to be heard on further directions; when it was contended for the plaintiffs that, though the petitioners were only made parties as representatives of Robert Blackman, they were, nevertheless, liable to pay the whole sum of 260l. found due by the Master's report, as well as all costs. On the other hand it was insisted that, there being no charge in the bill, nor any evidence affecting the petitioners personally, they ought not to be made liable for the misconduct of other persons. No order was then made, and the cause stood over, with liberty to the petitioners to present a petition for leave to have the cause reheard, which was now accordingly done. The reason for the petitioners not having taken earlier steps to correct the decree appeared to be that, until Braddick's insolvency took place, they were not aware that the suit would be substantially prosecuted against them.

The petition was met by an affidavit on the part of the plaintiff, to the effect that, at the time of the purchase of the premises by the plaintiff, one Pring was the tenant; that Pring paid the plaintiff some rent, but afterwards, at the instance of the petitioners, refused to do so; that the petitioners colluded with Pring to deprive the plaintiff of his rent, and by an arrangement between them a distress was levied on Pring's premises for the benefit of the petitioners; that these circumstances were not known to the plaintiff till after the decree was made, and that the plaintiff had no opportunity of charging such matters in the bill. The affidavit stated other circumstances to shew that since the decree the petitioners had done various acts to obstruct its execution.

Mr. Simpkinson and Mr. Hayter, for the petition. The Court, on a special case, will grant liberty to present a petition of rehearing, although six months have expired from the time of pronouncing the decree: *M'Lach*-**[240]**-*lan* v. *Rob* (1 Y. & C. 267), *Halford* v. *Halford* (id. 270), *Story* v. *Johnson* (2 Y. & C. 587), in which some years had elapsed, and the decree had been acted upon, *Heneage* v. *Lord Andover* (3 Y. & J. 360), *Drake* v. *Smith* (3 Bligh, 267). The petitioners say that they had reason to believe that the suit would not be prosecuted against them, and therefore they omitted to draw up the order. No relief is prayed against them personally, and the Master has found that they have received nothing on account of these rents. Yet the decree proceeds to make these representatives, who do not admit assets, personally liable, not for what they themselves have received, but for what their testator and his co-trustee may have received. They are made jointly and severally liable to pay what is due. The decree also goes on to make them personally liable to pay all costs; not merely the costs up to the hearing, but all future costs. If they are implicated in the misconduct of any one it must be that of their testator, and out of his assets they may be liable to pay the costs, but in no other manner: *Corporation of Ludlow* v. *Greenhouse* (1 Bligh, N. S. 17). It is clear that they were only made formal parties in order to see whether they had received any assets from Robert Blackman. The affidavit for the plaintiff relates only to acts which occurred subsequently to the decree, charging them with obstruction in the execution of the decree. No wonder they did so. The decree is grossly unjust, and appears on the face of it to have been drawn up in great haste. In many places it treats Robert Blackman as a person still living.

Mr. G. Richards and Mr. Puller, contrà. The decree was made so far back as 1830, and has since been acted upon. The report was made in February 1836, the cause **[241]** came on for further directions on the 9th of July in the same year, and the cause was again before the Court in February, 1837. During the whole of that period, therefore, the petitioners might have made this application if they had pleased. The costs which they say they ought not to have paid were paid five years ago; and

they now seek repayment of them. If the decree was not according to the minutes, they should have corrected it long ago. In *M'Lachlan* v. *Rob* and *Halford* v. *Halford* the time which elapsed after the six months and before the application was very short. In *Heneage* v. *Lord Andover* nothing is said about time. In *Story* v. *Johnson* the circumstances were very special. Even admitting the decree to be wrong, the conduct of the petitioners has been such as to deprive them of the benefit of such an application as this. It is clear, upon the affidavits, that they have conspired to defraud the plaintiff of his rent. In that view of the case it is immaterial whether they are charged personally in the bill or not, or even whether the decree is right or wrong. The question is whether they shew special circumstances to warrant a petition of rehearing, and to take the case out of the general rule. We submit, on the contrary, that they have no claim to the indulgence of the Court: *Bowyer* v. *Bright* (13 Price, 316).

Mr. Simpkinson, in reply.

THE LORD CHIEF BARON. The general order that a cause cannot be reheard after six months have elapsed from the time of the decree only means that leave for a rehearing will not be granted as of course, except upon an application within the six months. It does not preclude the Court from exercising the authority which it had before the order was made. The only question, therefore, **[242]** is in what sort of cases the Court will exercise a sound discretion in permitting a rehearing, notwithstanding that the ordinary time for granting it has elapsed.

Several cases might be put in which, I conceive, the Court would refuse any indulgence of this sort. Suppose a decree to have been made which is in all its terms final and accomplished, and then the parties, upon discovering an error in it, come to the Court for a rehearing. That might be a fit case for the Court to say to them—No; you have acquiesced in the proceedings throughout, and have not discovered any error in them till they have been brought to a close: you must, therefore, abide by the consequences of the error, or correct it in some other way. Again, suppose it to be thought that an error in the decree has arisen from an erroneous conclusion of the judge in point of law. The party lies by till after the ordinary time has expired, and then applies for a rehearing. That, also, would be a case for the Judge to say to him—No; it is unreasonable that you should ask me to reconsider my opinion after having acquiesced in it for twelve months; besides, if I hear the petition, I do, in effect, rehear the cause. These are cases in which I apprehend the Court would permit no relaxation of the general rule.

But another case may occur where the decree not being final nor executed, and where the Court being called upon to carry it out, as the vulgar phrase is, may find it improper and useless so to do in the face of manifest error. Now, here I am called upon for further directions upon a decree that is erroneous on the face of it—so erroneous, that if it were proceeded with, the result would only be that it would go to the House of Lords, where it would be clearly reversed. Am I bound, then, to carry out such a decree as that? To do so would only be to put the parties to useless expense, and therefore I think that the general rule ought to be relaxed in such a case. I cannot take the subsequent matters into consideration. If you **[243]** could shew that the subsequent matters had reference to the decree, and that the decree, when viewed in connexion with those matters, might be right, the case would certainly be different; though, even then, I do not know that I could go into those matters. I am inclined to think that, upon an application of this nature, the only case where the conduct of the parties would influence my judgment, would be, where the error was not manifest in the decree itself. It is possible I might then say to the party applying—abi in malam rem—you have yourself committed so gross an error that the Court cannot hear you. I cannot say, however, that I think that will apply to a case where the error is apparent on the decree; and upon that consideration I decided *Story* v. *Johnson*. I felt very much hampered by that case at first, but I ultimately thought that it was a fit case for a rehearing.

Motion granted.

WETHERELL *v.* WEIGHILL. Nov. 10th, 1838.—Under the 45th section of the Tithe Commutation Act the commissioners, if they intend to determine any suit heretofore pending in this Court, must give specific notice of their intention to that effect, the ordinary notice to commute being insufficient for that purpose.

But there is no doubt as to the jurisdiction of the commissioners to determine such suits, though the jurisdiction is discretionary.

[S. C. 8 L. J. Ex. Eq. 291; 2 Jur. 939.]

This was a motion to stay proceedings in this suit until the commissioners for the commutation of tithes should have made their award pursuant to the stat. 6 & 7 Will. 4, c. 71. The plaintiff claimed to be impropriate rector of the township of Osmotherly, in the county of York, and in that character had filed his bill against various persons for an account and satisfaction of the tithes of that township. The defendants had put in their answers denying the title of the plaintiff, and also claiming exemption from the payment of tithes; and the plaintiff was now about to enter into evidence in support of his claim. The present motion was supported by the affidavit of one of the overseers of the parish of Osmotherly, who deposed to the commissioners having issued their usual notice of holding **[244]** a meeting for the purpose of commuting the tithes, pursuant to the 37th section, and also that preparatory meetings had been held by the landowners, at which the deponent had been present, and had been requested to prepare evidence (comprehending the claims of the various parties) to lay before the commissioners.

The motion was made on the authority of the 45th section of the Tithe Commutation Act.(*a*)

Mr. Barber, for the motion. No suit for tithes can be instituted or carried on in this Court since the Tithe Commutation Act; and, therefore, this Court, as a court of law would do under parallel circumstances, will stay the proceedings in this suit. [The Lord Chief Baron. There seems no doubt that the commissioners have power to determine the suit.

Mr. Boteler, contrà, said that, admitting the commissioners had jurisdiction to determine the suit, it was only discretionary, and they had not chosen to exercise that discretion in this case; for that supposing they had power under the act to appoint a time and place for determining questions of this sort, they had not done so here, but had **[245]** only appointed a time and place for fixing a rent-charge. However, he submitted they had no such jurisdiction as that which was now claimed; and he referred to the 44th and 89th sections.

Mr. Barber, in reply.

THE LORD CHIEF BARON. I cannot accede to the present motion. If, as I was inclined to think in the first instance, the commissioners were bound under the 45th section to proceed with the present suit, it would be idle for this Court to continue the proceedings here, and thereby put the parties to unnecessary additional expense. But I think that clause of the act does not bear that interpretation, but leaves it discretionary with the commissioners to proceed or not as they may think fit. They may meet and say that, in their opinion, this Court is a better tribunal for trying this question; or they may, as I think they have power to do, suspend the proceedings of this Court. But if they have not yet considered the question, I think I ought not to suspend these proceedings on the mere ground that they may take the matter up. That is not the ordinary practice of this Court, even when a bill is filed in Chancery for the same matter. If the commissioners give notice of their intention to take the cause into their own hands, then will be the proper time for this application, and then the question as to the power of the commissioners to determine the cause may be

(*a*) By which it is enacted "that if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant commissioners shall be hindered, it shall be lawful for the commissioners or assistant commissioners to appoint a time and place in or near the parish for hearing and determining the same; and the decision of the commissioners or assistant commissioners shall be final and conclusive on all persons, subject to the provisions thereinafter contained." (The subsequent provisions relate to issues at law, &c.)

discussed. I think they have such power, but they must signify their intention to exercise it; and as they have not done so at present, I cannot accede to this motion.

Motion refused.

[246] PEARCE *v.* EDMEADES. Nov. 10, 16, Dec. 17, 1838.—Testator bequeathed the residue of his property to trustees, upon trust to pay the interest and dividends thereof unto and between his grandchildren, E. and G., during their respective natural lives, in equal shares; and, after the decease of the said E. and G., upon trust to pay, assign, and transfer such interest and dividends, and the stocks, funds, and securities upon which the same should be then invested, unto and between all and every the child and children of the said E. and G. in equal shares; and if there should be no child or children of the said E. and G. living at the time of their decease, or born in due time after the death of G., then upon trust to pay, assign, and transfer the same to the testator's personal representatives. E. died in the lifetime of G., leaving several children. G. also had children: Held, that G. was entitled to the whole of the interest and dividends of the trust fund during his life, and that, upon his decease, the corpus of the fund would be distributable among such of the children of E. and G. as should be living at G.'s death.

[S. C. 8 L. J. Ex. Eq. 61; 3 Jur. 245. Distinguished, *Vanderplank* v. *King*, 1843, 3 Hare, 1. Applied, *Draycott* v. *Wood*, 1863, 8 L. T. 304; *Cooper* v. *Macdonald*, 1873, L. R. 16 Eq. 272; *In re Richerson; Scales* v. *Heyhoe*, [1893] 3 Ch. 150. Not applied, *Wills* v. *Wills*, 1875, L. R. 20 Eq. 342. Explained, *In re Firth; Loveridge* v. *Firth*, [1914] 2 Ch. 392. Referred to, *Arrow* v. *Mellish*, 1847, 1 De G. & Sm. 355; *Abrey* v. *Newman*, 1853, 16 Beav. 431; *In re Tate; Williamson* v. *Gilpin*, [1914] 2 Ch. 185; *In re Brown's Will Trusts*, [1915] 1 Ch. 694; *In re Stanley's Settlement; Maddocks* v. *Andrews*, [1916] 2 Ch. 55.]

Thomas Wickens by his will devised an estate at Cobham to certain persons (whom he appointed his executors), upon trust to sell the same and apply the proceeds as part of the residue of his personal estate; and, after directing payment of his debts, and bequeathing various legacies, and directing a sale of all his personal effects not before disposed of, he desired his trustees to invest all the monies arising from the conversion of his real and personal estate in government or real securities, and to stand possessed thereof upon trust to pay several life annuities; and, as to the residue of his property, he bequeathed as follows:—"And, as so far and concerning all the rest, residue, and remainder of my estate, and the stocks, annuities, or securities whereof the same shall consist, or wherein or upon which the same shall be placed out or invested, and the dividends, interest, produce, and profits thereof, subject to and after payment of the said several annuities, I do hereby direct that my said trustees, executors, administrators, and assigns, shall stand and be possessed thereof and interested therein, upon trust to pay the interest, dividends, and produce arising therefrom, unto my said daughter, Martha Foster, during the term of her natural life, for her own use and benefit, independent of her present or any future husband, her receipt alone, whether married or sole, to be a good and sufficient discharge for the same; and from and after the decease of my said daughter, Martha Foster, then upon trust to pay the interest, dividends, and produce of the said residue of my said estate unto and between my grandchildren, Elizabeth Goldsmith and George Gold-**[247]**-smith, two of the children of my said daughter, Martha Foster, by her former husband, during their respective natural lives in equal shares. And I do hereby declare that the receipt of the said Elizabeth Goldsmith, whether married or sole, shall be a good and sufficient discharge for her part or share of and in the dividends or interest arising from such residue as aforesaid. And from and after the decease of the said Elizabeth Goldsmith and George Goldsmith, upon further trust to pay, assign, or transfer such interest, dividends, and produce of the said residue of my estate, and the stocks, funds, securities, in or upon which the same shall be then placed out or invested, unto and between all and every the child and children, if more than one, of the said Elizabeth Goldsmith and George Goldsmith, in equal shares; and, if but one, then to such only child, his or her executors, administrators, and assigns; and, if there shall be no child or children of the said Elizabeth Goldsmith and George Goldsmith living at the time of their decease,

or born in due time after the death of the said George Goldsmith, then, upon further trust, to pay, assign, or transfer the same and every part thereof unto and equally between all and every my legal personal representatives, their respective executors, administrators, and assigns."

The testator died in 1810, and Mary Foster in 1819. Elizabeth Goldsmith married a person of the name of Pearce, by whom she had several children. George Goldsmith also had children. Upon the death of Mary Foster a suit was instituted in this Court by Elizabeth Pearce and her children, against the executors and George Goldsmith and his children, under which the will was established, and an order was made for payment of the income of the trust-fund to Elizabeth Pearce and George Goldsmith, during their joint lives, with liberty upon the death of either of them for all parties interested to apply to the Court. Mrs. Pearce being now dead, the question was **[248]** whether her children and the existing children of George Goldsmith were entitled to take a moiety of the capital of the fund presently, or, whether George Goldsmith was entitled to receive the income of the whole fund during his life.

Mr. Cooper and Mr. Rogers, for George Goldsmith. There are several authorities to shew that George Goldsmith takes the whole income of the fund for his life by survivorship. The words "during their respective natural lives in equal shares," which would primâ facie give Elizabeth and George Goldsmith a tenancy in common, are controlled by the subsequent words, "and from and after the decease of the said Elizabeth Goldsmith and George Goldsmith." These latter words create a joint tenancy in the income of the property; and if the limitation over is per capita (as the testator clearly intended) the Court must necessarily give effect to the words of joint tenancy. If the gift for life be construed a tenancy in common, there must be two periods of distribution, and the objects of distribution will be different at different times. In other words, if Elizabeth Pearce took a moiety with remainder immediately after her death to the children, the Court, at the present moment, would have to divide that moiety among the children of Elizabeth Pearce and those of George Goldsmith now living; but when the other moiety came to be divided, at the death of George Goldsmith, his children, then living, would take; consequently all the children would not take share and share alike. In *Malcolm* v. *Martin* (3 Bro. C. C. 50) the will was very similar to the present. There the income of the fund was given to the children of Mr. Lyon and Mrs. Glass for life, to be equally divided between them; and, at their decease, the fund was to be divided betwixt the grandchildren of Mr. **[249]** Lyon and Mrs. Glass. Mr. Glass having died in the lifetime of the testator, leaving no children, but leaving grandchildren, the question was whether the children of Mrs. Glass were entitled to take the whole income for their lives, and it was held they were. The Master of the Rolls, in giving judgment, said that until failure of all the children of Mr. Lyon and Mrs. Glass, the fund was not to be divided; and that the children took the whole for life with survivorship inter se. He added that the gift over, after the decease of all, constituted a joint tenancy (3 Bro. C. C. 52, n. Belt's ed.). The other cases strongly in point are *Armstrong* v. *Eldridge* (3 Bro. C. C. 215), and *Tuckerman* v. *Jefferies* (Bac. Abr. Joint Tenants (F), 11 Mod. 108). [The Lord Chief Baron. Another question may be whether cross remainders may not be implied between the tenants for life.] In that view of the case *Doe d. Gorges* v. *Webb* (1 Taunt. 234), *Doe d. Watts* v. *Wainewright* (5 T. R. 427), and *Doe d. Wight* v. *Cundall* (9 East, 400), are in point.

Mr. Simpkinson, for the children of Mrs. Pearce. The result must be the same, whichever of the tenants for life died in the life time of the other. Suppose Mrs. Pearce had survived George Goldsmith, would she have been entitled to the whole income by survivorship during her life? Clearly not; because by the terms of the will George Goldsmith's moiety would have been divisible among his children living at his death or born in due time afterwards. The same rule of construction, therefore, must apply to the other moiety. It cannot be doubted, that if the testator had stopped at the words "in equal shares," that clause would have created a tenancy in common. Is there any thing on the face of the will to controul the ordinary force of those words? It can only be **[250]** by necessary and unavoidable implication that the interest, in the event which has happened, is to go to the survivor. In *Malcolm* v. *Martin* the gift was not to individuals, but to a class, and it is clear that the remainder men were not to take till the whole class had been swept away. *Armstrong* v. *Aldridge* is at variance with *Jones* v. *Randall* (1 J. & W. 100), in which Sir Thomas

Plumer held that a bequest to certain persons, as tenants in common, was not controlled by subsequent words of survivorship. In *Tuckerman* v. *Jefferies* the remainder was only limited to heir-at-law, from and after the death of the survivor of two persons. It was clear, therefore, that he was not intended to take till the death of the survivor. But that case is altogether different from the present. The Court will lean to the construction of a tenancy in common rather than to that of a survivorship between parents, to the partial disherison of their children.

Mr. Cooper, in reply. It is a mistake to say that the gift in *Malcolm* v. *Martin* was to a class of children. That case is scarcely distinguishable from the present, except that here the will is more explicit. There, the testator, in giving the corpus of the stock after the decease of the tenants for life, uses the words "after their decease." Here the testator says expressly "after the decease of the said Elizabeth Goldsmith and George Goldsmith," which is a far more emphatic declaration. [The Lord Chief Baron. But in the subsequent clause he says: "If there be no child or children living at the time of their decease." If those words are taken in the same sense as in the first clause, would not the effect be that none but the children living at the decease of the survivor could take?] That clause is a quasi conditional limitation; giving the corpus over on a certain event which has not happened, nor is **[251]** likely to happen. Under the present state of circumstances, it is unnecessary to put any construction on that clause.

THE LORD CHIEF BARON. The difficulty I have had during the argument has been principally in regard to the interest taken by the tenants for life. Those words "during their respective natural lives, in equal shares," taken per se, would give a tenancy in common, but I am inclined to think, upon the whole construction of the will, that this was by implication a devise of the income of the fund to the two as joint-tenant, with remainder, as to the corpus, to the children. If, in a will, after words creating a devise to two in common, you find, by other words, that the devise over is only to take effect after the death of both, the effect of that is to control the former words. And here the word "respective" might be used in reference to the time of enjoyment; for, in the nature of things, each could not enjoy beyond his own life.

As to the mass of the property, it is to be distributed upon the decease of the two; and, as it appears to me at present, to be then given to the children of both equally. Upon that construction, the interests of the children would be vested, but liable to be devested in case there should be no child or children of the tenants for life "living at their decease." If this be construed to mean "living at the decease of both," it would follow that all the children who were living at the decease of their own parent, but who might die before the death of the other parent, would be ousted. Looking, however, at the whole will, it seems to me that the intention of the testator was that all the children of both should take per capita, and take the whole mass of the property. But whether I can adopt that construction or not, as regards the children, I still think I must treat the surviving parent as taking the whole life interest. I will, however, defer my judgment.

[252] Dec. 17th.—THE LORD CHIEF BARON. This case turns upon the will of Thomas Wickens. The testator, after subjecting his property to certain charges, directs the trustees named in the will to stand possessed of all the residue of his estate, and of the funds wherein it shall be invested, upon trust to pay the interest and dividends to his daughter, Martha Foster, for her life; and, after her decease, then upon trust to pay the interest and dividends unto and between his grandchildren, Elizabeth Goldsmith and George Goldsmith, during their respective and natural lives in equal shares; and after the decease of Elizabeth Goldsmith and George Goldsmith, upon further trust to pay, assign, and transfer such interest and dividends, and the stocks, funds, and securities on which the residue of his estate shall be then invested, unto and between all and every the child and children of the said Elizabeth Goldsmith and George Goldsmith in equal shares; and if but one, to that child only; and if no child or children of Elizabeth and George Goldsmith should be living at their death, or born in due time after the death of George Goldsmith, then upon trust to assign the same equally amongst his legal personal representatives.

Elizabeth Goldsmith is dead, leaving children. George Goldsmith is alive and has children. The question is whether, upon the words of the will, the children of Elizabeth are entitled to the mother's portion in the life-time of George Goldsmith, or

whether George is entitled to the whole of the interest and dividends during his life? I am of opinion that George Goldsmith is so entitled.

It has been settled by a series of decisions, that the words "respectively, in equal shares," when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with, or followed by, others which would make a tenancy in common inconsistent with the manifest design **[253]** or the subsequent bequest of the testator, they may be taken to indicate not the nature, but the proportion of the interest each party is to take.

In the present case the bequest to George and Elizabeth Goldsmith during their lives is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of George and Elizabeth; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a tenancy in common of the parents.

Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon the failure of these, to his then personal representatives, shews that he meant to die intestate of no part of it. But as the interest and dividends only are devised to his grand-children, George and Elizabeth Goldsmith, and nothing is devised to their children till the death of both; it would follow that if George Goldsmith is not entitled to the whole interest and dividends accruing after the death of Elizabeth during his life, the portions of interest and dividends which she took in her life-time would be undevised during the remainder of George's life.

For these reasons I think that George and Elizabeth must be taken to be joint-tenants for life, of the interest and dividends, or that he by implication takes an interest for his life in the whole after her death. The case of *Malcolm* v. *Martin* (3 Bro. C. C. 50) is a strong authority, as well as the others cited at the bar.

Declare accordingly.

[254] THORPE *v.* MATTINGLEY. Nov. 20th, 1838.—Except under special circumstances, the Court will not stay the proceedings under a decree pending an appeal to the House of Lords.

[S. C. 8 L. J. Ex. Eq. 16.]

The Master having made his report in this case,(*a*) whereby he found several sums, amounting to about 1000l., to be due to the plaintiff for the single value of the tithes mentioned in the report,

Mr. G. Richards, for the plaintiff, now moved that the Master's report might be confirmed, and that the defendants might, within a week after the service of the order to be made upon this application, pay to the plaintiff the sums found due by the report.

Mr. Boteler, for the defendants, opposed the motion, on the ground that an appeal had been lodged against the decree in the House of Lords, and that the cause was only twelfth in the paper of appeals in that house. He cited *Meade* v. *Norbury* (4 Price, 322), *Gwynn* v. *Lethbridge* (14 Ves. 585), and *Way* v. *Foy* (18 Ves. 452), and offered to pay the money into Court.

Mr. Richards, in reply. This money clearly and distinctly belongs to the plaintiff. The defendants ought to have stated their objections on petition or motion, in which case they must have proceeded on affidavits. They do not state that the plaintiff is insolvent, or is about to leave the country, or give any other reason for their opposition. If this motion is refused, the consequence will be that a plaintiff, who is successful in this court, will never be paid, when an appeal is lodged against him. Special circumstances should be shewn against the motion.

(*a*) Reported at the hearing, ante, vol. 2, p. 421.

ALDERSON, B., granted the motion on the plaintiff's **[255]** giving security to refund in the event of the decree being reversed.

Order accordingly.(*a*)

THOMAS *v.* TYLER. Nov. 21st, 1838.—C. having an account with the defendants (the Coventry Bank), whose London agents were E. & Co., accepted a bill of exchange for 379l. in favour of the plaintiffs, payable at E. & Co.'s. Immediately before that bill became due, which was on the 23rd of February, 1837, C. requested the defendants to advise E. & Co. of the bill, and remit to them a certain sum to meet it. At the same time C. indorsed to the defendants a bill for 485l. drawn by him upon and accepted by L., due May, 1837; and also delivered to them a written direction to advise E. & Co. of the first-mentioned bill. The defendants received the second bill and written direction, without making any objection to C.'s proposal, but omitted to advise E. & Co. of the first-mentioned bill, which was accordingly dishonoured. Upon the second bill becoming due, the defendants received the proceeds of it, which they applied to their own use. In the interim C. became bankrupt. Upon a bill of discovery in aid of an action of assumpsit, brought by the plaintiffs against the defendants to recover the amount of the sum which C. had requested the defendants to remit to E. & Co.: Held, that a demurrer to the discovery must be overruled, it being a fair subject of discussion in a court of law whether, under such circumstances, the action was or was not maintainable.—Semble, that the action was maintainable.—Upon a mere bill of discovery filed in aid of proceedings at law, a court of equity will not, except in a very clear case, decide upon the legal rights of the party seeking the discovery.

[S. C. 8 L. J. Ex. Eq. 4.]

The bill stated that the plaintiffs, John Thomas and Jonathan Chapman, had, for many years, carried on the business of Italian merchants in Broad Street, in the city of London; and in the course of their business, and on or about the 20th of September, 1836, sold to one Richard Crofts, of Coventry, a quantity of silk, in payment for which Crofts accepted a bill of exchange dated 20th September, 1836, at five months, for 497l., which bill was drawn by the plaintiffs and made payable at the banking-house of Sir James Esdaile and Co. That the defendants, Tyler and Warner, are the public officers of the Coventry Union Bank, and manage and direct the affairs thereof, and that Sir James Esdaile and Co. are the **[256]** London agents of that bank. That Crofts employed the Union Bank as his bankers; and that before the above-mentioned bill became due, namely, on the 21st February, 1837, he applied and requested them to remit to Sir James Esdaile and Co. the sum of 479l. 15s. 3d., for the purpose of meeting such bill, so far as the same would extend; that at the time of making such application, Crofts, as a security and inducement to the Coventry Banking Company to remit such sum, deposited with them a bill of exchange, bearing date the 20th of February, 1837, drawn by Crofts upon, and accepted by, Messrs. Leaf, Coles and Co., payable three months after date, for the sum of 485l. 15s., and indorsed by Crofts; that, together with such bill, Crofts delivered a note in writing, directing the Coventry Banking Company to advise the plaintiff's bill for 497l., due at Sir James Esdaile's; that thereupon the banking company, in consideration of such deposit, assented and agreed to such order, request, and direction of Crofts, and then undertook and faithfully promised Crofts, and well knowing the plaintiffs to be the holders of the bill, faithfully promised the plaintiffs that they would advise the bill, and that they would remit the said sum of 479l. 15s. 3d., in order that the same should be at the banking-house of Messrs. Esdaile and Company, and that the same should be paid to the plaintiffs, the then holders of the bill, on the 23rd of February, 1837, when it should be there presented by the plaintiffs for payment. That, notwithstanding such promise, &c., the said banking company did not remit to Esdaile and Company the sum of

(*a*) The above motion was, in the first instance, made before the Lord Chief Baron, who thought it a matter peculiarly in the discretion of the Judge who tried the cause, and therefore left it to Alderson, B., to determine. But his Lordship took occasion to observe that in some cases the payment of money into court under such circumstances might be very desirable; and he referred to *Small* v. *Atwood*, ante, p. 105.

479l. 15s. 3d., or any other sum, for the purpose of taking up the above bill; by reason whereof, when it was presented for payment, it was dishonoured, and returned unpaid to the plaintiffs by Sir James Esdaile and Company, there then being no effects of Crofts at their house to pay the same; and that the bill remained in the hands of the plaintiffs overdue and unpaid. That a fiat in bankruptcy, on the [257] 8th of March, 1837, issued against Crofts, under which he was duly found and declared a bankrupt; and that, on the 23rd of May, 1837, the bill of exchange so deposited, drawn by Crofts on Leaf and Co., for 485l. 15s., was duly taken up, and the amount received by the Coventry Banking Company, and applied by them to their own purposes. That they held, at the time this deposit was made with them, deeds and other securities more than sufficient to cover the balance due to them from Crofts. That, on the 13th of March, 1837, the plaintiffs commenced an action against the defendants, as such public officers, to recover from the said company the sum of 479l. 15s. 3d., so paid to them under the circumstances stated; to which action the defendants appeared and pleaded, amongst other matters, that they did not assent or agree to such order, request, and direction of Crofts; and, further, that he did not deliver or deposit with them the said bill of exchange as a security or inducement to them to remit the sum of 479l. 15s. 3d. to Sir James Esdaile and Co.; to which pleas the plaintiffs replied that the cause was set down for trial for the sittings after Easter Term; and that the defendants caused the same to be made a special jury cause. That Crofts was subpœnaed, and would have appeared at the trial as a witness for the plaintiffs, and would have proved by his evidence the whole of the matters stated concerning the bill for 497l., and that the banking co-partnership did assent and agree to the order, &c. of Crofts; and that he did deliver and deposit with the company the second mentioned bill of exchange as a security to them to remit the sum of 479l. 15s. 3d. to Esdaile and Co.; but that, after the cause was set down for trial, and after Crofts had been subpœnaed, and before the plaintiffs were able to try the cause, Crofts died, without having at any time revoked the order, and the plaintiffs were unable then to prove the matters stated by any other evidence, and the plaintiffs made default in proceed-[258]-ing to the trial of the cause. That, after the plaintiffs had made the above default, the defendants moved for judgment as in case of a nonsuit, but that the Court refused to grant such judgment, unless the defendants would produce to the plaintiffs the note so delivered to the banking company by Crofts, at the time of depositing the bill for 485l. 15s., or allow the plaintiffs to inspect the same, which they had always refused to do. That the defendants threatened and intended to move the Court of Common Pleas for judgment as in case of a nonsuit, pursuant to the statute; and at other times they threatened and intended to bring the cause to trial by proviso, and in pursuance of such intentions had already given notice of trial by proviso to the plaintiffs; but the plaintiffs were unable to go to trial, and could not prove the matters aforesaid, without a discovery on oath of the same from the defendants; and the plaintiffs insisted that they were entitled to such discovery, and to an injunction restraining the defendants from proceeding to move for judgment as in case of a nonsuit, and from proceeding to the trial of the cause by proviso, until they should have sufficiently answered the bill; but the defendants sometimes pretended that the company did not assent to the order, &c., as stated.

The bill then charged that the defendants did so assent &c., and that the defendants ought to set out the balance, if any, which was due at the time of the deposit of the bill to the banking company, by Crofts; that a conversation took place between Crofts and the defendant Tyler at the time when the bill was deposited, when Tyler expressly undertook in such conversation to advise the bill for 497l.; that the bill for 485l. 15s. was entered in the books of the Coventry Banking Company, as deposited for the purpose of meeting the bill for 497l.; and that the defendants and banking company have now, or had lately in their possession, &c., divers accounts, books of account, letters, &c., relating to the above matters, and particu-[259]-larly the paper-writing referred to as having been left by Crofts with the banking company at the time of the deposit of the bill for 485l. 15s.

The bill prayed that Tyler and Warner might make a full and true disclosure and discovery of the above matters, and, in the meantime, be restrained by injunction from proceeding further to apply for judgment as in case of a nonsuit, or from taking the cause to trial by proviso.

To this bill the defendants demurred, on the ground that the plaintiffs had not,

by their bill, made such a case as entitled them, in a Court of Equity, to any discovery from the defendants as to the matters contained in the bill.

Mr. Simpkinson and Mr. G. Richards, for the demurrer. The bill alleges that the defendants faithfully promised the plaintiffs that they would advise their bill, and remit the funds to Sir James Esdaile and Company to meet it; and that, upon the failure of that undertaking, the plaintiffs brought their action of assumpsit against the defendants, in support of which action they now file their bill for discovery. But the question is whether assumpsit will lie upon such an undertaking as this. Upon the face of the bill, the consideration for it moved from Crofts, and not from the plaintiffs; and there are several authorities to shew that assumpsit cannot be maintained where the consideration has moved from any other than the party bringing the action: *Bourne* v. *Mason* (1 Ventr. 6), *Crow* v. *Rogers* (1 Str. 592), *Price* v. *Easton* (4 B. & Ad. 433). The consideration must move from the party who claims the benefit of the undertaking. [The Lord Chief Baron. It is more correct to say that the party who claims the benefit must be privy to the consideration. It is not always true that the considera-**[260]**-tion coming from another person is an objection to the party who claims the benefit of the contract recovering.] The agreement to remit was made with Crofts alone, and was for Crofts' sole benefit. The bankers agreed with Crofts to put 497l. into Esdaile's hands: they did not do so, and Crofts was damnified. That is all that appears by the bill. In *Williams* v. *Everett* (14 East, 582) the same attempt was made as in the present case, and failed. [The Lord Chief Baron. The plaintiff will perhaps say that the direction from Crofts to the bankers was an appropriation of the second bill.] That cannot be, because it was not due till the following May. Besides, the plaintiffs only say that the bankers undertook to provide the funds, and to induce them to do so Crofts indorsed to them this bill. There is no statement of appropriation. Another point is that the plaintiffs should have alleged by their bill that they intend to prosecute the action. They not only omit to do so, but seek by this prayer to restrain the defendants from exercising their ordinary legal rights, in taking the cause to trial by proviso. If we are entitled to judgment as in case of a nonsuit, there is no justice in preventing us from taking the cause to trial by proviso. No such thing however has ever been known as a prayer for time to proceed at law to judgment.

Mr. James Russell and Mr. Terrell, contrà, were stopped by the Court.

THE LORD CHIEF BARON. As to the objection which has just been urged by Mr. Richards, I cannot think that the plaintiffs are not entitled to what they ask by their prayer. It appears to me that they have just as much a right to stay the proceedings at law before discovery as to have the discovery itself. If a verdict is had in an action tried by **[261]** proviso, the case is set at rest and cannot be discussed again, though certainly a nonsuit is no bar to another action. Here the plaintiffs were going to trial when Crofts died, and the death of Crofts, as they allege, made it necessary for them to make default of trial and have this discovery. The defendants then moved for judgment as in case of a nonsuit, but the Court refused the rule, unless the defendants produced to the plaintiffs a certain note. The defendants then gave notice of proceeding to trial by proviso, when the plaintiffs filed this bill, and obtained an injunction to restrain the defendants, and to obtain a discovery in aid of the action. Now, even a court of law, according to its usual practice, postpones the trial by proviso until the next term after default made. It appears to me, therefore, that the object of the plaintiffs being to obtain discovery, it was quite a legitimate mode of proceeding for them to seek to prevent the defendants from forcing them to trial without such discovery. I think, in such case, they had as great a right to stay the defendants as the defendants would have had, under like circumstances, to stay the plaintiffs.

We now come to the material question whether the bill discloses sufficient grounds at law to entitle the plaintiffs to a verdict. If I were called upon to decide the question here in the first instance, I should take time to consider it. But the rule I apprehend is, that a party seeking discovery in equity at his own expense is not to be barred of that privilege by the mere suggestion that he has no remedy at law. That, I apprehend, is the rule, unless the case is clear of all doubt. It was said by Lord Thurlow, in *Fytche's case* (*Bishop of London* v. *Fytche*, 1 Bro. C. C. 98), the plaintiff pays for his discovery, and why should he not have it? The case where he is not entitled to it is where the case at law is manifest. Is this so clear a case? I am

far from thinking it free from doubt **[262]** or unfit for argument; and shall, therefore, not prevent the party from having the benefit of the opinion of a court of law. I do not dispute the principles of a case which has been cited, and which certainly comes near to the present case—that of *Williams* v. *Everett* (14 East, 582). That case was brought into court in consequence of a previous decision which is very like it, namely *De Bernales* v. *Fuller* (id. 590, n.). There, Puller, who was a merchant in London, and who had not a very good account at his banker's, had accepted a bill of which De Bernales was the holder. The bill was payable at Fuller's banking-house. Shortly before the bill became due Puller took the requisite amount of cash to the bank, and said to the clerk, this is to pay De Bernales. The clerk took the money, but the bank refused to pay De Bernales; upon which De Bernales brought his action of assumpsit against the bank, and ultimately recovered on the ground that the banking-house took the money to pay that particular bill, thereby creating a privity of contract between De Bernales and the Fullers on which the action could be founded. *Williams* v. *Everett* followed upon that case, and it was there attempted to shew the same sort of privity between the plaintiff and the defendants. If I remember right, the Court bestowed much consideration upon it, and the case of *De Bernales* v. *Fuller* was cited upon that occasion. The Court, however, took this distinction between the two cases. In the one case, Puller was present when the direction to appropriate was given, and the banker ought to have immediately signified his dissent from that direction. In the other case, the bill came from abroad—and what was the banker to do with it? In Puller's case the banker was considered, under the circumstances, to have assented to the appropriation. In *Williams* v. *Everett* no such assent was given; but, on the contrary, the banker expressly **[263]** refused to appropriate the bill. No doubt, however, it was his duty, if he did not appropriate it, to return it; and if it had been money paid to him instead of a bill remitted him, the question would have arisen whether the case of *De Bernales* v. *Fuller* did not apply, so as to authorize each of the individuals for whose use the money was paid to bring assumpsit for its recovery.

Look at the present case. The defendants admit that they are the bankers of Crofts, and that Esdaile is their London agent. Now, it is the practice of some county banks to compel their customers to accept bills payable at their agents in London, although those customers may have no account there. I do not know, therefore, whether the defendants and Esdaile do not stand on the same footing in regard to the first bill. Now, upon the face of the record, I take the facts to be, that the defendants, knowing that Crofts was the acceptor of a bill of which the plaintiffs were the holders, took from Crofts, with the knowledge of the plaintiffs, a specific bill of exchange, with a direction from him to apply it to meet this specific bill of the plaintiffs. The bill having thus come to the defendants' hands, we may suppose (I say this to meet the observation that the second bill was not due till afterwards) that the defendants agreed to supply cash to take up the first bill. But, however this may be, they make no objection to Crofts' application; they receive the bill with the written direction that it is to be applied to the particular purpose which has been mentioned, but they fail to apply it to that purpose. Now, suppose that first bill to have been made payable at their own house instead of at Esdaile's. That would have been the case of *De Bernales* v. *Fuller*. The step which invites discussion is the fact of Esdaile being the defendants' agent. If you ask me what my opinion is upon that point, all I say is, that it is considerable matter for argument, and may lead to distinguish this case from a class of cases some of which have been cited. **[264]** Upon these grounds, I think I ought not to prevent the plaintiffs from trying the case at law.

Demurrer overruled.

WALTERS *v.* MEREDITH. Nov. 16th, 1838.—Where, in a creditors' suit, bond creditors had been allowed by the Master their principal and interest to the extent of the penalties of the bonds, and had received an apportionment upon the sums so amounting to the penalties—upon further funds becoming available for the creditors, Held, that the bond creditors were entitled to subsequent interest on the sums remaining due in the conditions of the bonds, provided that

such interest, together with the sums remaining due, did not exceed the penalties in the bonds.

This suit was instituted by certain persons on behalf of themselves, and all other the unsatisfied creditors of Richard Hall Green and Jonathan Green, both deceased, for the administration of their assets, and to carry into execution a deed of trust, dated the 3rd of December, 1812, under which certain real estates, which had descended to Jonathan as brother and heir-at-law of Richard Hall Green, were conveyed by him to trustees in trust to sell, subject to existing incumbrances, and to apply the proceeds—first, in discharge of the specialty and simple contract debts of Richard Hall Green, and then in discharge of those of Jonathan.

By the decree made on the hearing of the cause, in June, 1829, the Master was directed to take the usual accounts; and he was to compute interest upon such of the debts as carried interest, at the rate of interest they respectively bore. When the creditors came before the Master he, in accordance with the usual practice, refused to allow interest upon the bond debts beyond the extent of the penalties in the bonds; and the bond creditors received their first dividend according to this calculation. Upon the same principle, when, in consequence of further funds accruing, a further dividend was paid, no more interest was calculated upon the bond debts, but those creditors received their apportionments on the amount of the penalties minus the sum before received on account. The consequence of this mode of payment and of the long standing of the debts was that the simple contract cre-**[265]**-ditors received more, in proportion to their respective debts, than the bond creditors.(*a*)

Since the last mentioned payment was made, additional funds had become available for the creditors, in consequence of the death of a party who had a life interest in them. A petition was therefore now presented by the plaintiff for the distribution of those funds; and it was suggested for the bond creditors, that as the Master had reported them creditors to the amount of the respective penalties in the bonds, they ought to receive interest on so much of the penalties as remained unpaid, provided that such subsequent interest did not exceed the penalties of bonds.

Mr. Simpkinson, for the petition.

THE LORD CHIEF BARON. At law the bond creditors could not receive payment beyond the penalties in the bonds; but if they are paid partially, they have a right, until the penalty is exhausted, to calculate interest on the sum in the condition and not on the remainder of the penalty. Let it be so calculated from the time of the **[266]** last payment, but not to exceed the penalty of the bonds.

It was ordered that it be referred to the Master to compute subsequent interest on the principal sums carrying interest remaining due to the principal creditors of Richard Hall Green and Jonathan Green respectively, and who are named in the schedule to the Master's report, dated the 21st of February, 1834, &c.; and, in computing such interest, the said Master is to compute and allow the bond creditors

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(*a*) For example, statements of this nature appeared in the schedules to the Master's report of the 21st of February, 1834:—

Debt due to A., &c., . . .	£1,000	0	0			
Interest thereon, at 5l. per cent., from the 3rd of December, 1812, to the 21st of February, 1834, . . .	1,060	0	0			
Total allowed, . .				£2,060	0	0
Debt due to B. on the bond of J. H. G., in the penal sum of 2400l., dated March 15th, 1798, ...	£1,200	0	0			
Interest thereon at 5l. per cent., from the 15th of March, 1811, to the 15th of March, 1821, ...	600	0	0			
For subsequent interest to the 21st of February, 1834, ...	775	19	8			
	£2,575	19	8			
Allowed to the extent of penalty only,				2,400	0	0

respectively, whose debts have been allowed to the extent of the penalties of the several bonds, but which have since been reduced by any payment or payments below such penalties, subsequent interest upon such as remained due, from time to time, of the principal sums secured by the conditions of the several bonds, from the respective times of such bond debts being so reduced as aforesaid, but such principal, with the interest already calculated and now remaining due, together with the subsequent interest to be calculated as aforesaid, is not to be allowed beyond the penalties of the several bonds.

FYSON *v.* POLE. Nov. 21st, 1838.—An attorney cannot file a bill in equity to recover the amount of his bill of costs; but where an attorney had commenced proceedings at law against his client, which were stopped by the client's proceedings in equity, and ultimately a compromise was had between the parties, which, by consent of both, was made the subject of an order of a court of law: Held, 1st, that the attorney could maintain a bill in equity, for the purpose of rectifying the order of the court, on the ground of mistake: 2nd, that it appearing from the bill that, by means of the defendant's proceedings, the plaintiff's legal remedy had been delayed beyond the period allowed by the Statute of Limitations, a general demurrer to the bill must be overruled.—A defendant may take advantage of the Statute of Limitations by demurrer, where the length of time since the cause of suit accrued appears on the face of the bill.

[S. C. 8 L. J. Ex. Eq. 17; 3 Jur. 122.]

The bill stated that in the year 1815 the defendants, Peter Free and Edward Down, carried on business as [267] bankers in London, in copartnership, together with Richard Down and Henry Thornton, under the style and firm of Down & Co.; that Richard Down and Henry Thornton died in the year 1815; and that Peter Free and Edward Down, in the same year, entered into a new copartnership with the defendants, Sir Peter Pole and John Scott, since deceased, which firm took upon themselves all the debts, and became entitled to the credits of the former firm of Down & Co.; that in 1825 the firm of Sir Peter Pole & Co. took into partnership the defendant, Henry Sykes Thornton, the style of the firm, debts, liabilities, &c., remaining as before.

The bill further stated that in August, 1821, the plaintiff entered into partnership with Mr. Charles Knight, in the business of attornies and solicitors, under the firm of Knight and Fyson; that the firm of Sir Peter Pole & Co. employed the firm of Knight and Fyson as their attornies and solicitors, in respect of law business arising as well from the transactions of the firm of Down & Co. as from the transactions of Sir Peter Pole & Co.; and that Knight and Fyson conducted several actions and suits, and other business in the name of each of the said banking firms for the benefit of the said firm of Sir Peter Pole & Co.; that the bills of costs for business done for the firm of Down & Co. were kept distinct from those for business done for Sir Peter Pole & Co., such business being at first considered by Knight and Fyson as transacted by them on behalf of the surviving partners of the firm of Down & Co.; but that, in fact, the said firm of Sir Peter Pole & Co. was liable for the payment of all bills of costs due to Knight & Fyson, for business done on the behalf of either of the said banking firms; that after the introduction of Henry Sykes Thornton into the firm Sir Peter Pole & Co. continued to employ Knight & Fyson as their attornies and solicitors in the same manner as before, and that Knight & Fyson continued to keep distinct accounts [268] as before; that the said firm of Sir Peter Pole & Co. became largely indebted to the said firm of Knight & Fyson for business done by them as attornies and solicitors as aforesaid.

The bill then stated the dissolution of the partnership between Knight and the plaintiff in May, 1826, and the bankruptcy of Knight in December, 1830.

The bill then alleged that in October, 1831, the plaintiff delivered to the defendant, Edward Down, certain bills of costs which were severally headed "Down & Co.," and "Sir Peter Pole & Co.," and were for business done by Knight & Fyson for those respective firms; the former bill amounting to 2171*l.*, and the latter to 1966*l.*; that after frequent applications had been made by the plaintiff, without success, to obtain payment of these bills, he, in Hilary Term, 1832, together with John Smith, the

assignee under Knight's bankruptcy, brought his action on the plea side of this Court against Sir Peter Pole, Peter Free, Edward Down, and John Scott, to recover the amount of the bill of costs for 1966l.; and that when that action was commenced the plaintiffs therein were not aware that the firm of Sir Peter Pole & Co. had taken upon themselves the debts and engagements of Down & Co., or that the defendant, H. S. Thornton, was a partner in the firm of Sir Peter Pole & Co.

The bill then stated that Sir Peter Pole, Peter Free, and Edward Down, and John Scott, in, or as of Hilary Term, 1832, exhibited their original bill in this Court against Smith, the plaintiff, and H. S. Thornton, alleging as the fact, &c. [Here followed a statement of the constitution of the several partnerships of Down & Co., and Sir Peter Pole & Co., and that each successive firm undertook the liabilities of the former.] And that Knight & Fyson were employed as attornies by those successive firms; and that large money transactions had passed between them; and that large balances had been received **[269]** by Knight & Fyson on account of those firms; and that the accounts between Down & Co., and Sir Peter Pole & Co., and the said firm of Knight & Fyson, were so complicated that the same could not be settled, except in a court of equity; and praying a general account, and an injunction to restrain the action.

The bill further stated that the plaintiffs in the said suit in equity obtained the common injunction which was afterwards continued, but ultimately, in Michaelmas Term, 1834, dissolved; that, upon the dissolution of the injunction, it was agreed by the counsel, on both sides, that an order should be taken by consent, for the taxation of both bills of costs in the equity side of this Court; but that to save expense, it was ultimately agreed that such taxation should be made on the plea side; and that accordingly an order was made by Mr. Baron Gurney, dated the 2nd of December, 1834, directing "that Messrs. Knight & Fyson's bills of costs, for the recovery of which this action is brought, and all other bills of costs be referred to the Master to be taxed, &c."

The bill then stated and charged that the words "all other bills of costs" were inserted in the order by mutual consent of the parties, for the express purpose of including the bills, headed "Down & Co.," in the taxation; that, except those bills, there were no others but those for which the action was brought, namely, the bills headed "Sir P. Pole & Co.;" that both sets of bills were taxed before the Master; that, nevertheless, the defendants, taking advantage of a passage in the plaintiff's answer to their bill, which was put in before he knew of the defendants having taken upon themselves the liabilities of the former firm, objected to the bills headed "Down & Co.;" that the Master, therefore, conceiving that he was not authorized by the words of the order so to do, refused to include in his allocatur the balance due in respect of the last mentioned bills; that, under the foregoing circum **[270]**-stances, the plaintiff refused to accept the sum of 369l., allowed by the Master for the bills, headed "Sir P. Pole & Co."

The present bill, therefore, after charging that the plaintiff had been misled by the defendants, and that, but for the injunction, he would have brought his action against the surviving partners of the firm of Down & Co. to recover the amount of the bills of costs headed "Down & Co.," prayed for an account and satisfaction in respect of those bills, and also for payment of the said sum of 369l.

To this bill the defendants demurred generally for want of equity.

Mr. Simpkinson and Mr. G. Richards, for the demurrer. The Court has no jurisdiction to give the account sought for by this bill. The object of the bill is exclusively to obtain payment of the bill of costs headed "Down & Co." Such a bill is of the first impression. Can it be contended that an attorney has a right to file a bill against his client—not against the representatives of his client—for payment of his bill of costs for business done? In intricate cases of mutual accounts between principal and agent the Court, no doubt, entertains jurisdiction; but here the account is all one way, and the demand is solely for business done. The mere circumstance that the attorney has received certain sums of money on account of his client, will not justify the interference of this Court; those sums might have been set off in the action, under the common order for taxation. The case of *Parry* v. *Owen* (3 Atk. 740) is an authority to shew that a bill in equity cannot be maintained by an attorney simply for his bill of costs, though perhaps such a bill might lie where the demand for business done is mixed up with demands of another nature. [The Lord Chief Baron. In *Parry* v. *Owen* **[271]** the bill was by the administrator, so that the reason given for the demurrer

did not apply.] On general principles the present bill is not sustainable: *Frietas* v. *Dos Santos* (1 Y. & J. 574); *Bowles* v. *Orr* (1 Y. & C. 464).

Secondly, the plaintiffs are barred by length of time. The partnership of Knight & Fyson was dissolved in 1826. The action was brought to recover only the amount of the bills headed "Sir P. Pole & Co." At law, therefore, the demand against Down & Co. is barred by the statute, and we submit that the consequence must be the same in equity. The allegation that the plaintiff was not aware, when he brought his action, of the connexion which subsisted between the successive firms of Down & Co. and Sir P. Pole & Co. will not cure this defect.

Mr. Bethell and Mr. Wood, for the bill. This is a cross bill to a bill filed by the defendants, praying for an account of all the dealings and transactions between them and the plaintiffs. The bill of the defendants is a submission to account, and it actually charges that the dealings and transactions in question, which include the matters relative to these bills of costs, are of such an intricate nature as to be the proper subject of adjudication in a court of equity. The defendants, therefore, put themselves under the jurisdiction of this Court, and the plaintiff has a right to meet their submission to account by a cross proceeding. Now, what the plaintiff seeks is the proper execution of an order which was made in the original suit by express agreement of the parties. [The Lord Chief Baron. You might have applied to the Judge who made the order to amend it.] Your lordship has the same power in the cause as the Judge would have. The plaintiff comes here by a cross suit to avail himself of the submission made by the **[272]** defendants, and he has that equity in addition to his right at law. It is a fallacy to say that this is a bill by a solicitor for his costs, though *Barker* v. *Dacie* (6 Ves. 681) is an authority to shew that such a bill is maintainable. It is a bill to have effect given to an agreement made in a suit already existing. Can it be said that if there be a mistake in the form of that agreement this Court will not correct it? On the contrary, the proper mode of correcting it is by means of a cross bill; and a demurrer will not lie to a cross bill filed for such a purpose. It has been laid down that the plaintiff in such a cross bill is not, as against the plaintiff in the original bill, obliged to shew any ground of equity to support the jurisdiction of the Court: Mitf. Pl. 81.

The objection arising upon the statute of limitations is not sustainable, because the defendants' own conduct has given rise to the circumstances on which they build their objection. They led the plaintiff to believe that they would enter into an arrangement as to both bills of costs, at the same time intending ultimately to repudiate the arrangement, and to set up the statute in bar of that demand which the plaintiff had not included in the action. But for this conduct of the defendants the plaintiff would have brought his action for that demand in 1832. Under such circumstances the Court will hold that time does not run against the plaintiff during the interval in which he delayed his remedy at the instigation of the defendants: *Pulteney* v. *Warren* (6 Ves. 73), *Bond* v. *Hopkins* (1 Sch. & L. 413, 434).

Mr. Simpkinson, in reply. The general proposition that a demurrer will not lie to a cross bill is not denied. But the allegation made at the bar that an original suit is depending, to which the present is a cross bill, is not warranted by the averments in this bill. This present bill **[273]** does not state, nor is it the fact, that the suit instituted by the defendants is an existing suit. This bill states the proceedings in the defendants' bill as far as the dissolution of the injunction, and then leaves it in dubio what became of that suit. It is fair, therefore, to infer (what in fact was the case, though it does not appear on the pleadings) that that suit was dismissed. As to the alleged agreement to include both bills in the taxation, it could not be a condition for dissolving the injunction. It was a mere agreement out of Court, which the Court did not act upon. The Court would never have entertained a bill for the specific performance of such an agreement. If it had been called upon so to do it would have left the parties to their remedy at law.

The Lord Chief Baron. In overruling this demurrer I am not prepared to say that an attorney can file a bill in equity for his costs. The authority cited by Mr. Simpkinson (admitting it to be a precise authority on the point) seems to me to be founded on good sense, and ought, I think, to be a governing authority in a court of equity. An attorney has an obvious remedy at law and is supplied a remedy by statute; therefore I should say that he had no right to come into equity for his costs; and if I saw that I was obliged to decide the present question upon that point alone,

I should be disposed to allow the demurrer. But it appears to me that I am not precisely in that situation. There can be no doubt that a court of equity will supply a defect in any title which has been prejudiced by an order of the Court. If, for instance, an injunction has been continued so long as to deprive a party of his legal remedy who has a clear right to recover at law, a court of equity would restrain the party who obtained the injunction from pleading the statute of limitations. Now, the facts of this case are briefly these: Fyson, having delivered these **[274]** bills to one of the partners in the firm of Sir Peter Pole, commenced his action against that house in 1832; and in the same term the defendants filed their bill for an injunction to restrain the action. It appears by the pleadings that the action was confined to the bills of costs headed "Sir Peter Pole & Co.," whereas other bills of costs had been delivered by Fyson, headed "Down & Co." Now, the bill filed by the defendants contained a prayer for an account of all the dealings and transactions between them and the plaintiff. Perhaps, therefore, if the plaintiff had been more alert, he might have insisted on having the bills headed "Down & Co." included in that account, and to explain his omission in that respect he states that he was then ignorant of the liability of the defendants for those bills. Be that as it may, he could not proceed in the action. At law his hands were tied until the situation of the accounts could be explained. Now, it does not appear that any account has been taken of these transactions in equity, but it is represented that, upon the dissolution of the injunction in 1834, an arrangement was made, whether by the Court or by the parties is not very essential, that all the bills headed "Down & Co." should be taxed with the others; and that afterwards, upon a suggestion that it might be done better at law, it was agreed they should be taxed at law. Now the bill alleges that that arrangement has fallen through, not by the fault of Fyson, but from some misapprehension in drawing up the order of taxation; and that the conclusion to which the Master has come in the construction of that order is not consistent with the original intention of the parties. Now, if I allowed this demurrer, the consequence would be that, by means of the defendants' suit in equity, Fyson would be barred by the statute of all remedy in respect of the bills headed "Down & Co.;" the real effect of that suit being not to have the accounts taken in equity, but to prevent the **[275]** operation of the inquiries which have been set on foot at law. Upon the whole, therefore, though not without considerable hesitation, I feel that I must overrule this demurrer.

Demurrer overruled.(*a*)

EX PARTE HARRISON. IN THE MATTER OF THE COMMERCIAL RAILWAY ACT. Nov. 27th, 1838.—Testator bequeathed two leasehold houses to his sisters H. and M., to be held by them during their natural lives, they keeping them in good repair, and to be disposed of at their deaths as follows, namely, the house, No. 79, to descend to his sister H.'s eldest son or daughter, and the next heir male or female, until the expiration of the lease; and the house, No. 80, to descend to M.'s eldest son or daughter, &c. in the same words as before: Held, that H. and M. took an absolute estate in the leaseholds.—Quære, whether, if it had been a devise of freeholds, H. and M. would have taken estates in fee or in tail.

[S. C. 8 L. J. Ex. Eq. 28.]

Philip Aldridge, by his will, bequeathed as follows:—"I give and bequeath to my eldest sister, Hannah, the house No. 79 Lucas Street, Commercial Road, and to my sister, Mary Ann, the house No. 80 Lucas Street, aforesaid; the said houses and all the fixtures to be at their own disposal and not to be amenable to any demands which may be made upon their husbands for any debts they may contract; and the above

(*a*) In the foregoing case it was assumed that the defendant could take advantage of the Statute of Limitations by demurrer. In *Plunket* v. *Earl of Burlington*, Rolls, E. T. 1837, in which a general demurrer was put in, upon the ground (amongst others) that the plaintiff's claim was barred by the statute, Lord Langdale, M. R., allowed the demurrer. In the course of the argument of that case, some doubt was expressed by the counsel for the plaintiff as to the correctness of the report of *Hoare* v. *Peck*, 6 Sim. 51, upon the authority of which the demurrer in *Plunket* v. *Burlington* was put in; but upon reference to the registrar's book that report was found to be correct.

houses are to be held by them during their natural lives, they keeping them in good repair; and to be disposed of at their death as follows, viz.—the house No. 79 to descend to my sister Hannah's eldest son or daughter, and the next heir, male or female, until the expiration of the lease; the house **[276]** No. 80 to descend to my sister Mary Ann's eldest son or daughter, and to the next heir, male or female, until the expiration of the lease." The testator then appointed the petitioners, Harrison and Ward, who had married the testator's sisters, to be the executors of his will.

The petitioners having contracted, in right of their wives, with the Commercial Railway Company for the sale to the company of the above-mentioned premises, the question was what interest the testator's sisters took in these leaseholds.

Mr. Calvert, for the petition, contended that the sisters took an absolute interest, inasmuch as if the premises were freehold, they would have taken an estate tail. He referred to *Mellish* v. *Mellish* (2 B. & C. 520).

Mr. Twells, for the company.

THE LORD CHIEF BARON held that the sisters were absolutely entitled, and he was inclined to think that, if the property had been freehold, they would have taken a fee simple.

WALKER *v.* CORKE. Nov. 27th, 1838.—The Court will not dissolve a special injunction till the documents, admitted by the defendant's answer to be in his possession, have been inspected by the plaintiff. Documents detained in court with a view to criminal proceedings being taken against the party who deposited them.

[S. C. 8 L. J. Ex. Eq. 56.]

In this case the plaintiff obtained a special injunction to restrain, until answer or further order, an action brought against him by the defendant on a bill of exchange. The defendant then put in his answer, admitting the possession of various documents, which he accordingly deposited with his clerk in court. He was now about to move to dissolve the injunction, when

Mr. Boteler and Mr. Dixon, for the plaintiff, moved that the case might stand over till the papers and docu-**[277]**-ments in the hands of the clerk in court might be examined; contending that the answer was not to be deemed sufficient till those documents had been inspected. It was the same as if they appeared on the face of the answer, and the injunction could only be dissolved on the merits.

Mr. Simpkinson, and Mr. Metcalfe, for the defendant. This was not the common injunction, but a special injunction till answer or further order. The defendant need not have put in his answer to enable him to dissolve this injunction. The dissolution of a special injunction does not depend on the sufficiency or insufficiency of the answer.

THE LORD CHIEF BARON. It is immaterial whether the answer is read as an answer or an affidavit. If the facts disclosed by it were sufficient to authorise me to dissolve the injunction, I would dissolve it. But here the documents, which are part of the answer, might shew that the plaintiff at law had received full consideration for the bill, and consequently ought to be restrained in his action. Time, therefore, must be given to the plaintiff to inspect these documents.

Feb. 20th, 1839.—Mr. Metcalfe now moved that the bills of exchange, promissory notes, books of account, receipts, vouchers, and documents, which had been deposited with the defendant's clerk in court, under an order of the 24th of November, 1838, might be redelivered to the defendant.

Mr. Boteler opposed the motion, so far as related to the bills of exchange and promissory notes, upon the ground, supported by affidavit, that the plaintiff was advised that it was material to him to take certain criminal proceedings against the defendant, in respect of such **[278]** bills and notes; the affidavit denying the genuineness of the plaintiff's indorsement to one of the notes.

Mr. Metcalfe, in reply, contended that the ground taken in opposition to the motion was too general.

ALDERSON, B. I will make no order at present as to the bills of exchange and promissory notes. Let them remain a reasonable time in court, in order to see whether the plaintiff will take criminal proceedings against the defendant.

WHITE *v.* HILLACRE. Dec. 11th, 1838.—Where a plaintiff's case had been conducted with great delay, and ultimately, through the mistake of his attorney, publication had passed without his examining witnesses, the attorney was made to pay the costs of an application to enlarge publication.

[S. C. 8 L. J. Ex. Eq. 65.]

The bill in this case was filed in Michaelmas Term, 1836, since which time the plaintiff's case had been conducted with every species of delay. In May, 1838, after he had obtained a commission to examine witnesses, the defendant not joining, he gave notice to withdraw his replication and amend his bill by striking out a defendant. The order then made was that the plaintiff should be at liberty to withdraw, &c., and should reply within a fortnight after so amending his bill, and go into commission and examine his witnesses in the ensuing vacation, and that publication should pass the first day of the next Michaelmas Term.

The time for publication having expired, but the plaintiff not having examined his witnesses,

Mr. G. Richards now moved on his behalf, that publication might be enlarged; and in support of the motion read the affidavit of the plaintiff's country solicitor, stating that the plaintiff's default had arisen from the mistake **[279]** of the deponent, he being under the impression that no commission could be had in this court in the vacation.

Mr. Simpkinson, for the defendant, opposed the motion on the ground of the delay.

ALDERSON, B. Let publication be enlarged; the attorney paying the costs of this application and undertaking to bring the cause to a hearing at the sittings after Hilary Term.

Order accordingly.

FRASER *v.* PALMER. Dec. 12th, 1838.—The circumstance that a plaintiff has no fixed place of abode, and that it is difficult to find him, is not a sufficient ground for compelling him to give security for costs, unless he goes out of the jurisdiction of the Court.—Quære, whether a defendant married woman, who has appeared separately to the bill, but who has obtained no order to answer separately, can compel the plaintiff to give security for costs?

[S. C. 8 L. J. Ex. Eq. 39; 3 Jur. 145. Discussed, *Cambottle* v. *Inngate*, 1853, 1 W. R. 533. Referred to, *Redondo* v. *Chaytor*, 1879, 4 Q. B. D. 457. See further, p. 491, post, and 4 Y. & C. Ex. 515.]

The bill, after alleging that the defendants, Palmer and his wife, were separated, and that Mrs. Palmer had separate property, on the faith of which she had become indebted to the plaintiff, prayed payment out of that separate property.

A motion was now made on behalf of the wife, who had appeared separately to the bill, but who had not obtained an order to answer separately, that the plaintiff might give security for costs. The motion was founded on affidavits of persons who stated their belief that the plaintiff had no fixed residence; that although he was described in the bill as resident at No. 23 Charlotte Street, Bloomsbury, it had been found upon inquiry at that house that he did not reside there, but only came there occasionally, and had his letters directed there; that, from fear, as the deponents believed, of his creditors, he was continually moving from place to place, more particularly from England into Scotland, and vice versâ; and that on one occasion he had taken sanctuary at Holyrood House.

On the other hand, there was evidence to shew that when in London, he was generally at Charlotte Street, **[280]** and although he was frequently travelling about, yet he had been known to live ten months together at the same place.

Mr. G. L. Russell, for the motion. This party has no fixed residence: and if he should be ordered to pay costs, there will be no means of enforcing the order. He must give security either in purse or in person, and if the latter is not forthcoming, he must produce the former. [Alderson, B. You only shew a difficulty in finding him; you do not say that he is out of the jurisdiction.] According to *Bailey* v. *Gundry*

(1 Keen, 53) and *Calvert* v. *Day* (2 Y. & C. 217), it is sufficient to shew that the party has no fixed place of abode. [Alderson, B. In the former of those cases, the plaintiff made default in payment of costs. In the latter the plaintiff gave a misdescription of his residence in the bill.] In the latter case the Lord Chief Baron says that if a hawker and pedlar is plaintiff he ought to give security for costs.

Mr. Simpkinson, contrà, after observing that it was not competent for this defendant, who had not obtained an order to answer separately, to make this application, was stopped by the Court.

ALDERSON, B. If a plaintiff gives the right description of his place of abode when he files his bill, his circulating about afterwards is immaterial, unless he goes abroad. He is still open to the process of the Court. It is a different thing if he gives a false statement of his residence; he is then guilty of a fraud on the Court, and on that ground is made to give security for costs. It cannot be contended that a person is to give that security on the mere ground that he is in the habit of moving from place **[281]** to place. The evident meaning of Lord Abinger's dictum in *Calvert* v. *Day* is this: that it is no excuse for a man to say that he is a hawker and pedlar, in order to give a false description as to his place of residence.

Motion refused.

JONES *v.* LANE. Dec. 12th, 1838; Jan. 11th, 1839.—A. & Co. being indebted to D. & Co. in the sum of 4000l., deposited with them a bill of exchange to that amount, endorsed by L. for the accommodation of A. & Co. Afterwards, A. & Co. having agreed to indemnify L., and, having prevailed upon several persons to accept bills for their accommodation, deposited those bills with D. & Co. "as a collateral security for the payment" of the former bill. A. & Co. subsequently obtained further advances from D. & Co. on the security of the bills so deposited. Upon the bankruptcy of A. & Co. D. & Co. sued the acceptor of one of the deposited bills, who thereupon gave a cognovit which, together with the bill, was handed over by D. & Co. to L., who paid full value for it: Held, that by the above-mentioned arrangement, the deposited bills were to be the primary security in the hands of D. & Co. for payment of the 4000l., but that L. being answerable for the residue which might remain unsatisfied by means of those bills, could not be compelled in equity to deliver up the bill and cognovit of which he had obtained possession.—If a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at law, a court of equity will order the delivery up of the instrument if, from lapse of time or death of witnesses, such defence is likly to fail; but the Court will refuse such relief in all cases where the possession of the party is not shewn to be inequitable. Therefore, where A. had possession of a bill of exchange accepted by B., which, for reasons dehors the instrument, he could not enforce against B. in an action: Held, nevertheless, that B. had no equity to have the bill delivered up to be cancelled, unless he could shew that A. had the wrongful possession of it.—The cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in equity.—Where an overdue bill or note is indorsed after action brought, the indorsee, with notice of the action, has no right of action upon it.

[S. C. 8 L. J. Ex. Eq. 41; 3 Jur. 265. Overruled, *Deuters* v. *Townsend*, 1864, 5 B. & S. 613.]

In January, 1831, Thomas Davison and Philip Nouaille carried on business in London, in copartnership, as silkmen, under the firm of Davison & Nouaille. About the 14th of that month, the plaintiff, who was a friend of Davison, received from him a letter in the following words:—

"Dear Edwin,—I shall thank you to accept the inclosed, having selected you as one of the friends who unite to form a sum of 4000l. I presume you will have no objection. You had better accept payable at 8 Colman Street."

In this letter was inclosed a bill of exchange, dated the **[282]** 13th of December, 1830, and drawn by Davison & Nouaille upon the plaintiff for the sum of 500l., payable thirteen months after date.

According to the plaintiff's statement, he, a day or two after he had received the

letter, and before he accepted the bill, enquired of Davison for what purpose the bill was to be used, when Davison replied that Durant & Co. of Copthall Court, silk brokers, required security for any risk they might incur in clearing silks, which they were accustomed to purchase at the East India Company's sales for Davison & Nouaille; that Davison & Nouaille were desirous to procure the plaintiff's acceptance, in order that the same, with other acceptances for an amount altogether of 4000l., might be placed in the hands of Durant & Co., for their indemnity against such risk; that the total risk would be very remote, and would not at any time exceed 2000l.; that by means of the proposed security, the plaintiff's liability could not in any event exceed 250l.; and that the plaintiff's bill should not be parted with by Durant & Co., but retained in their hands. That the other bills to be used as securities, together with the plaintiff's, were as follows, namely:—A bill for 1000l., accepted by John Davison; for 500l., accepted by William Davison; for 1000l., accepted by Peter Nouaille; for 500l., accepted by Wood; and for 1000l., accepted by Dickenson.

In consequence of these representations, as the plaintiff stated, and under the belief that his acceptance was required for a specific purpose, he accepted the bill. He alleged also, and that appeared to be the fact, that he did so entirely without consideration, and for the accommodation of Davison & Nouaille.

At the time of such acceptance, namely, on the 11th of January, 1831, Davison & Nouaille were indebted to Durant & Co. in a sum of 4000l., for which they had indorsed and delivered to Durant & Co. a bill of exchange, **[283]** dated the 13th of December, 1830, drawn by Davison & Nouaille upon and accepted by John Hawkes, payable at thirteen months after date, and indorsed by the defendant Lane.

On the 20th of January, 1831, Davison & Nouaille, in violation, as the plaintiff contended, of their engagement with him, wrote and sent the following letter to Durant & Co.:—

"Gentlemen—We inclose the following bills, viz. for 1000l., accepted by Peter Nouaille; 500l., by William Dickenson & Co.; 500l., by William Davison; 500l. by John Wood; 500l., by J. Coulthard; 500l., by Colonel Dodgin; 500l., by E. Jones, which are to be held as a collateral for the payment of our draft on John Hawkes for 4000l., due 16th of January, 1832, and indorsed by R. Lane; and also for the purpose of occasionally clearing silk to the amount of 2000l."

The bills thus specified were indorsed by Davison and Nouaille, and inclosed in this letter. Subsequent letters were also sent of the respective dates of the 17th of May and the 11th of July, 1831, in which Davison & Co. requested Durant & Co. to discount several bills on the security of the bills already deposited with them for the objects specified in the letter of the 24th of January.

On the last mentioned 11th of July, which was immediately before their bankruptcy, Davison and Nouaille wrote and sent another letter to Durant & Co., with a view, as the plaintiff alleged, of giving an undue preference to the defendant; it was in these words:—"The bills accepted by Peter Nouaille, William Dickenson & Co., and others, amounting in the whole to the sum of 4000l., were deposited by us in your hands on the 24th of January last, for the protection of Mr. Lane against his indorsement on Hawkes' bill for the same amount, which will become due 16th January, 1832; the collateral bills were originally intended to have been placed in the hands **[284]** of Lane instead of yours for the purpose above stated, but it was afterwards agreed they should be left with you on the understanding that if they were paid, Hawkes' bill for 4000l. should be given up to Mr. Lane; but if the 4000l. bill on Hawkes was paid by Mr. Lane, then all the securities should be handed over to him in order that he might claim payment of the collateral bills from all the parties liable on them." To which letter Durant & Co. returned the following answer:—"The objects for which we hold the bills on Peter Nouaille, William Dickenson, and others, amounting together to 4000l., are expressed in your letters to us of the 24th of January, 1831, 17th and 24th of May, 1831, and 11th of July, 1831, consequently we cannot recognise your second letter of the 11th of July, expressing what was your original intention; but after all the objects for which the above-mentioned securities for 4000l. are now or may hereafter become liable shall have been satisfied, we will retain them for the benefit of Mr. Richard Lane, understanding this to be your wish."

On the 20th of July, 1831, Davison & Co. became bankrupts.

On the 16th of January, 1832, the plaintiff's bill having become due, and not being paid, Durant & Co. commenced an action against him upon it, whereupon the plaintiff gave them a cognovit for the amount and interest. These, together with the costs of the action, were afterwards satisfied by the defendant, and the bill and cognovit were accordingly handed over to him with a prohibition however on the part of Durant & Co. not to sue the plaintiff in their names.

The plaintiff now brought his bill against the defendant, charging that at the time he accepted the bill for 500l. he was entirely ignorant of the transaction between the defendant and Durant & Co. as to the 4000l. bill; and that his acceptance was given solely for the purpose before **[285]** mentioned in regard to the clearing of silk for Davison & Co.; that the letter of the 24th of January was a fraud upon him by Davison & Co.; and, further, that it never was attempted to make his acceptance available for the defendant until the second letter of the 11th of July was sent to Durant & Co.; that the purpose for which the plaintiff had accepted the bill for 500l., as also all the purposes for which the firm of Davison & Co. made and had any power to make such acceptance liable, had been answered and satisfied, inasmuch as all the liability of Durant & Co. in respect of their clearing of silks for Davison & Co., had terminated or been discharged, and all the bills and notes for which the plaintiff's acceptance was given as a security had been taken up and paid, or otherwise satisfied by means of securities obtained by Durant & Co.; that Durant & Co. had no longer any claim upon the plaintiff in respect of the said cognovit and bill of exchange, or either of them, as was manifest from the fact of their having delivered them over to the defendant; that under the circumstances aforesaid, the plaintiff had never come under any liability to the defendant in respect of the said acceptance or cognovit. The plaintiff therefore prayed that the securities so obtained by the defendant might be delivered to him to be cancelled, and that satisfaction might be entered on the record of the judgment (if any) entered up on the cognovit, and for a perpetual injunction to restrain the defendant from entering up judgment and suing out execution thereon, and from bringing any action on the bill, &c.

The defendant who, in all the material parts of his answer, was supported by the evidence of Thomas Davison, stated the case as follows:—

That in December, 1829, Davison & Co. applied to the defendant to indorse a bill for 6000l. for their accommodation; that after much hesitation he did so upon the assurance of being indemnified by other bills to a like **[286]** amount, to be placed in his hands; that the bill for 6000l. was afterwards sent to Durant & Co. to be discounted, but that they declined to discount it without further security, and consequently it was agreed that the bills to be given as a security should be deposited in their hands; Durant observing that they would still be as good and available a security to the defendant as though they remained in his possession; that ultimately Durant & Co. discounted the 6000l. bill upon the deposit of bills to the amount of 3000l. only; that in December, 1830, the 6000l. bill being about to fall due, Davison & Co. applied to Durant & Co. for a renewal, when the latter firm agreed to take a renewal for 4000l., the other 2000l. being paid in cash; that the 2000l. was accordingly provided for; that bills, including the plaintiff's, were deposited with Durant & Co. to the amount of 4000l.; and that the defendant, on the faith and understanding that he should be secured by that deposit in the same manner as on the former occasion, indorsed the 4000l. bill. The defendant totally denied the plaintiff's ignorance of this transaction, and Thomas Davison swore that on his interview with the plaintiff before he gave his acceptance, he expressly called his attention to it; and that it was clearly stated and understood between them that the bill was to be accepted principally for the security of the defendant, though it was also to be an indemnity to Durant & Co. in the clearing of silks.

The defendant, by his answer, likewise denied that the purpose for which the plaintiff had accepted the 500l. bill had been satisfied, for that, although he, the defendant, had retired it in manner before mentioned, Durant & Co. still sought to charge it and the other collateral bills, not only with what he, the defendant, insisted to be the primary object for which they were deposited, namely, his indemnity for any loss on his indorsement of the 4000l. bill, but also for a sum of 300l., or thereabouts, arising on **[287]** the clearing of silks for Davison & Co. He likewise alleged that Durant & Co. sought to render the whole of the collateral bills liable for the payment of four bills which they had discounted for Davison & Co., and which had been dishonoured;

and, with that view, had improperly, as he contended, debited him, the defendant, in an account stated by them. And he insisted that even if the collateral bills were not deposited with Durant & Co. expressly for his security, yet as they were intended, at all events by Davison & Co., to be a collateral security in some way for the due payment of said bill of 4000l., and as the defendant was well known by Durant & Co. to be a mere surety for the payment of such bill of 4000l., he, the defendant, was entitled to have the benefit of all securities placed by Davison & Co. in the hands of Durant & Co., and thereby to work out his indemnity against the loss he would otherwise have sustained by his becoming an indorser of said bill for 4000l.

Both parties entered into evidence at considerable length. The plaintiff failed in proving that he gave his acceptance for a special purpose, and principally relied on the circumstances attending the deposit of the bills, as shewing that, whatever were the rights of Durant & Co., the defendant had no right to the possession of the 500l. bill or the cognovit. In support of this part of the case, the plaintiff relied on a statement of Durant and one of his partners, who were examined as witnesses, to the effect that the letter of the 24th of January contained the whole agreement or understanding upon which the collateral bills were deposited. Durant, however, admitted that he had said that if the bills were available for his house, they were equally so for the defendant, or words to that effect.

Mr. Simpkinson and Mr. Girdlestone, for the plaintiff. According to the statement in the bill, the letters sent by Davison & Co. to Durant & Co. were a complete fraud **[288]** upon the plaintiff; but admitting, for the sake of argument, that the letter of the 24th of January was not so, the case made by the answer is totally inconsistent with that letter. There is nothing in that letter which shews that it was intended to indemnify Lane. The subsequent letter, in which that intention was expressed, was a mere concoction for the purposes of the moment, and was repudiated by Durant & Co. Taking the whole case to stand upon the letter of the 24th of January, it cannot be considered that Lane and the plaintiff were co-sureties to Durant & Co. The deposit of the 500l. bill was not a separate security given by one of the two co-sureties, but simply a collateral security given for the payment of a debt for which Lane was previously liable. That brings the case within the principles of *Craythorne* v. *Swinburne* (14 Ves. 160), in which it was held that one surety had no right of contribution against another whose engagement was not that of a co-surety, but a distinct collateral security, limited to the case of default of payment by the principal and the other surety. *Coope* v. *Twynam* (Turn. & Russ. 426) involves the same principles. Here it is established, in fact, that there was no contract by which the plaintiff agreed to become liable to Lane for Lane's benefit, though in point of law he agreed to be liable to Durant & Co. for the bill. [Alderson, B. In that view of the case, if the bill had been endorsed over to Lane, he could not have maintained an action against the plaintiff.] That observation is strong to shew that this case comes within the principles of *Craythorne* v. *Swinburne*. [Alderson, B. My difficulty is to know why you come into equity. The bill having been sued upon by the holder cannot be sued upon again. If a bill is handed over after it has become due, it is liable to all the equities of the original holder; but if it has been sued upon, it is waste paper in the **[289]** hands of a party who had notice of the action: *Columbies* v. *Slim* (2 Chit. R. 637). Here it is not denied that Lane had notice of the action.]

The second point in the plaintiff's argument is that to which your lordship has adverted, namely, his right to come into equity to have the instruments delivered up. The mere circumstance that there is a good defence at law cannot exclude the plaintiff from coming into equity in a case of this nature. If a court of equity thinks that a plaintiff may be harassed by proceedings at law, it will exercise a jurisdiction to order the instrument to be delivered up. One class of cases is that of forged instruments. [Alderson, B. Those are cases of fraud.] The objection against equitable relief would equally apply to such cases as to the present. In *Peake* v. *Highfield* (1 Russ. 559) and *Esdaile* v. *La Nauze* (1 Y. & C. 394), the instruments were ordered to be delivered up simply on the ground of forgery. In *Wynne* v. *Callander* (1 Russ. 295) a gambling security was ordered to be delivered up. It is unnecessary to mention the cases in the annuity acts.(*e*) [Alderson, B. In *Simpson* v. *Lord Howden* (3 M. & C. 97) the Lord Chancellor refused to order the instrument to be delivered up, because no action would

(*e*) *Byne* v. *Potter*, 5 Ves. 609, &c.

lie upon it. The question is whether any action would lie on this.] It is submitted that although an action has been brought on the bill in the name of Durant, yet, as judgment has not been entered up, Lane would not be precluded from bringing another action upon it. It is neither stated in the bill, nor assumed in the prayer, that judgment has been entered up. Here, then, the plaintiff is liable to have judgment entered up and to be taken in execution; and, if the witness Stone were to die, he might be unable to state under what circumstances the bill was **[290]** accepted by him. This case, therefore, comes within the principle of the authorities which have been referred to; but, at all events, should this Court refuse to order the instrument to be delivered up, the plaintiff is entitled to a perpetual injunction.

Mr. Temple and Mr. Wilcock, for the defendant. This is not a bill filed by the defendant for contribution from his co-surety, but a bill filed by the plaintiff against the defendant to prevent him from following up his legal right under a bill of exchange, of which he is proved to be the holder for full value, and for which he is, therefore, entitled to prosecute his remedy, unless a legal defence or equitable circumstances stop him. We are only called upon to shew that there is no fraud to induce a court of equity to interfere. There is a great distinction between cases where the main object is to interfere against legal rights, and where the interference is only auxiliary to a primary right properly cognizable in equity. Here the whole equity of the plaintiff rests on mere allegation; he gives no evidence of the special purpose for which he says he endorsed the bill in question, and, therefore, in effect admits the equity of the defendant. Besides, Davison's evidence is express that he informed the plaintiff that the proposed collateral securities were principally for the indemnity of the defendant. Then, if such was the defendant's right on the collateral securities as regarded the plaintiff, the question is how that right was affected by the subsequent transactions between Davison & Co. and Durant & Co. Suppose Durant & Co. were ignorant that the bills which had been obtained for one purpose were handed over to them for another, would that extinguish the defendant's right? If there is a contract between Davison and the plaintiff and Lane, by which security is made for Lane, no misuser of that security by Davison can extinguish the equitable right of Lane upon **[291]** it. He is, in truth, the holder of it for value; and the object of the bill is to prevent an examination before a jury on that fact. If the defendant has to prove his title to those bills before a jury, he must prove valuable consideration, and he will be able to do so by the facts upon which he now proceeds. Those facts would be best discussed before a jury, particularly if, as it is alleged, they rest in contradiction. It is attempted, indeed, to make this a question of law upon the authority of *Craythorne* v. *Swinburne*; but Lord Eldon admitted in that case that the doctrine was established that suretyship may be created by an independent instrument, but that it was a question of fact. Upon the facts of that case, Sir John Swinburne was certainly fortunate. Here, the Court will act upon the nature of the case as proved. The defendant may be pursuing a wild and disadvantageous course, but the Court will not deprive him of his legal rights. Upon the whole, the defendant has a clear remedy at law; and the plaintiff has, if he can shew want of consideration, a good defence at law.

Mr. Simpkinson, in reply, denied it to be law that in order to entitle a court of equity to interfere to restrain an action on a bill of exchange or promissory note, it is necessary for the plaintiff to bring forward any equitable circumstances beyond what might be a defence at law. He contended that this court would exercise a discretion to order a bill or note to be delivered up to be cancelled, although there might be a good defence at law, and that *Simpson* v. *Lord Howden* proceeded in a great measure on that principle. He cited *Hodgson* v. *Murray* (2 Sim. 515. But see 3 Sim. 283), *Lisle* v. *Liddle* (3 Anstr. 649), *Newman* v. *Milner* (2 Ves. jun. 483), *Jervis* v. *White* (7 Ves. 413), *Houlditch* v. *Nias* (8 Price, 689), and *Davis* v. *Duke of Marlborough* (2 Swanst. 157), **[292]** as shewing that cases of this nature do not depend upon equitable circumstances as distinguished from a good legal defence; and he contended that unless the invalidity appears on the face of the instrument, a court of equity will always assume jurisdiction to interfere in such cases.

Jan. 11th, 1859.—ALDERSON, B. In this case the plaintiff seeks equitable relief from this court against the defendant, and prays that certain documents in the defendant's possession may be delivered up to be cancelled; and that there may be a perpetual injunction against the defendant to restrain him from suing the plaintiff at law on the bill of exchange, or from issuing execution under the cognovit against him.

It appears that the bill of exchange was accepted by the plaintiff as an accommodation bill for Davison and Nouaille in January, 1831, and was, by them, together with other securities, deposited in the hands of Durant & Co., first as a collateral security for the payment of a draft for 4000l. indorsed by Lane, the defendant; and also for the purpose of occasionally clearing silk to the amount of 2000l.

From the subsequent letters, it clearly appears that the bill of the plaintiff, remaining in the hands of Durant & Co., was charged by Davison and Nouaille with the payment of other advances made by them in addition to the original purposes, and the inference I should draw from the whole facts of this case is that the bill must be taken to have been given by the plaintiff and used by Davison and Nouaille, for the general accommodation of the latter.

Then come the two letters in which Davison and Nouaille, on the 11th of July, 1831, state to Durant & Co. that these bills were deposited for the protection of Lane, and that it was understood that if paid, Lane's bill was not to be enforced against him. To this Durant & Co., as well they might, utterly disagree: but they assent to **[293]** holding the securities for the benefit of Lane after all their own demand shall have been satisfied.

In pursuance, I think, of this arrangement, Durant & Co., instead of first suing Lane on the bill for 4000l., sue the plaintiff Jones on his acceptance for 500l. For if they had thus obtained the money from him, it would have gone pro tanto in discharge of Lane's liability.

I think, therefore, from the correspondence itself, coupled with the whole evidence and the admitted acts of the parties, which give the best explanation of their real intentions, that either we ought to understand the words "collateral security" in the original letter to mean that the bills so deposited should be first enforced and the bill of Lane made responsible for the residue alone—or that at least (and this conclusion I prefer) after the letters of the 11th and 12th of July, this must be taken to have been the case. And I can find in no part of the case any thing to shew that, as between Jones and Davison and Nouaille, the doing so was any breach of faith. For I think that upon the evidence the accommodation as between him and Davison & Co. was without any terms stipulated for by him. I do not therefore see that Durant & Co. acted wrong in delivering up to Lane the bill in question on receiving from him the amount. And I am wholly at a loss to see how Jones, who has not paid this bill at all, can have any right at law or in equity to the possession of it. If the bill is not property in the hands of the defendant, it ought to be in the possession of Durant & Co.

The cases of fraud where a bill has been ordered to be given up are, I believe confined to those where the possession, but for the fraud, would be that of the plaintiff in equity.

On the whole, therefore, I think that I ought to dismiss this bill, both on the ground that Lane's possession is not shewn to be fraudulent or against good faith; and also on the ground that Messrs. Durant & Co., and not the plain-**[294]**-tiff, would (if Lane is not properly the holder) be entitled to the possession of the documents in question.

But there is another point in the case upon which, perhaps, I may, for the benefit of the parties, express my opinion. It appears that Durant & Co. brought an action on this bill against the plaintiff, and that the plaintiff, not being able to make a defence, gave to them a cognovit, and it is clear that the defendant has obtained the bill with full knowledge of all these facts from Durant & Co. For he has paid the amount of the bill and the costs of the action, and has got possession both of the bill and of the cognovit also. Now, under these circumstances, I think no action can be maintained upon the bill. In *Columbies* v. *Slim*, cited in Mr. Chitty's book on bills (vol. 1, p. 745. See 1 Taunt. 109), the Court of King's Bench held that an indorsement after action brought on a note over-due, would nevertheless give the indorsee a right of action unless he had express notice of the action Here the defendant had express notice of it, and I think an action would not lie, at the defendant's suit, on the bill. I should probably, however, had it been necessary, have allowed the defendant to have argued this question before the full Court.

Taking this to be the law, it has been contended that the plaintiff is entitled to equitable relief and to a perpetual injunction against the defendant to restrain him from suing on this bill.

This question was much considered by the Lord Chancellor in *Simpson* v. *Lord*

Howden (3 M. & C. 97). The result of an examination of the authorities seems to be that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at law, equity will nevertheless interfere, if from lapse of time or death of witnesses such defence is likely to fail; but that if the objection, being apparent on the **[295]** face of the instrument, must always be open to the defendant whenever such action be brought against him, he is not entitled to apply to a court of Equity for relief. Here, it is true, the defence rests on the express notice of the action previously brought, and it is obvious that time and the death of witnesses may deprive the plaintiff in equity of it altogether. But then the improper possession of the bill by the defendant, which I conceive to be the ground for equitable interference, fails in this case, and if I were to give relief here, I see no reason why I might not do so in every case in which there is a good defence at law to a suit on a negotiable instrument, but which defence is necessary to be proved by the testimony of witnesses.

Under all the circumstances of this case, I think the bill should be dismissed with costs.

Decree accordingly.

KIRBY *v.* MASH. Dec. 14th, 1839.—Where by the terms of a marriage settlement a trustee was to compel payment of a sum of money due on covenant, but by consent of the cestui que trusts the money was left outstanding on that security: Held, upon their subsequent application to have the money called in and invested, that the trustee was bound, if necessary, to enforce payment by an action on the covenant, without requiring any indemnity from the cestui que trusts; and in default of so doing he was compelled to pay the costs of a suit brought against him to enforce the execution of the covenant.—Quære, whether where the joint consent of husband and wife is necessary to authorize money to be left outstanding on a certain security, they may not jointly file a bill to have the money called in and invested, although the interest and annual proceeds of it are settled to the separate use of the wife during the coverture

[S. C. 8 L. J. Ex. Eq. 33; 3 Jur. 221.]

By an indenture of settlement, dated the 3rd of November, 1828, and made between E. Kirby, of the first part; Margaret White, of the second part; Henry White, of the third part; and Thomas White and Stephen Mash, of the fourth part (being the settlement made previously to the marriage of E. Kirby and Margaret White): reciting that there were due to Margaret White two several sums of 1135*l.* and 150*l.*, secured by the joint and several promissory notes of her brothers, Henry and Thomas White (Thomas being joined as a surety), and reciting that it had been agreed that the notes should be delivered up, and **[296]** that, in lieu thereof, they should enter into a joint and several covenant for payment of 1285*l.*, being the amount of the said two sums, and that 1000*l.*, part thereof, should be settled as thereinafter mentioned; and further reciting that the notes had been accordingly delivered up to be cancelled: It was witnessed that in consideration of the marriage, &c., the said Henry and Thomas White did for themselves, &c., jointly and severally covenant, promise, and agree with and to the said Stephen Mash, his executors, administrators, and assigns, that the said Henry and Thomas White, or one of them, their executors or administrators, would well and truly pay to the said Stephen Mash, his executors or administrators, the said sum of 1285*l.*, with interest for the same at 5*l.* per cent. per annum, on the 12th day of May then next ensuing. And in further pursuance of the said agreement, and in consideration of the said intended marriage, it was thereby agreed and declared that the said Stephen Mash, his executors, administrators, and assigns, should stand possessed of and interested in the said debt of 1285*l.*, in trust for the said Margaret White until the said intended marriage, and upon the solemnisation thereof, upon trust either to call in and compel payment of the said sum when the same should be payable, or with the consent in writing of the said E. Kirby, and Margaret, his intended wife, to permit the same to remain on the security of the covenant therein contained, and in that case, from time to time, to receive or compel payment of the half-yearly interest which should become due upon the said principal sum, or upon so much as should remain due on the aforesaid security;

and in case the said principal sum, or any part thereof, should remain due or owing on the said covenant at the decease of the survivor of them, the said E. Kirby and Margaret, his said intended wife, then forthwith to compel payment of the same with all arrears of interest. And as to, for, and concerning the said principal sum of 1285l., it was thereby [297] agreed that the said Stephen Mash, his executors, &c., should stand possessed of and interested in 285l., part thereof, in trust for the said E. Kirby, his executors, administrators, and assigns; and as to 1000l., residue thereof, in trust to place the same out in the joint names of the said Thomas White and Stephen Mash, in or upon any of the public securities in England; and that the said Stephen Mash, his executors, &c., should, in the mean time, and the said Thomas White and Stephen Mash, and the survivor of them, &c., should, after such investment as aforesaid, stand possessed of the fund upon which the said sum of 1000l. should be placed out, upon trust to pay the interest and annual produce thereof to the said Margaret White, or to such person or persons as she should by writing appoint, for the term of her life, for her sole use and benefit, independently of her said intended husband; and after the death of either of them, the said E. Kirby, and Margaret, his said intended wife, upon trust to pay such interest, dividends, and annual produce to the survivor, and after the decease of the survivor, to divide the principal among the children of the marriage in manner therein mentioned.

The settlement was executed, the marriage took effect, and there were three infant children of the marriage. Stephen Mash got in 285l., part of the sum of 1285l., and the residue remained due on the security of the covenant.

In November, 1835, the interest on the 1000l. falling in arrear, Mrs. Kirby requested a friend to apply for it, and he accordingly wrote to Mash, desiring immediate payment of the interest, and likewise to have the 1000l. invested according to the trusts of the settlement on approved security. This letter, and subsequent letters of a similar nature, were met by various excuses on the part of Mash, and ultimately, in December, 1836, the present bill was filed by Mr. and Mrs. Kirby against Mash and the [298] infants, praying that Mash might be compelled to enforce the covenant against Henry and Thomas White, and to invest the money upon the trusts of the settlement.

The defendant Mash, by his answer, stated that no application had been made to him to bring any action on the covenant.

Mr. G. Richards, for the plaintiffs. This trustee has no excuse for not having taken steps to enforce the covenant. He admits that the money is outstanding, and says that he is ready and willing to invest it when received of Henry White. Why, then, does he not compel Henry White to pay the money? Perhaps an objection may be raised to the frame of this record in making Mr. and Mrs. Kirby join as plaintiffs; but the husband and wife are not in litigation; they only ask that the money may be placed in the hands of the trustees. It was only to remain in the hands of the debtor upon the joint consent of the husband and wife.

Mr. Heberden, for the infants.

Mr. Puller, for the defendant, Stephen Mash. It would be inexpedient, on the ground of costs, to rely on the objection as to the frame of the record; but *Wake* v. *Parker* (2 Keen, 59) and other cases shew that that objection is tenable. The whole complaint against this defendant is that he has been slow to go to law. No act of fraud is alleged against him. The plaintiffs ought to shew that they have tendered him an indemnity, and asked him to bring the action. He denies that he has ever been asked to do so. Was he, under such circumstances, bound to involve the brothers of this lady in an action? The plaintiffs, at all events, must give him the funds for that purpose. All they can ask is for liberty to sue in his name, indemnifying him for the costs.

[299] Mr. Richards, in reply, said that there was no statement in the answer as to the want of funds to bring the action: that was a mere afterthought to avoid payment of costs.

ALDERSON, B. Upon looking at the settlement, it appears to me that it was the duty of the trustee, in the first instance, to get in the money, unless relieved of that duty by the joint consent of the husband and wife. It was not necessary, therefore, that he should be set in motion by an indemnity; he was obliged by the terms of the settlement to do without it. It is clear that he ought to have got in the money long ago. Up to a certain period he might possibly be excused for his negligence, for want

of an application on the part of the plaintiffs; but the moment they did make the application, he ought to have done his duty. They absolutely and affirmatively requested him to call the money in. The decree must, therefore, be carried into execution, and the defendant must pay the costs of this suit.

Decree accordingly.

RICHARDS *v.* PERKINS. Dec. 14th, 1838.—Testator devised his real and personal estates to trustees, who were also executors, upon trust, to raise thereout, by sale or otherwise, 4500l., and invest the same in Government or mortgage securities, and pay so much of the annual proceeds as should be necessary for the maintenance of his granddaughter, M. A., until her age of 25 years, and then to pay the annual proceeds to her for her life; and upon her death to divide the principal among her children, and if she died without children, among the testator's other grandchildren, B., C., and D.: and as to the residue of the testator's real and personal estate, he directed his trustees to pay the rents, interest, and annual proceeds of it to the said B., C., and D. equally, till the eldest should attain 25, and, upon that event happening, to convert so much of the residue as should not consist of money into money, and divide the same equally among B., C., and D.; and power was given to the trustees to advance to B. and D. part of their expectant portions before they attained 25: Held, that it was the duty of the trustees to set apart and invest as soon as possible the sum of 4500l., and, for that purpose, to sell the testator's real estates, notwithstanding that none of the grandchildren might have attained 25; and in consequence of the non-performance of this duty by the acting trustee and executor, and other acts of misconduct on his part, a receiver was appointed.—It is a good ground for the appointment of a receiver that an executor and trustee has, by omitting to get in the testator's personal estate, deprived infant legatees of the maintenance or means of advancement provided for them by the will.

[S. C. 8 L. J. Ex. Eq. 57; 3 Jur. 168.]

John Richards, by his will, dated the 28th of February, 1833, after directing payment of his debts and **[300]** bequeathing various legacies, gave, devised, and bequeathed to Mark Perkins and T. L. Parker, their heirs, executors, and administrators, all freehold and leasehold estates mortgaged to him, and all other his freehold and leasehold estates, ready monies, monies at interest and securities for money, and all other his real and personal estate, to hold the same respectively upon trust, to raise thereout by sale or otherwise the clear sum of 4500l. (in case his mortgage securities should not amount to that sum at the time of his decease), and to stand possessed of that sum in trust for his, the testator's granddaughter, Mary Ann Richards and her issue, as thereafter mentioned; and he directed his trustees to invest the said sum in Government securities or on mortgage at their discretion, and apply so much of the annual proceeds of it as should be necessary in the rearing, educating, and maintenance of the said Mary Ann Richards until her age of twenty-five years, and then to pay the whole of such annual proceeds into her own hands during her life, for her sole and separate use, and after her decease to divide the said principal sum of 4500l. amongst her children; and in case she should die without leaving a child or children, then to divide the said principal money between the testator's other grandchildren, J. S. Richards, Elizabeth Richards, and George Richards, at their respective ages of twenty-five years, share and share alike, &c. And as to the residue and remainder of his, the testator's, real and personal estate and effects, upon trust that his said trustees and the survivor, &c., should collect and receive the rents, interest, and annual produce thereof, and after setting apart a necessary sum for repairs, and paying a life annuity of 26l. per annum as therein mentioned, pay the residue or surplus of such rents, dividends, and proceeds unto the said J. S. Richards, Elizabeth Richards, and George Richards in equal shares, until the eldest should attain the age of twenty-five years, and when and so soon as that event should have happened, upon trust to convert such part **[301]** of the said residue of his estate as should not consist of money or securities for money into ready money, and pay and divide the money so arising from such residue unto and among them, the said J. S. Richards, Elizabeth Richards, and George Richards, as they should respectively attain the age of twenty-five years, share and share alike;

with a limitation to the issue of such of them as should die under twenty-five, and benefit of survivorship to such as should survive the others dying under twenty-five without issue. And the testator authorized and empowered his said trustees, if they in their discretion should think proper, to pay and advance to the said J. S. Richards and George Richards before they should attain twenty-five, for their or his advancement in life, or otherwise, any part or share of their expectant portions which they could respectively be entitled to under his will. And the testator appointed his said trustees and also the said Mary Ann Richards, when she should attain twenty-five, to be the executors and executrix of his will.

The testator died in 1833, leaving his above-named grand-children surviving him, of whom J. S. Richards attained twenty-one in June, 1834, Elizabeth Richards, who, after the testator's decease, married Morgan Powell, attained twenty-five in September, 1836, and George Richards and Mary Ann Richards (who was the testator's heiress-at-law) were, at the time of filing the bill, infants under the age of twenty-one.

Upon the death of the testator Mark Perkins alone proved the will.

The bill was filed in August, 1836, by J. S. Richards and George Richards against the trustees, and against Mary Ann Richards and Mr. and Mrs. Powell, praying to have the usual accounts taken of the testator's real and personal estate, and that the sum of 4500l., bequeathed by the testator, might be set apart and invested for the benefit of the parties interested, that out of the residue of **[302]** the testator's estates a proper sum might be assigned for preferment and advancement of the plaintiffs, and that in the mean time a receiver might be appointed.

The bill charged that the real and personal estates of the testator, at the time of his death, were very considerable, and that the personal estate alone was sworn to be worth under 8000l.; that, after payment of the testator's debts, the testator's real and personal estate was sufficient to raise not only the sum of 4500l., but also to leave a considerable surplus; that the defendants, the trustees, or one of them, although they had not, as they ought to have done, converted the whole of the testator's property into money, had sold and disposed of a great part thereof; that they had, nevertheless, omitted to apply the monies arising from such sale to the raising and investing the sum of 4500l., but had applied them to their own use; that Mark Perkins had refused to deliver to the plaintiff, J. S. Richards, a gold watch which had been bequeathed to him by the testator; that the defendants, the trustees, or one of them, had in their hands a considerable residue applicable to the trusts of the testator's will, but that they had nevertheless refused to make any payments to the plaintiffs for their preferment or advancement, although the plaintiffs had no father or mother, and were in necessitous circumstances.

The defendants, T. L. Parker and Mark Perkins, put in a joint answer, from which it appeared that the former had not received any part of the testator's property, though he had in some degree interfered in the trusts. Throughout the whole of the answer, he supported the statements of his co-trustee.

In reply to the material charges of the bill, the answer stated as follows:—"These defendants believe that, after full payment and satisfaction of the testator's funeral and testamentary expenses, debts, and legacies, the said testator's real and personal estate will and ought to produce, **[303]** though they have not yet produced, not only sufficient to raise the sum of 4500l. in the said bill mentioned, but also to leave a considerable surplus or residue (though what surplus, &c., &c., these defendants cannot set forth) applicable to the trusts of the said will, in favour of the said plaintiffs and the said defendant, Elizabeth Powell; but that inasmuch at the said plaintiff, J. S. Richards, hath not attained his age of twenty-five years, and inasmuch as the said Elizabeth Powell attained her age of twenty-five years, after the filing of the said bill of complaint (that is to say), on the 17th day of September now last past; and inasmuch as the value of the real and leasehold estates of the said testator hath since his decease been, and is greatly increasing; and inasmuch as a large debt which was due and owing to the said testator at the time of his decease, from Joseph Underwood, of &c., amounting to 1100l. or thereabouts, is disputed and unpaid, and a suit in Chancery, not yet determined, has been instituted by this defendant, Mark Perkins, under legal advice, to recover the same; and inasmuch as this defendant, Mark Perkins, hath advanced out of his own monies divers sums, and applied them towards payment of the demands against the assets of the said testator, for which advances he is not yet reimbursed, and inasmuch as these defendants are advised that upon the

true construction of the said will of the said testator, it was not imperative upon the trustees and executors to sell the real and leasehold estates of the said testator, and to convert into money his mortgage and other personal estates, immediately after his the said testator's decease, this defendant, Mark Perkins, out of the monies so possessed by him as aforesaid hath not, and this other defendant, for the reasons aforesaid, hath not, and these defendants jointly have not, in any manner, raised or invested the sum of 4500l. in the said bill in that behalf mentioned, or any part thereof; and these defend-[304]-ants, or either of them, have not, nor hath ever, in any manner, set apart the surplus or residue of the testator's said real and personal estate, or any part thereof."

The defendants then denied that they had applied any of the testator's monies to their own use, or that Mark Perkins had refused to deliver the gold watch. As to the charge of refusing money for advancement, they stated Mark Perkins had not, for any reason, refused to make any payments for the use of the said plaintiffs, for their preferment or advancement in respect of their presumptive shares of the residue, save as by the said bill appeared; but that otherwise he had made divers advances to the said plaintiffs and the defendant Elizabeth Powell, which were contained in the account thereinafter set forth. The defendants then stated that "they believe that the complainants have not either father or mother; and that the said complainant, J. S. Richards, may be, from improvidence, and not otherwise, in necessitous circumstances; but they say that the said complainant, George Richards, is not in necessitous circumstances, but is placed at a boarding school, where no vacations are allowed, and he is not in want of such aid or assistance as in the said bill mentioned; but, on the contrary, the said George Richards has expressed his satisfaction and gratitude."

The sum which appeared by the account to have been advanced by Mark Perkins to the plaintiff, J. S. Richards, was 29l. 7s. 6d.

It appeared from the schedules to the answer that several promissory notes and other personal securities belonging to the testator were left outstanding, for what reason did not, generally speaking, appear, except that in the opinion of Mark Perkins the assets could not be distributed till the suit against Underwood had been determined. Annexed to the statement of some of the debts [305] were such observations as the following:—"Debtor poor, debt considered bad." "These debts, it is said, will be paid, but must be considered doubtful" &c.

It appeared that some months before the hearing a motion had been made for a receiver upon the facts admitted by the defendants' answer, but that that motion had been refused. The grounds of that decision did not at present appear.(*a*)

Mr. Simpkinson and Mr. O. Anderdon, for the plaintiffs. We do not complain of the mortgage debts not being called in, but it was the duty of the executor to call in the promissory notes. Many of these securities, if not made available immediately, will be barred by the statute of limitations. Then with respect to the sum of 4500l., if the executor has realized sufficient assets for the purpose, he ought to have invested that sum long ago. It was the primary purpose of the testator's will to realize and set apart that sum for the benefit of his grand-children. It is in vain for the defendants to contend that the parties interested in the residue are not interested in setting apart that sum. They had no discretion to leave that sum uninvested, but were bound to sell the testator's real estates, if necessary, before Mrs. Powell attained twenty-five. Then the executor has been guilty of gross misconduct towards the plaintiffs, both in refusing to advance the one, and in placing the other at a very questionable sort of school. On the ground, therefore, of this misconduct in the executor, the plaintiffs ask for a receiver; but there is also another ground, namely, that where one of two trustees refuses to act, and the parties beneficially interested all concur in the application, the Court will [306] appoint a receiver: *Brodie* v. *Barry* (3 Mer. 695), *Beaumont* v. *Beaumont* (3 Mer. 696, cited).

Mr. Puller, for the heiress-at-law.

Mr. Wright and Mr. Boyle, for the other defendants, in the same interest with the plaintiffs, referred to *Dimes* v. *Scott* (4 Russ. 195).

Mr. Spence and Mr. Webster, for the defendants, Mark Perkins and T. L. Parker. The executors were not bound to sell the real estates until Mrs. Powell attained

(*a*) The motion was heard before the Lord Chief Baron in January, 1838. On that occasion no counsel appeared for Mary Ann Richards.

twenty-five. She had not attained that age before the bill was filed, and it is sworn by the executors that the testator's leaseholds have increased in value. They expressly deny that they have applied any of the testator's assets to their own use; and one of them alleges that he has advanced money to pay the testator's debts. It is said that they have omitted to get in the personal estate, and upon that point *Dimes* v. *Scott* is cited, but there is no express charge in the bill to that effect. On the contrary, the plaintiffs charge that the estate has been got in and misapplied. Again, the bill does not ask that the executors may account for what, but for their wilful default, they might have received; the plaintiffs, therefore, are not entitled to more than the common account. When a motion was made for a receiver in this cause, the court refused the application. It requires a very strong case to remove a trust out of the hands of an executor, and to put a receiver in his place: *Middleton* v. *Dodswell* (13 Ves. 266). With respect to the conversion, there is sufficient doubt on the face of the will to justify the executors in **[307]** what they have done. [Alderson, B. It seems to me they were bound to set apart the 4500l., and to appropriate the mortgage securities for that purpose, as far as they would go. The maintenance and education provided for the grand-children, until they should attain twenty-five, could only be effected by means of such appropriation, or the sale of the testator's estate.]

Mr. Simpkinson, in reply.

ALDERSON, B. The point which embarrasses my mind is the fact that a receiver was refused in this case on a former application; but, as the reasons for that refusal do not appear, I must act upon the circumstances of the case, as they appear before me. My own impression is that to authorize this Court to appoint a receiver, it is enough to say that this executor has not done what he could to get in the personal estate of the testator; that he has left a considerable portion of it outstanding on improper securities; and that he has not raised the 4500l., as, according to the testator's will, he should have done in order that the parties might know what they had to look to. Upon these grounds, I am of opinion that the parties are entitled forthwith to a receiver both of the rents and profits of the real estates and of the outstanding personalty.

Decree accordingly.

[308] ANGELL *v.* DAWSON. Dec. 14th, 1838; Jan. 11th, 1839.—Where by the terms of a settlement 7000l. stock was vested in trustees upon certain specific trusts, and the bill alleged that one of the trustees had sold out the stock and applied part of it in discharge of a claim in no way connected with the trust: Held, although the bill did not make a case or pray for enquiry upon this point, that the plaintiffs were nevertheless entitled to an enquiry; the trustee by his answer stating that the stock so applied had been included in the settlement by mistake, notwithstanding that he himself had been a party to and had executed the settlement.—Where a trustee had dissented from the conversion of Navy 5l. per cents. into new 4l. per cents., under circumstances which were charged by the bill to be injurious to the trust property, it was referred to the Master to consider how the trustee ought to have acted in relation to the trust in March, 1822, the time limited by the act of Parliament for the assent or dissent of trustees; the Court at the same time observing that the trustee would receive full protection in equity, if it could be shewn that he had acted as a sensible and prudent man, acting for the common benefit of all the cestui que trusts, might fairly have acted.—A father by deed settled certain leaseholds upon his son, H. O. D., absolutely, and a certain rent charge, and stock in the public funds, upon H. O. D. for life, with remainder to his children. The settlor afterwards, by a deed-poll, which he had reserved to himself power to make, revoked all the uses, trusts, estates, &c. of the settlement, so far as the same related to his son, H. O. D., and declared that all estates, shares, right, interest, and benefit whatever given by the settlement to or in favour of the said H. O. D., should be and remain to the use of trustees, their heirs, executors, and administrators, in trust during the joint lives of H. O. D. and his wife M. D., to pay the annual income to M. D. for her sole and separate use, and for the support of her children by H. O. D.; and if H. O. D. should die in the lifetime of M. D., in trust to pay the same to her during her widowhood for the support of herself and her said children, with

a limitation over in favour of such children in case of her death or second marriage. H. O. D. died in the lifetime of M. D., leaving several children by her: Held, that the deed-poll was not to be considered merely as a revocation of H. O. D.'s life estate, but that the trusts of the second deed were to be substituted for the trusts declared by the first deed in favour of H. O. D.; consequently that M. D. took an estate for life, or during her widowhood, in the rent charge and stock as well as in the leaseholds.

[S. C. 8 L. J. Ex. Eq. 50.]

By an indenture dated the 4th of December, 1813, and made between William Dawson the elder, of the one part; and Hannah Dawson, his wife, William Dawson the younger, and John Thomas Dawson, his eldest and second sons, and Thomas Whately, his son-in-law, of the other part, it was witnessed that in consideration of the natural love and affection which the said William Dawson the elder had for his said wife and sons, and his son Henry Overton Dawson, and his two daughters, Priscilla, wife of the said Thomas Whately, and Maria, wife of J. R. Prior, and for making some provision for their use and benefit, and for other good considerations, he, the said William Dawson the elder, in pursuance and exercise of certain powers given by certain indentures which were referred to, and all other powers, &c., did limit and declare that the manor and freehold estates therein mentioned should be and remain to the uses therein declared, for the benefit of himself and William Dawson the younger, and that a certain rent-charge of 65l. per annum therein mentioned **[309]** should be to the use of the said Henry Overton Dawson for his life, with remainder to the use of all and every his child and children, if more than one, as tenants in common, and his and her respective heirs for ever. And it was by the said indenture further witnessed that, for the considerations aforesaid, the said William Dawson the elder granted, bargained, sold, and assigned to the parties thereto of the second part, their heirs, executors, administrators, and assigns, two leasehold messuages situate in Islington, to hold the same with the appurtenances, &c., in trust for the said Henry Overton Dawson, his executors, administrators, and assigns, for his and their own absolute use and benefit: and after reciting that the said William Dawson the elder was possessed of or well entitled to 7000l. 5l. per cent. Navy annuities, which had been transferred to and were then standing in the joint names of himself and the said defendant William Dawson the younger, in the books of the Bank of England, it was thereby, for the considerations aforesaid, declared and agreed that the said 7000l. 5l. per cent. Navy bank annuities were so transferred into the joint names of them the said William Dawson the elder and William Dawson the younger; and that they and the survivor of them, his executors and administrators, should stand possessed thereof and interested therein, and of and in the dividends, interest, and produce thereof, upon trust for the said William Dawson the elder for his life; and, from and after his decease, upon trust out of the dividends thereof to pay unto the said Hannah Dawson, his wife, the yearly sum of 150l. as therein mentioned and subject thereto, upon trust for the said William Dawson the younger, Henry Overton Dawson, Paulina Whately, and Maria Prior, for their lives respectively in equal shares; and from and after their respective deaths, in trust for their respective children equally, with benefit of survivorship. The settlement then, after disposing of other property, gave power to **[310]** William Dawson, by deed or will, to revoke all or any of the trusts, estates, provisoes, and covenants therein contained. It likewise contained a covenant on the part of William Dawson the younger that he would, immediately on the decease of his father, transfer the said trust stocks or funds into the joint names of himself, the said Hannah Dawson, Henry Overton Dawson, and Thomas Whately, or any other trustee or trustees whom William Dawson the elder should by deed or otherwise appoint.

By a deed-poll dated the 23rd July, 1813, made in pursuance of the power of revocation contained in the settlement, William Dawson the elder revoked, annulled, determined, and made void all the uses, trusts, estates, powers, provisoes, matters and things in and by the said indenture declared and contained, so far as the same related to his son the said Henry Overton Dawson, and the provision thereby made for his use and benefit; and the said William Dawson the elder thereby limited, declared, directed, and appointed that all estates, shares, right, interest, and benefit whatsoever in and by the said indenture limited and given to or in favour of the said Henry

Overton Dawson, or provided for his use, should thenceforth rest in and be and remain unto and to the use of the said William Dawson the younger, John Thomas Dawson, and Thomas Whately, their heirs, executors, and administrators, according to the nature and terms thereof respectively, in trust, during the joint lives of the said H. O. Dawson and Mariel Dawson, his wife, to pay the rents, interest, dividends, profits, and annual income thereof as the same should become due, into the proper hands of the said Mariel Dawson, to and for her own sole and separate use and benefit, and for the support, maintenance, and education of her children by the said Henry Overton Dawson, exclusively and independent of him, and not to be liable to any of his debts, contracts, or engagements; and the receipts of the said Mariel Dawson alone for the **[311]** said rents, &c., notwithstanding her coverture, were to be sufficient discharges; and if his said son, Henry Overton Dawson, should happen to die in the lifetime of his said wife, in trust to pay the same to her during her widowhood, for the support of herself, and the maintenance and education of her children by him; and from and after her decease or second marriage, which should first happen, as to the same shares, estates, and premises, the same should be in trust for all and every the child and children of the said Henry Overton Dawson, or such other person or persons as would be entitled thereto, or for her use and benefit during her life.(*a*)

William Dawson the elder died in 1817, having by his will appointed William Dawson the younger his sole executor, and leaving the several parties named in the settlement surviving him. Of these Hannah Dawson, Thomas Whately, and Henry Overton Dawson, died some years before the filing of the bill; the latter leaving Mariel his wife and three children surviving him, one of whom married Isaac Angell.

The bill was filed by Mr. and Mrs. Angell against William Dawson the younger, and John Thomas Dawson, and also against Mariel Dawson and the other parties interested in the settlement, for the purpose, in the first place, of charging William Dawson the younger, and his co-trustee, with the loss alleged to have been sustained in consequence of improvident management of the 7000l. stock; and, in the second place, of having a declaration by the Court as to the interest taken by Mariel Dawson under the settlement and deed-poll.

Upon the first point the bill charged that from the death of William Dawson the elder to the 1st of August, 1822, the said sum of 7000l. Navy five per cents. continued to stand in the joint names of William Dawson the elder, **[312]** and William Dawson the younger; that by statute 3 Geo. 4, c. 9, it was enacted, that persons holding any Navy 5l. per cent. annuities, and who should not dissent from the reduction of the interest thereof to 4l. per cent. per annum, should receive for every 100l. of Navy 5l. per cent. annuities a sum of 105l. new 4l. per cent. annuities, and that persons who should so dissent should be paid off the amount of their stock at par; that if the said sum of 7000l. Navy 5l. per cent. annuities had been converted into 4l. per cent. stock, the same would have been converted into a sum of 7530l. new 4l. per cent. stock; but that the defendant, William Dawson, dissented from such reduction; and, accordingly, on the 1st of August, 1822, he received the said sum of 7000l. Navy 5l. per cents. in cash; that out of the cash so received he paid 300l. to a Mrs. Quartermass, in satisfaction of a claim set up by her on the above mentioned 7000l. stock, and applied 350l. in discharge of certain costs in a Chancery suit; that after such payments he, in September, 1822, invested the residue at a considerable loss in the new 4l. per cents., alleging the amount of stock so purchased to be no more than 6318l. stock; that the plaintiff never authorized such disposition of the stock; and that in so dissenting as aforesaid, the said William Dawson the younger acted fraudulently and in breach of his trust, and with an intention to benefit the tenants for life of the said fund at the expense of the parties interested in the capital, and that by his so dissenting they lost the benefit of the bonus given by the Act of Parliament.

Upon the second point the bill submitted that, under the settlement and deed poll, Mariel Dawson had an interest only during her life or widowhood, in one fourth of the 7000l. stock, in the rent-charge of 65l. per annum, and in the leaseholds; and that she ought to give up the title deeds of the leaseholds to be deposited in this Court for safe custody.

The defendant, William Dawson the younger, by his **[313]** answer, admitted that he had disposed of the stock in the manner stated by the bill; but he alleged that he

(*a*) Sic.

had done so at the request of the parties immediately entitled to the dividends, and, amongst the rest, of Mariel Dawson, the mother of the plaintiff; the intention of the parties being that he should sell out and reinvest at a favourable opportunity, with a view to amend the dividends and make the income of the stock the same as it was when the settlement was made; that the object of increasing the fund had been prevented by a fall in the stocks, but that, to prevent a loss, the defendant had purchased 129l. 12s. 3d. stock with his own monies; that the sum of 350l., paid for the costs of the Chancery suit had been replaced; and that the circumstances under which he had paid the 300l. to Mrs. Quartermass were as follows—namely, that in fact only the sum of 6700l., part of the said sum of 7000l. Navy 5l. per cent. annuities, was subject to the trusts declared by the settlement and deed poll; the remaining sum of 300l., Navy 5l. per cent. annuities, being previously to the transfer thereof, vested in William Dawson the elder, as a trustee for Mrs. Sophia Quartermass, to whom the same beneficially belonged; that such sum of 300l., Navy 5l. per cent. annuities, having been placed in the name of William Dawson the elder, as one fund with the said sum of 6700l. like annuities, to which alone he was beneficially entitled, was, by mistake, included with the said sum of 6700l. like annuities in the trusts declared by the said settlement and deed poll; and that the recital contained in the said settlement to the effect that the said William Dawson the elder was well entitled to the sum of 7000l., 5l. per cent. Navy annuities, was, under the circumstances as aforesaid, erroneous to the extent of the said sum of 300l. like annuities.

The defendant John Thomas Dawson, had not acted in the trusts of the settlement, but he corroborated the statements of his co-trustee.

[314] Mr. Simpkinson and Mr. Bagshawe, for the plaintiffs. Upon the death of Dawson the elder it became the duty of Dawson the younger, in pursuance of the covenant in the settlement, to transfer immediately the 7000l. stock from his own name into the name of himself and the other co-trustees. Instead of that, he allowed it to remain in his own name, and that of the settlor. Then came the statute of 3 Geo. 4, c. 9, for the reduction of the 5l. per cents., by the terms of which act, the parties who assented to the reduction were entitled to a bonus. This trustee, however, took upon himself to dissent; and no doubt he would have had a right so to do if he had been entitled to the 7000l. stock, as sole trustee; but he was not so entitled. By his act, in omitting to place the stock in the joint names of all the trustees, he deprived other parties of their right to assent or dissent; and by this breach of trust, the trust property has become deteriorated in value. Then, there is no pretence for saying that he was justified in paying the 300l. to Mrs. Quartermass, contrary to the express provisions of the deed which he himself has executed. Under all the circumstances of this case, the plaintiffs are entitled to a general enquiry as to the management of this trust.

With respect to the interest of Mariel Dawson, under the settlement and deed poll, it is clear that, as to the leaseholds, she has no more than an estate for her life, or during her widowhood; and as to the other property, it may be doubtful whether she has even a life estate. By the deed poll, the trustees take only such estate and interest as H. O. Dawson had under the settlement; and by the settlement he took only a life interest in the rent-charge and in the 7000l. stock.

Mr. Spence and Mr. Toller, for the defendants, the trustees. The answer of William Dawson the younger is a satisfactory explanation of all the statements in the bill, **[315]** and is so considered by all the parties interested except the plaintiffs. The only point upon which the plaintiffs can possibly be entitled to an enquiry is as to the circumstances under which Dawson the younger dissented from the conversion of this stock into new 4l. per cents. But it may be questioned whether they are even entitled to that; for the statute 5 Geo. 4, c. 9, s. 6, enables trustees to dissent without the sanction of their cestui que trusts. [Alderson, B. It never was the meaning of the act to protect trustees who dissent, but those who assent. Those who dissent must be protected by the circumstances of the case.] At all events, as to the other parts of the case, the bill asks for no enquiry; and, under those circumstances, an enquiry will not be granted, although upon the hearing it may seem necessary: *Lush* v. *Wilkinson* (5 Ves. 384), *Hardy* v. *Reeves* (id. 426), *Holloway* v. *Millard* (1 Madd. 414).

Mr. Loftus Wigram, for the other defendants.

Mr. Simpkinson, in the course of his reply, referred to *Dimes* v. *Scott* (4 Russ. 195), as bearing upon the question as to the stock.

Jan. 11th, 1839.—ALDERSON, B. The points in dispute are three. First, as to the payment to a lady of the name of Quartermass of the sum of 300l. stock, being part of the 7000l. Navy 5l. per cent. stock, subjected by William Dawson, senior, to the trusts of the first settlement. Now as to that, the case stands thus: by their bill, the plaintiffs seek to charge William Dawson, junior, the trustee, with the payment, as one wrongfully made by him out of the settled property. By their answer, William Dawson and John Thomas Dawson deny this—the former positively, the latter as to his belief, the facts not being within his personal knowledge; **[316]** and William Dawson states the case thus: that the 7000l. stock was composed of two sums, 6700l. and 300l., of which the former belonged to the settlor, and the latter to Mrs. Quartermass; that both sums stood in the names of W. Dawson, and W. Dawson, junior; that by mistake both were included in the settlement; and that in paying the 300l. to Mrs. Quartermass, W. Dawson, the surviving trustee, only discharged his original duty to her, and thereby corrected the mistake in the settlement. If there was nothing in this case except the answer of W. Dawson, junior, I should think it fell within the rule laid down in *Holloway* v. *Millard* (1 Madd. 414), and should not think it necessary to direct an enquiry. But here W. Dawson junior's answer is at variance with the plain terms of the settlement to which he himself was an executing party; and I think this raises so much of doubt as to induce me to give the plaintiffs, if they wish to take it, the benefit of an enquiry before the Master as to the fact whether Mrs. Quartermass was really entitled to the 300l. in question. The plaintiffs, as they are the only parties beneficially entitled who wish for it, will probably have to pay the costs of the enquiry in case of failure.

The next question is, as to the bonus on the stock. It seems to me that on this also I ought to send the parties before the Master. I should be unwilling to lay it down, where the trustees have the power of vesting monies in government securities, that they are absolutely bound to select 3l. per cents. for that purpose. But even if that were so, it clearly would not govern this case. Here the trustees are intrusted only with 5l. per cent. stock; they have no express power to change the securities, and they have not acted upon it, if it had been in existence. What they have done is to dissent from the payment off of the 5l. per cents. by refusing to accept the bonus offered by the government, and requiring payment in money. The act **[317]** of Parliament has been referred to, by the 6th section of which it is made competent to trustees to intimate their dissent at any time before the end of March, 1822. I do not think the intention of this clause is to give trustees any power to dissent; for such parliamentary authority was needless; as without it I apprehend they had full power over the stock standing in their names. But this clause indemnified them for assenting, and enlarged their time for dissenting, both of which were necessary. If, therefore, in dissenting, they exercised a reasonable discretion, they ought to be protected. For this is not an ordinary case of trustees selling out on a speculation of advantage, in which case they must always be charged with the loss; but here we have a trustee acting in a new state of circumstances imposed on him by an act of the legislature, in which he ought to be protected, for he has acted in a way in which a reasonable and prudent man, acting for the common benefit of all his cestui que trusts, might fairly have acted. I shall, therefore, refer that question to the Master, who will consider how a trustee situated as W. Dawson was, in March, 1822, ought then to have acted. That is the important period—the time (August) when the money was paid is not the proper time to be considered.

The third question is whether Mrs. Mariel Dawson, the widow of Henry Overton Dawson, is entitled to a life estate in the annuity of 65l., and in the share of the 7000l. stock. It is conceded that as to the leaseholds she has it. And, after fully considering it, I have come to the conclusion that she has a life interest also in the other property. There is no way of construing the two deeds so as to give full effect to all the words. If there were, I should adhere to such a construction. By the first deed, Henry Overton Dawson took the leaseholds absolutely, the rent-charge for life, with remainder to his children; and the dividends of his share of the stock for life, with **[318]** the corpus of the stock after his death to his children. That deed also contains a clause (in case he died leaving a widow, but childless), giving to his widow, for her life, her husband's share. Now, under these circumstances, the second deed revokes, in terms, all uses, trusts, estates, provisoes, matters, and things by the said deed declared and contained, so far as relates to the said Henry Overton Dawson, and then limits,

declares, directs, and appoints that all estates, &c., given to him or provided for his use shall vest in the trustees in trust during the joint lives of himself and his wife, to pay the rent, interest, dividends, profits, and annual income to the wife for her sole use, and for the maintenance and education of the children. And upon his death during her life (the event which has happened), in trust to pay the same (i.e. the rents, interest, dividends, profits, &c.) to her, during her widowhood, for the same purposes of maintenance and education. And, after her decease, or second marriage, then in trust for the children, or such other person as shall be entitled thereto. Now, if this be confined to a mere disposition of Henry Overton Dawson's life estate, no dividends could be payable after his decease. Yet the dividends are to be paid to the widow, as well as the other profits. I think, therefore, that the best way to construe the two deeds will be to substitute in the first deed, for the trust in favor of Henry Overton Dawson, the new trusts contained in the second deed. And if we do so, the leaseholds, which were given to him absolutely, will, in the event which has happened, go to Mariel for her life or widowhood, and after her decease equally amongst her children; and so, also, as to the 65l. annuity and share of the stock, the same consequences will follow. I have not come to this conclusion without some hesitation; but, upon the whole, it seems to me that this construction is subject to the least difficulties and objections.

It is clear, however, that Mariel Dawson ought not to **[319]** retain the title deeds of the leasehold property. I see no reason, however, for believing they will not be quite safe in the hands of the trustees, to whom, therefore, I propose to direct their restoration.

There is no necessity, I believe, for any other special directions.

WETHERELL *v.* BELLWOOD. Nov. 27th, 1838.—Commission to examine witnesses granted, where the defendants had omitted to examine witnesses, under the impression that the questions in dispute would be disposed of by the commissioners acting under the Tithe Commutation Act.

[S. C. 8 L. J. Ex. Eq. 85.]

Motion on the part of the defendants for a commission to examine witnesses in this and several other suits, all the suits being tithe suits. The motion was supported by an affidavit to the effect that the defendants considering and believing that the commissioners acting under the Tithe Commutation Act would determine the matters in issue in the causes, had omitted to examine their witnesses in sufficient time before the commissioners under the commission issued by this Court for the examination of witnesses. The affidavit further stated that the examination of the witnesses on the part of the plaintiffs had occupied so much time that even if the defendants had proceeded to examine their witnesses, there would not have been sufficient time for their examination before the return of the commission.

Mr. Barber, for the motion. There has been no delay on the part of the defendants, nor has the plaintiff sustained any inconvenience, for if the defendants had proceeded to examine witnesses, the commissioners must necessarily have stopped the examination on or before the first day of the term when the commission was returnable. No delay or inconvenience being sustained by the plaintiff, the application ought to be granted without costs.

[320] Mr. Griffith Richards, contrà. The defendants neglected to examine their witnesses in due time, having supposed, as it would seem, that the commissioners under the Tithe Commutation Act had power to stay proceedings in the suits. It was however on a late application for an injunction determined that as to tithes already accrued due, the proceedings in this Court could not be stayed.

ALDERSON, B. Then this whimsical course of proceeding, it would seem, may take place. This Court may come to one determination as to the tithes for the time past, and the commissioners under the Commutation Act to a different opinion as to future tithes.

The application was granted on payment of the costs of suing out a new commission, but no costs were given as to the execution of the commission.

GEORGE FOOT AND THE REV. MATTHEW IRVING, D.D., *Plaintiffs;* ROBERT BESSANT, *Defendant.* Dec. 20th, 1838; Jan. 11th, 1839.—A bill was filed in the joint names of the lessee of the vicar and the vicar against an occupier of lands for the recovery of tithes. The bill stated that the plaintiff, the vicar, in the year 1832, demised to the other plaintiff the tithes arising and renewing on the defendant's farm and lands for a term of years commencing at Michaelmas, 1832, and then unexpired. The defendant, by his answer, admitted the demise as stated in the bill, and submitted that the plaintiff, the vicar, had no interest in the subject-matter of the suit, and had no right or title to maintain the same: Held, on the hearing of the cause, that if the demise were by parol, the vicar was rightly joined as a co-plaintiff; but if by deed, then he was an improper party; but that the Court (there being no evidence on the subject) might treat the expression "demised" as if it had been "demised by parol;" that construction being the most natural and reasonable, giving full effect to the whole bill, and the contrary construction rendering the bill altogether erroneous.

[S. C. 8 L. J. Ex. Eq. 58.]

The bill stated the presentation, institution and induction of the plaintiff, Matthew Irving, in the year 1827, into the vicarage of Sturminster Minshull, in the county of Dorset, to which vicarage the chapel of Lytchett Minster, in the same county, had been immemorially annexed. That **[321]** the plaintiff, Matthew Irving, as such vicar had, ever since his endowment, been and was entitled to all and singular the tithes, as well great as small, and, in particular, to the tithes of turnips, pigs, calves, milk, eggs, pigeons, garden stuff, vegetables and fruit, and agistment, yearly arising, growing, renewing, and increasing in and throughout the said parish of Lytchett Minster and the titheable places thereof. The bill then stated that the defendant had since Michaelmas, 1832, held and occupied a farm and lands containing 107 acres and 21 perches, situate in Lytchett Minster aforesaid, and the titheable places thereof; and that the plaintiff, Matthew Irving, in the year 1832, demised to the plaintiff, George Foot (among other things), all the tithes belonging to the plaintiff, Matthew Irving, as such vicar as aforesaid, yearly arising, growing, renewing, and increasing upon and from the said farm and lands so occupied by the defendant as aforesaid, for a term of years commencing at Michaelmas, 1832, and then unexpired; and that the plaintiff, George Foot, by virtue of the said demise, became and had ever since been and then was entitled to have, receive, and take all and singular the said tithes, and that the plaintiff, George Foot, had accordingly since Michaelmas, 1832, received and taken the tithes of all the said titheable matters and things which had arisen and been produced on the said farm and lands of the said defendant since the said last mentioned time, save and except in respect to the tithes of the several titheable matters and things thereinafter mentioned to have been subtracted by the defendant.

The bill then alleged the perception by the defendant of certain titheable matters specified in the bill, in respect of which small tithes were payable, without duly setting out the tithes or making satisfaction for the same.

The bill prayed an account of the several titheable matters before specified, and that the defendant might be **[322]** deemed to pay the value of the tithes thereof to the plaintiff, George Foot, or to the plaintiff, Matthew Irving, as the Court should direct.

The defendant, by his answer, admitted the title of the plaintiff, Matthew Irving, as vicar, and his right to all small tithes, and particularly the tithes enumerated in the bill, but denied his title to any great tithes. He admitted his occupation of the farm and lands in the bill mentioned, and he believed that the plaintiff, Matthew Irving, in the year 1832, demised to the plaintiff, George Foot, all the tithes belonging to the plaintiff, Matthew Irving, yearly arising, growing, and renewing upon the defendant's farm and lands, and that the plaintiff, George Foot, had, since 1832, taken such tithes except as after mentioned.

The defendant admitted his perception of the titheable matters in the bill specified, some of which he alleged to have been duly set out, and as to others of them he alleged that the time at which, by the course of dealing usually observed between the plaintiff, George Foot and himself, the tithes ought to have been accounted for, had not arrived at the time when the bill was filed. The total amount of the tithes was also alleged to be very trifling, and not to exceed 15s.

The defendant, by his answer, contended that he was not liable to account; and he submitted that the plaintiff, Matthew Irving, had no interest in the subject-matter of the suit, and had no right or title to institute or maintain the same; and he claimed the same benefit as if he had demurred to the bill.

The plaintiffs entered into evidence to prove, among other things, the perception of titheable matters by the defendant, without setting out the tithes.

No evidence was entered into on the part of the defendant.

Mr. Boteler and Mr. Eagle, for the plaintiffs. The **[323]** plaintiffs, upon the evidence and on the admissions in the answer, are entitled to an account of the tithes specified. It is anticipated, from the statement in the answer, that it will be objected that the vicar ought not to have been made a co-plaintiff. It is quite clear, however, that a lessee of tithes by parol cannot alone, or without the owner of the tithes, file a bill for the recovery of the tithes: *Henning* v. *Willis* (2 Eagle & Y. 188), *Governors of Lucton School* v. *Smith* (M'Clel. 17; 3 Eagle & Y. 1117; 13 Price, 545), *Jackson* v. *Benson* (M'Clel. 62; 13 Price, 131; 3 Eagle & Y. 1121). The statement in the bill in this case is quite consistent with the fact of the demise having been by parol. If the vicar had not been made a party, the objection would have been taken that the defendant might be called upon to pay the demand twice over.

Mr. Barber and Mr. D. James, for the defendant. There is a clear misjoinder in this case. A person who has no interest cannot be joined as a co-plaintiff with a person who has an interest. The form of the bill shews that the demise must have been for more than three years. It is a settled rule of pleading that every allegation shall be taken most strongly against the pleader. The bill prays an account of the tithes, and that payment may be made to the plaintiff, George Foot, or to the plaintiff, Matthew Irving, as the Court shall direct.

A bill alleging that the interest in the matter, the subject of the suit, is vested in one or other of the plaintiffs, and that one or other of the plaintiffs is entitled to the relief sought cannot be supported: *Cholmondeley* v. *Clinton* (Turn. & Russ. 107, 115). Where there are several co-plaintiffs, and some of them have an interest in the matters in question, but others of them have no interest, a general demurrer lies to the whole bill: *King of Spain* v. *Machado* (4 Russ. 225), *Cuff* v. **[324]** *Platell* (4 Russ. 242), *Makepeace* v. *Haythorne* (id. 244), *Harrington* v. *Long* (2 Mylne & Keen, 590), *Bill* v. *Cureton* (id. 503). Admitting, for the sake of the argument, that the statement in the bill leaves it doubtful whether the demise was by deed or by parol, the defendant is entitled to have that construction put upon it which is most favourable to him and most opposed to the interest of the plaintiff: *Vernon* v. *Vernon* (2 Mylne & Cr. 145), *Attorney-General* v. *Corporation of Norwich* (id. 406). The bill alleges that the plaintiff, Matthew Irving, who is the vicar, demised the tithes to the other plaintiff. The demise must necessarily be inferred to be a demise by deed in the usual form, and not a mere parol demise. If the vicar, having parted with his interest by the demise, can be joined the impropriate rector (for the claim is for great and small tithes), or any other parties may be joined, and delay and expense may be occasioned to the defendant. The demise ought to have been stated to have been by parol, to justify the vicar being made a party. As the pleadings now stand, the bill might have been demurred to, whether the vicar was made a party or was not made a party. The defendant has in his answer distinctly pointed out the difficulty, and claimed the benefit of the objection. The plaintiffs might have amended the bill.

Mr. Boteler, in reply. In *Cholmondeley* v. *Clinton* there were two distinct legal titles, and those titles were set up adversely and in opposition to each other. Here the title is alleged to be either in the one plaintiff or the other. In all the cases cited the objection was taken by plea or demurrer. In *Bill* v. *Cureton* (2 Myl. & K. 503) the bill was dismissed on a different ground. The reason for joining **[325]** the vicar in the present case is, that the demise being by parol, we could not sue without him. It must necessarily be inferred, from the vicar being joined as a co-plaintiff, that the demise was by parol. In *Jackson* v. *Benson* (M'Clel. 62; 13 Price, 131; 3 Eagle & Y. 1121) the objection that the impropriate rector was not made a party to a bill by his lessee was raised by demurrer; and though the Court allowed the demurrer, it permitted the plaintiff to amend by making the impropriate rector a party. The Court, in the present case, will look at the whole of the record, and will not suffer the plaintiff to be defeated by a mere technical objection.

ALDERSON, B. I will look into the cases with reference to the question of mis-

joinder. If I should be of opinion with the plaintiffs on that point, then there must be an account as to turnips, calves, pigs, and agistment. As to the milk, I think the plaintiffs have failed in making out their case. The present inclination of my opinion is, that I must take the statement in the bill most strongly against the pleader; and if so, holding the demise to be a demise by deed, the vicar would appear to be improperly joined; but if by parol, then he would seem to be a proper party. And there may be cases in which I think the vicar would be a necessary party, as where moduses are set up.

Jan. 11th, 1839.—ALDERSON, B. (after stating the pleadings, and referring to the observations made by him at the hearing of the cause). It may be conceded, for so the law undoubtedly is, that if it appeared that either the plaintiff, Irving, or the plaintiff, Foot, had no interest at all, legal or equitable, in the subject-matter of the suit, the bill must be dismissed, for it is a fatal objection to join a party who has no interest as a plaintiff in a suit with a person who has the sole interest. If, then, the statement in the bill, that Irving demised the tithes to Foot for a term of years **[326]** not yet expired, necessarily imports that the demise was by deed, and that during that demise Irving had no interest, then the defendant must necessarily prevail in his objection. The case turns therefore entirely on the statement that Irving had demised the tithes to Foot. It is not stated whether the demise was by deed or by parol. If the demise were by parol, the plaintiffs would be right, for then Irving would have the legal and Foot the equitable title to the tithes, and both ought to be joined in a suit for them. But if by this statement it is to be understood that the demise was by deed, then Irving has no interest at all, and the objection taken on the part of the defendant is a valid objection. Now, according to the cases cited of *Jackson* v. *Benson* (M'Clel. 62; 13 Price, 131; 3 Eagle & Y. 1121), and *Henning* v. *Willis* (2 Eagle & Y. 188), it appears that where the bill stated only that A. B. demised or granted to C. D. the tithes, the Court held it to be an insufficient statement of the title in C. D. to have any relief in equity without making the owner a party, and a demurrer was allowed in each of those cases. In the present case, the owner is made a party as a co-plaintiff; but it was argued that, if a plaintiff in his pleadings uses ambiguous words, the defendant has a right to take them in any of the senses in which they are capable of being used, and if in any of those senses the necessary construction be that the plaintiff was not entitled to the relief, that will be sufficient for the defendant's purpose. In support of this argument the cases of *Vernon* v. *Vernon* (2 Mylne & Cr. 145), and *The Attorney-General* v. *The Mayor of Norwich* (id. 406), were cited. There is no doubt that in pleadings, both at law and in equity, the plaintiff must state such a case as, if true, will necessarily entitle him to the relief which he seeks, and it is not sufficient that it may or may not entitle him to the relief. In *Vernon* v. *Vernon* a fact was **[327]** alleged in two different ways, each contradictory of the other, and the Lord Chancellor held, that if he was bound to assume the fact, either one way or the other, he ought to take that statement which made for the defendant. In *The Norwich case* the bill stated an intention on the part of the defendants to pay certain charges, but it did not expressly state that it was their intention to pay them from a fund out of which it would be illegal to pay them; and there appeared by the bill to be two funds, out of one of which, though not the other, they might lawfully be paid. The Lord Chancellor held, most correctly no doubt, that the bill did not necessarily allege any intention on the part of the defendants to violate the law. In this case the suit is instituted by two persons. They may properly join in the suit if one has demised to the other by parol; but they cannot do so if the demise be by deed. The statement in the bill is simply that the one plaintiff had demised to the other. Now, two senses may reasonably be put on the expression "demised"; and, if so, why am I necessarily bound to put that construction upon it, which it is obvious the plaintiffs never intended should be put upon it, because such a construction would make the suit erroneous? Besides, the defendant is in no manner prejudiced by the statement, for he might easily have raised the question. If he knew that it was a demise by deed he might have so stated in the answer, or if he knew nothing about it he might have put the plaintiff to the proof of the fact, and then, if the point turned out favourably for him, he would have been entitled to take advantage of the objection. But instead of that he admitted the title of the plaintiffs. Taking all the allegations in the bill together, I think I ought to read the expression "demised" as if it had been "demised by parol," adopting that construction as the most natural, and, at all events, as the

most reasonable, because it will give effect to the whole bill taken together, whilst the contrary con-[328]-struction would render the bill altogether erroneous. If the demise had indeed been stated in terms to have been by deed, then the plaintiffs could not have been permitted to join in the suit. Upon the whole, I think the plaintiffs are entitled to an account of the tithes to which I before referred, but, under the circumstances of the case, I shall reserve the costs until the Master shall have made his report.

SMITH *v.* FARR.(*a*) Dec. 18th, 1838.—A., by his will, directed the residue of his estate to be placed out and invested by the trustees of his will on freehold or Government securities, the interest and dividends of which securities he directed to be paid to his several children during their respective lives; and from and after the decease of his said children, upon trust, that his trustees should receive and take the rents, issues, and produce of all the trust estate and effects, and pay and divide the same unto and equally between all his surviving grandchildren who should be then living, share and share alike, until the youngest of them should attain the age of 21 years; and upon the youngest of them attaining such age, to sell and dispose of his real and personal trust estate, and convert the whole into money, and pay and divide the same unto and equally between all such his said grandchildren, and the children and child of any such grandchild who may be then dead, leaving lawful issue; such children or child to take only his, her, or their parent's share; and if there shall be but one such grandchild who may live to attain the age of 21 years, then upon trust for such grandchild, his or her heirs, executors, administrators, and assigns: Held, that the bequest to the children of the grandchildren was confined to the children of the grandchildren who should be living at the death of all the testator's children, and that the children of a grandchild who died in the lifetime of some of the testator's children did not take any interest under his will. Quære, also, if the bequest was not void for remoteness.

[S. C. 8 L. J. Ex. Eq. 46.]

By the decree made in the hearing of the cause on the 13th of December, 1837, it was referred to the Master to inquire whether there was any thing, and if any thing, what due to the estate of Frederick Smith, deceased, the late plaintiff in the original suit, in respect of the arrears of the annuity of 10l. a year, given to him by the will of the testator, William Smith, at the time when Mary Ann Farr Smith the elder, widow, was made a party to the supplemental suit, but the inquiry was to be entirely without prejudice to any question in the cause, as to the alleged misjoinder of plaintiffs in the amended supplemental suit, or otherwise.

Richard Richards, Esquire, by his report, dated the 29th of June, 1838, found that on the 16th day of June, [329] 1835, the said plaintiff, Frederick Smith, filed his original bill in this court, and that on or about the 28th day of October, 1835, he departed this life intestate, leaving the infant plaintiffs, his children, and leaving the plaintiff, Mary Ann Farr Smith, his widow him surviving, who shortly after his decease duly obtained letters of administration to be granted to her of his estate, and effects, and thereby became his legal personal representative. And he found that on the 2nd day of December, 1835, Elizabeth Farr Smith, Mary Ann Farr Smith the younger, and John Farr Smith, the infant plaintiffs, by the said Mary Ann Farr Smith, widow, their mother and next friend, filed their supplemental bill in this court, against the said defendants, and which bill was on the 16th day of July, 1836, amended, and the said Mary Ann Farr Smith was as such administratrix made a co-plaintiff therein. And he found that at the time the said last named Mary Ann Farr Smith, widow, was made such co-plaintiff, as last aforesaid, there was not any thing due to the estate of the said late plaintiff, Frederick Smith, from the estate of the said testator, in respect of the arrears of the said annuity of 10l., but that the account between the estate of the said late plaintiff, and the said testator's estate, in respect of the arrears of the said annuity, was still an open and unsettled account.

(*a*) See the facts of this case stated on a motion for a receiver, under the title *Smith* v. *Smith*, ante, vol. 2, p. 353.

The cause now came on for further directions.

Mr. Simpkinson and Mr. Kenyon Parker, for the plaintiff. The interest which the children take is not a new interest, but merely a substitution of the children for the parent. But even if it were a new interest it would be monstrous to say that a person who is thus substituted for another should be compelled to commence de novo. The point does not rest on principle only, but on authority. Lord Redesdale states (Treatise on Pleading, p. 72, 4th edit.), "If the interest of a plaintiff or **[330]** defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming entitled, upon the death of a prior tenant, under the same settlement, the suit cannot be continued by bill of revivor, nor can its defects be supplied by supplemental bill. For, though the successor in the first case, and the remainder-man in the second, have the same property which the predecessor, or prior tenant, enjoyed, yet they are not, in many cases, bound by his acts, nor have they, in some cases, precisely the same rights. But in general, by an original bill in the nature of a supplemental bill, the benefit of the former proceedings may be obtained." Lord Redesdale, in support of these propositions, refers to *Lloyd* v. *Jones* (9 Ves. 37), in which Lord Eldon discusses the principle very fully. In that case a tenant in tail claiming upon the death of a former tenant in tail without issue, not through or under such former tenant, but by a new limitation in remainder, was held entitled to continue the suit of the former tenant in tail, and to the benefit of the proceedings by a supplemental bill. The same principle is recognised in *Gifford* v. *Hart* (1 Sch. & Lefr. 386).

Another objection is, that Mary Ann Farr Smith has no right to file the bill; and this is attempted to be supported by the argument that, though the annuity was in arrear, yet there was a counter-demand exceeding in amount the arrears. The facts give, however, a conclusive answer to this argument. The annuity was in arrear at the time when she was made a co-plaintiff. Her husband had an interest in having an account of the arrears taken; he had an interest in obtaining an equitable set-off in respect of the arrears of the annuity; and if he had such an interest, his **[331]** wife, as his personal representative, would have an interest to the same extent. She was entitled to have an account taken of the arrears of the annuity. She had also a clear locus standi in respect of the interest which her husband had in the intermediate rents and profits of the real estate, and in the personal estate before the final division took place. She had a further interest, because the testator, by his will, gave her husband an interest, at the discretion of his trustees, in the surplus income of the residuary estate given to the grandchildren: *Woods* v. *Woods* (1 Myl. & Cr. 401). [The Lord Chief Baron. It appears to me that the discretion given to the trustees is only a discretion to be exercised during the lives of the children, and that, if not exercised during the life of Frederick Smith, his personal representative would not have any interest in the surplus income.] She would have a right to file a bill as to the retrospective application of the surplus income. The interest of Mary A. Farr Smith is merely an interest with reference to the arrears of the annuity and to the extent of the surplus income during the lifetime of her husband. The interests of her children are not in any manner opposed to her interests. It is impossible to say that she has not any interest. But supposing that she had no interest, and that there was a misjoinder, it does not follow as of course that the bill would be dismissed. This Court is not so bound by forms and technicalities as in such a case to refuse to do justice. The Court would get rid of the point of form, either by allowing the party who has an interest to amend the bill, by striking out the party who has not any interest, or by dismissing the bill with respect to that party. In *Mortimer* v. *West* (3 Russ. 370, 372) a bill was filed to have the rights of children ascertained. In that bill children born before the date of the testator's will and children born after the **[332]** date of the testator's will were joined as co-plaintiffs. The case had been argued before Lord Eldon, and he stated his opinion to be, that the children born after the date of the will did not take. But as the children born after the date of the will were co-plaintiffs with the children born before the date of the will he refused to make any decree, and the cause stood over in order that the after born children might be made defendants, and that being done, the cause was disposed of. In *The Attorney-General and the Queen Dowager and her Trustees* v. *Torrington* (Hardr. 219) the King had granted to the Queen for life the office of the

Custody of Higham Ferrars Park, reserving the soil and sufficient feed for the deer. The bill was filed to inforce a forfeiture by a lessee of the Queen, and for relief in respect of breaches of covenant, and though the court said that the King and the Queen Dowager could not join because their interests were several—the one in respect of the office, herbage and pannage, and the other in respect of the soil and inheritance—yet it is clear that there would have been a decree if the parties had not submitted to a reference to the Attorney-General. In *Gemmel* v. *Block* (2 Dick. 513) a bill was brought by Gemmel and Dallas for a joint demand. The Court on the hearing, being of opinion that Dallas was not entitled to any thing, a doubt arose, as the demand was joint, whether the bill, as to one of the plaintiffs, could be dismissed, and after two or three days' consideration Lord Chancellor Bathurst dismissed so much of the bill as related to the plaintiff Dallas. The reporter adds a note that a case of *Mattison* v. *Mattison* was cited as in point, but has thought proper to add a query to it. In *Morley* v. *Lord Hawke*, a case before Sir William Grant, and cited by the present Lord Chancellor when at the bar, in *Small* v. *Attwood* (2 Younge & J. 520), the Court went much further, for there it **[333]** was held that though there might be cestui que trusts, some of whom were innocent, and others of whom had improperly joined in committing a breach of trust, and both were joined as plaintiffs in the same suit, still those who had not joined in the breach of trust were entitled to a decree. This case was cited with approbation, and was, to a certain extent, acted upon by the present Master of the Rolls in *Raffety* v. *King* (1 Keen, 601, 617), though that was not a case of conflicting interests, but where a party who had no interest whatever, but was a mere formal party, was joined as a plaintiff. In the first instance the present plaintiffs filed their bill, claiming in their own right to have the benefit of the former proceedings. This was met by an objection on the part of most of the defendants, that the personal representative of Frederick Smith was a necessary party to the suit. The personal representative is accordingly brought before the Court, and then it is objected by another defendant that such personal representative is an unnecessary party, and that there is a mis-joinder. It being admitted that the defendant, Henry Sweeting Smith, has been a bankrupt, and that he has not obtained his certificate, the plaintiffs are entitled to have him removed as a trustee, and to have new trustees appointed in his place.

Mr. Griffith Richards and Mr. Puller, for the defendant Henry Sweeting Smith. The validity of the objection on the ground of mis-joinder is established by the several cases of *The King of Spain* v. *Machado* (4 Russ. 225), *Cuff* v. *Platell* (4 Russ. 242), *Makepeace* v. *Haythorne* (id. 244), and *Cholmondeley* v. *Clinton* (4 Bligh, N. S. 1, 14). A second objection to the plaintiff's case is that the children of Frederick Smith do not take any interest under the will. The bequest of the residue is to the testa-**[334]**-tor's surviving grandchildren who should be living at the decease of the testator's children. Frederick Smith died in the lifetime of his own father, and of some other of the testator's children, and therefore did not come within the description. The substitution of the children of any grandchild who might die before the division of the residue in the place of such grandchild has reference to the event of a grandchild who shall survive all the testator's children, but die before the division of the residue, leaving issue.

Supposing, however, a grandchild, who did not survive all the testator's children, to have taken any interest, the question arises whether the gift over to the children of the grandchildren is not void for remoteness. The trustees are to stand possessed of the residue upon trust after the decease of the testator's children to receive and pay the rents and income unto and equally between all his surviving grandchildren who should be then living, share and share alike, until the youngest of them shall attain the age of twenty-one years; and upon the youngest of them attaining such age, to sell and dispose of his real and personal estates, and convert the same into money, and pay and divide the same unto and equally between all such his said grandchildren, and the children and child of any such grandchild who may be then dead leaving lawful issue, such children or child to take only his, her, or their parent's share, or otherwise to release, assign, and convey the same unto and equally between them, his, her, or their heirs, executors, administrators and assigns in the proportion aforesaid, or to the children of any deceased grandchild, and if there should be but one such grandchild who should live to attain the age of twenty-one years, then to such grandchild, his or her heirs, executors, administrators or assigns

for ever, and to convey and assign the same accordingly. The children are to take certain shares. The grandchildren, upon whose attaining twenty-one the property **[335]** is divisible, might have been in ventre sa mere. The question which arises therefore is whether the period of gestation is included. In *Cadell* v. *Palmer* (3 Moore & Scott, 571) a limitation by way of executory devise to take effect after the determination of one or more life or lives in being, and the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person, was considered not to be void for remoteness; but it was held that the term of twenty-one years was the extreme limit, and that the period could not be extended by the number of months equal to the ordinary or longest period of gestation, such years and months being taken as a term in gross, and without reference to the infancy of any person whatever, born or in ventre sa mere. The period of gestation would be included in the case of a grandchild, but not in the case of a great-grandchild. The limitation here is not to the infant himself, but to other persons who might be in existence for many years before the infant. The testator has directed that the fund shall not be distributed till the youngest grandchild shall attain twenty-one. The fund is tied up longer than the law allows; for the share of a great-grandchild might not become payable till after a life or lives in being, and twenty-one years. The case is therefore clearly within *Cadell* v. *Palmer*. The testator lets in the issue of the grandchildren dying leaving issue, but does not deprive the personal representatives of the grandchildren who should die without issue. The words clearly extend to all the grandchildren who should be entitled to share in the rents and profits. [The Lord Chief Baron. There might be a question whether the executor of one of the grandchildren dying before the youngest attained twenty-one, without issue, would not be entitled to a share of the rents and profits **[336]** until the youngest grandchild attained twenty-one. But it is not likely that the testator intended that grandchildren dying without issue under twenty-one should not take any interest. With respect to the preliminary objection, the want of interest in the plaintiff, Mary Ann Farr Smith, the objection is distinctly raised by the answer, and the fact has been substantiated before the Master. It has been suggested that she is a necessary party to the suit, and that it is therefore immaterial whether she was made a plaintiff or a defendant; but she is not a necessary party. It was not necessary to make her a party, on the ground that she was indebted to the testator's estate. The trustee or executor might sue her at law. If she claimed any interest she ought to have been applied to before she was made a party. If made a defendant she might have disclaimed. It would have been her duty under the circumstances to disclaim, and the bill would have been dismissed against her. It is quite clear that where a party comes into equity, and the defendant admits that the plaintiff has a claim, but insists that he, the defendant, has a counter claim at law, a court of equity will take notice of the counter claim.

With respect to the objection made to the defendant, Henry Sweeting Smith, as a trustee, it has no foundation. He appears to have become a bankrupt thirty-eight years ago; his affairs were settled by his father, and he does not know whether he obtained his certificate or not. Any observation which may be made with respect to the annuity being given to him free from his creditors may be made equally to the other annuitants. With respect to the personal estate, it appears from the covenant that the defendant became administrator de bonis non to his father's estate with the concurrence of all the other parties.

Mr. Piggott, for the defendants, the persons entitled to annuities and shares of the residue, supported the **[337]** removal of the defendant, Henry Sweeting Smith, and the appointment of new trustees in his place.

Mr. Hurd, for the defendant Farr.

Mr. Blunt, for the defendants Whitwell and wife, the annuitants.

Mr. Simpkinson, in reply.(*a*) The objection on the ground of remoteness is nowhere raised by the answer. The question is one of legal construction. The objection is twofold: 1st, that the great-grandchildren do not take any interest; and, 2ndly, that the interest is too remote. In support of the latter position *Cadell* v. *Palmer* has been cited; but that decision, when carefully attended to, supports the right of the great-grandchildren. It is clear, from the will, that the rents and profits

(*a*) The reply was directed to be confined to the question of remoteness.

until the youngest grandchild shall attain twenty-one, are to be paid among such of the grandchildren as shall survive all the children and those only. Frederick Smith was not one of the surviving grandchildren, he having, in fact, died in the lifetime of some of the children. In no way therefore could he be entitled to any share of the rents and profits. The testator then directs that, upon the youngest grandchild attaining twenty-one, the property shall be divided between "all such my grandchildren." If it had stopped here all the grandchildren who survived the children would have been entitled; but he goes on, "and the children or child of such my grandchildren as shall then be dead leaving lawful issue." He had before spoken of his grandchildren generally. It is quite clear that he never meant that in the event of only one grandchild attaining twenty-one, the issue of the other grandchildren [338] should not take any interest. [The Lord Chief Baron. The question is whether the word "such" does not limit the bequest to such grandchildren as should then be living.] He could not have any partiality or favor for those grandchildren who might survive his children exclusively. [The Lord Chief Baron. The final division is to take place when the youngest grandchild attains twenty-one, but the rents and profits are to be applied in the meantime: would therefore the children of F. Smith have been entitled to any part of such rents and profits?] If the testator had intended that the grandchildren only who should survive the children should take, why should he have postponed the vesting? [The Lord Chief Baron. None of the rents and profits would have gone to Frederick Smith or his children.] There is certainly some ambiguity in the will, but the testator's intention was not to vest the property in the grandchildren only who should be living when the youngest of them attained twenty-one, but in all the grandchildren, if then living, and if any of them should be then dead leaving issue, then their issue. Suppose some of the grandchildren who survived the children had died before the period appointed for the final division, leaving issue, could it be said that their children would not take. If this construction be right, then arises the question of remoteness. The case cited proves any thing but that for which it was cited. That case only proves that an estate cannot be tied up for more than a life or lives in being, and a further term of twenty-one years as a term in gross. The opinion of the judges, as delivered by Mr. Justice Bayley, turns exclusively upon this. No person ever doubted that an estate might be tied up for life or lives in being, and a minority, and the period of gestation. Here there is no term in gross. The limitation is confined to a life or lives in being and minority, with a possibility that, at the period when the minority ceases and the division takes place, some person entitled, not originally, but by substi-[339]-tution, may be in ventre sa mere. Here the period of gestation has nothing to do with the vesting. If it had it would apply as much to the case of a grandchild as to the case of a great-grandchild. All the authorities admit that the period of vesting may be suspended for a life or lives in being, and for the period of twenty-one years afterwards. Assuming Henry Sweeting Smith to be solvent, instead of the contrary, still it is quite of course to appoint new trustees in a case where the testator has appointed four trustees, three of whom disclaimed, and the acting one has died, and the present trustee is merely such in his character of heir at law.

THE LORD CHIEF BARON. The first point made on the part of the plaintiffs is whether the administratrix is a proper party. As I do not entertain any doubt on this point, I am ready at once to give my opinion. I should be very sorry if a party were to be turned round on a mere technical objection; but it appears to me that she is a proper party. She is entitled as representing her husband to the arrears of the annuity. It does not appear to me to be necessary to consider the minuteness of the interest, but only, whether any interest in fact existed. I confess I should consider a very minute interest indeed quite sufficient to prevent a party from being turned round and put to considerable expense. Admitting the point to be sufficiently raised by the answer, still she is interested in knowing whether she is entitled to any arrears of the annuity. Suppose an action were to be brought against her for money due from her to the testator's estate, she could not set off at law the arrears of the annuity. Suppose a bill in equity were filed, there could not be any set-off until it was ascertained whether any thing was due in respect of the annuity. It is clear, therefore, that she is interested in having the accounts taken. I think she has at least a scintilla of interest suf-[340]-ficient to justify her being made a party. It is true that where a party is made a co-plaintiff who has palpably no interest, a demurrer will lie. So

where the point can be raised by plea, advantage may be taken of it as well as if it were by demurrer. The rule in equity being that a party may reserve his defence until the hearing, it is clear that if the objection would be good on a demurrer or plea, the bill at the hearing will be dismissed. But that rule admits of some qualification. A party may have a doubtful interest depending upon whether any thing may be due or not, or on the result of accounts to be taken. In this case it appears to me that Mary Ann Farr Smith had sufficient interest as being entitled to have the account of the estate taken, and that she was therefore properly joined as a plaintiff.

As to the remoteness of the bequest, the question seems to me to be whether I can give a different construction to the word "such," occurring in the various parts of the will. I will consider that and the other points.

Jan. 21st, 1839.—THE LORD CHIEF BARON. The plaintiffs in this bill are the widow and nine children of a grandchild of the testator. One question is whether the widow is entitled to be a co-plaintiff in the bill. If no other objection existed in this case than some of those which have been made at the bar, I think she might be a party in respect of her interest in having the accounts taken, her claim being for arrears of an annuity due to her late husband, of whom she is the representative, and the amount of these arrears could not be ascertained until the accounts were taken. The bill might therefore, I think, be supported on this ground.

I am, however, disposed to accede to that which has been contended to be the correct interpretation of the will of the testator. It has been contended that, according to the true interpretation of the will, the children of Fre-**[341]**-derick Smith take no interest in the residue, in consequence of their father having died in the lifetime of some of the children of the testator, and that the widow might have set off the arrears of the annuity against any demand which might have been made against her.

The terms of the will are that after the decease of the testator's children the trustees do receive and take the rents, issues, and produce of all his said real and personal estate and effects, and pay and divide the same unto and equally between all his surviving grandchildren who should then be living, that is at the time of the death of all his children, share and share alike. The money must therefore be divided among the grandchildren who survive the surviving child, and those grandchildren only. He goes on to direct the income to be so paid until the youngest grandchild shall attain twenty-one, and upon the youngest of them attaining such age, upon trust to convert the real and personal estates into money, and pay and divide the same unto and equally between all such of his said grandchildren, and the children or child of any such grandchild as might be then dead leaving lawful issue. Now, who are such of his said grandchildren? Why necessarily the grandchildren he had lastly before referred to—those to whom he had given the annual interest and dividends, those who were living at the death of the survivor of the children.

The parties by whom the present bill is filed are the children of a grandchild; not, however, of a grandchild who was living at the death of the survivor of the testator's children, but one who had died during the lifetime of several of the testator's children. It appears to me, as I have already stated, that the grandchildren who might die before all the testator's children should be dead are excluded, and, therefore, that the present plaintiffs have no interest whatsoever.

With regard to the question of remoteness, which was ingeniously argued, it does not appear to me that any mate-**[342]**-rials exist in the present case for that argument, and it is not therefore necessary to enter into the consideration of it. The argument that the devise to the children of the grandchildren would be void for remoteness, as extending the devise beyond the period allowed by law by the further period of gestation, proceeded on the judgment of Mr. Justice Bayley, in the case in the House of Lords. But there the grandchild was one of the persons who was to take. By pursuing that reasoning in the present case you much necessarily let in a person who, as it appears to me, was not to take. The plaintiffs in the present case can have no interest, because their father died in the lifetime of the grandfather, who was one of the children of the testator. I think the bill must be dismissed, but, under the circumstances, without costs.

HODGE AND OTHERS *v.* THE ATTORNEY-GENERAL. Dec. 20th, 1839.—The title-deed of a leasehold estate were deposited with bankers, by way of equitable mortgage for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mortgagees by virtue of the deposit, against the Attorney-General for a sale of the property: Held, that the Court had no jurisdiction, the legal estate being in the Crown to decree a sale of the estate, nor any power to compel a conveyance by the Crown of the legal estate; but only to declare the plaintiffs, as equitable mortgagees, entitled to hold possession of the property until the Crown should think fit to redeem.

[S. C. 8 L. J. Ex. Eq. 28. Followed, *Dyson* v. *Attorney-General*, [1911] 1 K. B. 410. Referred to, *Burghes* v. *Attorney-General*, [1911] 2 Ch. 149; *Gresham Life Assurance Society* v. *Attorney-General*, [1916] 1 Ch. 234.]

George Bailey being entitled to certain leasehold estates at Stoke Damerell and at Plymouth, in the county of Devon, deposited the deeds and writings of those estates with the plaintiffs, who carried on the business of bankers, to secure the balance of a running account between him and the plaintiffs, as his bankers.

Sometime afterwards George Bailey was convicted of felony.

At and prior to the time when George Bailey was convicted of felony, he was indebted to the plaintiffs in a considerable sum of money on balance of the account between them, and in respect of which debt they afterwards obtained a judgment.

[343] The bill was filed by the plaintiffs claiming to be equitable mortgagees of the leasehold property by virtue of the deposit, against the Attorney-General, and it prayed a declaration that the plaintiffs were entitled to the benefit of the deposit, by way of lien or equitable mortgage; that an account might be taken of what was due to the plaintiff under or by virtue of the deposit; that the leasehold premises might be sold, and that out of the proceeds the equitable mortgage of the plaintiffs might be satisfied, and that in the meantime a receiver might be appointed.

The Attorney-General put in the usual formal answer.

The plaintiffs, by evidence, proved the deposit of the deeds, the amount of the debt, and the conviction of Bailey for felony.

The cause now came on for hearing.

Mr. Simpkinson and Mr. Pitman, for the plaintiff. The only question in this case is whether the Court, under the circumstances, can decree a sale as against the Crown, or will declare that the plaintiff shall hold until the Crown shall think fit to redeem. It must be admitted that no case can be found in which, where the legal estate has been in the Crown, the Court has decreed a sale. Where the Court, under the acts of Parliament relating to extents, has found the debtor entitled to an equitable estate, it has decreed a sale of that equitable estate. In *Pawlett* v. *The Attorney-General* (Hardres, 465), though the Court doubted whether a decree for redemption of a mortgage and a reconveyance could be made against the Crown, yet it decreed the plaintiff to hold until the Crown redeemed. In *Bower* v. *Barnes*, Easter T. 10 Eliz., referred to in *Brakine's case* (Dyer, 236 a.), it was held in the Court of Wards that the mortgagor, after payment of the mortgage money, **[344]** should have the lands out of the hands of the Queen, by whom they had been taken, in consequence of the infancy of the heir of the mortgagee, by a monstrans de droit upon the matter of record, and suggestion of payment without being driven to his petition. The jurisdiction of the Court of Exchequer, as a court of revenue, to direct a sale where the mortgaged property has escheated to the Crown, is recognised by Lord Hardwicke in the case of *Reeves* v. *The Attorney-General* (2 Atk. 223). In *Casberd* v. *The Attorney-General* (6 Price, 411, 478) an equitable mortgage by deposit was established against the Crown, and the debt secured by the deposit was ordered to be paid out of the proceeds of the sale of the estates, which had been sold under an extent, in priority to the claim of the Crown. It may be collected from the authorities that an equitable mortgage may be made available as against the Crown; and the only question is, how it is be made available. In *Reeves* v. *The Attorney-General* Lord Hardwicke doubted whether the Court of Chancery had any jurisdiction, or whether the jurisdiction was not confined to the Court of Exchequer as a court of revenue. [Alderson, B. If you rely on this being a court of revenue the case should be heard before the whole Court, and not before

me sitting in equity.] In a late case at the Rolls, *Smith* v. *Tyler* (28th June, 1837; Jurist, vol. i. p. 470), the Court decreed a sale as against the Crown at the instance of an equitable mortgagee. If Bailey had been a mere naked trustee having the legal estate vested in him, then, under the provisions of the late Escheat Act (4 & 5 Will. 4, c. 23), the lands would not have escheated, and the Court of Chancery would have had power to appoint a new trustee in the place of the felon, and such trustee would have had all the interests of the felon vested in him: *Ex parte Tyson* (Rolls, 10th June, 1837; Jurist, vol. i. p. 472). In the present case Bailey was in fact only **[345]** a trustee of the legal estate, the money secured by the equitable mortgage greatly exceeding the value of the property.

Mr. Wray, for the Attorney-General. The facts of this case, as constituting an equitable lien, are not disputed. The Crown has, however, obtained the legal estate in the property which is a felon's leasehold property. Admitting the authority of the cases cited they are still cases in which the Crown had not the legal estate, but merely an equitable interest. In those cases the simple fact which arose was whether the Court would make a decree of foreclosure, or only decree the party to hold until the Crown thought fit to redeem. It was held, on the general maxim that time does not run against the Crown, that the Court could not make a decree of foreclosure against the Crown; but the Court got at the justice of the case by decreeing the party to hold until the Crown thought fit to redeem. The legal estate being in the Crown, how is the Attorney-General to be compelled to sell and convey? The object of the suit might have been attained by a memorial to the Treasury. The Court has no jurisdiction to enforce a conveyance as against the Crown, or to direct the Privy Council to order the seal to letters patent, which would be the only mode of conveyance. At all events the only decree which can at present be made is a decree for taking the accounts; and, if sought, the plaintiff must pay the costs of the Crown.

Mr. Simpkinson, in reply. The opposition of the Crown is unreasonable. An application to the Treasury would be attended with great expense. In *Casberd* v. *The Attorney-General* there was an equitable mortgage. The Crown seized the property under a writ of extent and sold it. The party entitled to the equitable mortgage filed his bill against the Attor-**[346]**-ney-General and other parties, and the Court, after some consideration, declared the plaintiff entitled to the benefit of his equitable mortgage as against the Crown, and decreed that he should hold until the Crown thought fit to redeem. If this be a revenue court, as a revenue court it has jurisdiction, and the relief sought is the proper relief. If the Crown cannot be foreclosed, and the legal estate being in the Crown, the Court cannot enforce a decree for a sale; still the Court may declare that the plaintiff has an equitable lien on the estate to the extent of his principal and interest, and may decree the plaintiff to hold possession until the Crown thinks fit to redeem.

Jan. 12th, 1839.—ALDERSON, B. I think the only decree which can be made in this case is for the Court to declare that the plaintiffs are equitable mortgagees of the property in respect of their lien, and to direct the Master to take an account of what is due to the plaintiffs on account of their lien, and then to decree that the plaintiffs shall hold possession of the property in question until their lien be satisfied. I do not think that I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the Crown; and I do not know any process by which this Court can compel the Crown to convey that legal estate. In the case before Lord Langdale the legal estate was not in the Crown; and there the Court directed a sale because it had jurisdiction over those who had the legal estate, and therefore could carry the sale into effect. In that case the Crown had only on equitable interest, and the difficulty which exists in the present case did not arise.

Decree accordingly.

[347] MEMORANDA.

In December, 1838, Sir James Allan Park, Knt., one of her Majesty's Justices of the Court of Common Pleas, died, and was succeeded in his office by the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy, who was thereupon called to the degree of the coif, and gave rings with the motto "Judicium parium."

In Hilary Term, 1839, Sir William Bolland, Knt., resigned his office of Baron of her Majesty's Court of Exchequer, and was succeeded by William Henry Maule, Esq.,

one of her Majesty's Counsel, who was thereupon called to the degree of the coif, and gave rings with the motto "Suum cuique," and shortly afterwards received the honour of Knighthood.

In the same term William Goodenough Hayter, Esq., received a patent of precedence, and John Stuart, Robert Vaughan Richards, Samuel Girdlestone, and Griffith Richards, Esqrs. were appointed Her Majesty's Counsel.

JONES *v.* MAUND. Jan. 17th, 30th, 1839.—A., having dealings with B., C., and D., who traded under the firm of B. & Co., and having become indebted to them on several transactions, entered into a covenant with them for payment of the whole amount. B. and D. afterwards died, and C. retired from the firm and assigned her interest to E. The business of the firm was continued by E. and F. under the firm of B. & Co., and A. continued his dealings with that firm, and made various payments to them. Upon a bill brought to restrain an action on the covenant brought by C. against A.: Held—1st, that the subsequent payments by A. to E. and F. could not be applied in reduction of the money secured by the covenant, unless it could be shewn that C. had assented to that arrangement.—2ndly, that although on the ground of an apparent unity of interest between C. and E. a bill of discovery, in aid of his defence to the action, might be sustained against them by A., with a view to ascertain the relation which subsisted between them, yet such a bill was not sustainable against F. or any of the quondam partners of the firm of B. & Co., they being merely witnesses in the matter between A., C., and E.—3rdly, that although, on the ground of intricate transactions between A., C., and E., a bill for an account might lie by A. against the two latter, yet such a bill was not sustainable against the other partners also, upon a mere general charge of mutual dealing, and no special connection appearing between their accounts and those of A., C., and E.—4thly, that the bill which prayed the enforcement of a document, under which it was alleged that the debt secured by the covenant had been compounded, was not sustainable, the bill not shewing the nature of the conditions under which such composition had been taken, or that the plaintiff had complied with any condition, or had paid any sum of money in relation to such alleged composition.—5thly, that the bill not being good for equitable relief, was not good for discovery in aid of the defence to the action.

[See 4 Y. & C. Ex. 581.]

The bill stated that in and previous to the year 1827 Robert Farquhar, Edwin Alyse, and Andrew Maund **[348]** carried on business as coal-merchants in co-partnership, under the style or firm of Robert Farquhar & Co.; that Andrew Maund died in March 1829, and that in January, 1832, Mary Ann Maund (his widow and executrix) became and was admitted a partner with Robert Farquhar and Edwin Alyse; that in September, 1832, Mary Ann Maund agreed to sell to John Maund all her share and interest in the co-partnership business and the debts due thereto; that they were accordingly assigned to John Maund by indentures dated the 13th and 14th of September, 1832; and that M. A. Maund thereupon ceased to be a partner, and John Maund became a partner in her place; that Robert Farquhar died in December, 1832, when his share became vested in his executors, who afterwards assigned it to John Maund; and that Edwin Alyse died in 1836, when his share became vested in his executrix Ann Alyse; that the business of such successive partnerships had always been carried on under the firm of R. Farquhar & Co., and that John Maund and Ann Alyse were the partners at the time of filing this bill.

The bill then stated that the plaintiff had had long and extensive dealings with the firm of Robert Farquhar & Co. from 1827 to 1836, and had made to them large payments both in money and bills, and had supplied to them divers large quantities of goods, wares, and merchandizes to a very considerable amount in the whole; and that many of the money payments were made without any vouchers having been given to the plaintiff for the same, and, in particular, that the plaintiff had been in the confidence of Robert Farquhar, and had from time to time sent him various remittances of money.

The bill then stated that, at the latter end of the year 1831, the plaintiff in his turn had become indebted to Robert Farquhar & Co. in considerable sums of money,

for which he had delivered to Robert Farquhar two promissory notes, and that his affairs being somewhat embar-[349]-rassed, a proposal was then made by him to Robert Farquhar & Co. and other creditors, that they should give him a letter of license to carry on his business under the inspection of his creditors. That this proposal was acceded to and was carried into execution by an indenture executed by the plaintiff and the consenting creditors dated the 3rd of December, 1831, under which the plaintiff had liberty to trade for three years, and by which he covenanted to pay the debts mentioned in the schedule by instalments within that period; the debt stated in the schedule as being due from the plaintiff to Robert Farquhar & Co. amounted to 1249l. 12s. 9d., and the deed was signed by Robert Farquhar, Mary Ann Maund, and Edwin Alyse, as creditors to that amount.

The bill then stated that one instalment was paid to the firm of Robert Farquhar & Co., under the provisions of the letter of license; but that upon their afterwards requiring a collateral security for part of the debt, the plaintiff agreed to give such security to the extent of 825l. 12s. 6d. by means of the surrender of certain copyholds, and the assignment of his interest in certain ships. That accordingly, by an indenture dated the 19th of January, 1832, "after reciting to the effect hereinbefore contained," and reciting payment of the instalment, it was witnessed that the plaintiff did thereby for himself &c. covenant with Robert Farquhar, Mary Ann Maund, and Edwin Alyse, their executors, &c., that he, his heirs, executors, &c., would before the 10th day of June then ensuing, pay to the said Robert Farquhar, &c. the principal sum of 825l. 12s. 6d. with interest thereon. And for the nominal considerations therein mentioned, the copyholds were thereby conveyed and assured to J. A. Jones, his customary heirs and assigns, upon the trusts thereinafter mentioned. And it was thereby agreed that the said J. A. Jones should stand possessed of the vessels (which had been clearly assigned to him by bill of sale), and of the copyholds, [350] in trust for the plaintiff until default should be made in payment of the said principal sum and interest; and in case of default, in trust to sell and pay all expenses and the monies due on that security, and pay the surplus to the parties entitled.

The bill then stated that default being made in payment of the 825l. 12s. 6d. the vessels were sold and produced about 180l. That the copyhold property was likewise contracted to be sold to one John Powell for 500l., but that he afterwards declined the purchase, and it was therefore arranged between John Maund and the other defendants or some of them, that the same should be sold to John Maund for 450l. only. That accordingly, by indenture dated in September, 1834, to which Mary Ann Maund and E. Alyse were parties, and which recited that J. A. Jones, as trustee for Maund, had agreed with the plaintiff for the purchase of the copyholds, and that it had been agreed that the purchase-money should be paid to M. A. Maund and E. Alyse, in part discharge of the mortgage debt, and reciting that the lands had been surrendered to J. A. Jones in trust for Maund, it was witnessed that in consideration of 450l. &c., the lands were conveyed by the plaintiff to Maund to hold for the lives of the parties therein named.

The bill then alleged that the monies so produced by the sale of the vessels and copyhold estates were paid to the said Edwin Alyse and Mary Ann Maund, in part discharge of the said mortgage, and that the plaintiff had delivered to Edwin Alyse, during the continuance of the said partnership, divers large quantities of coal to the amount of 216l. and upwards; and that by means of the said several payments, all the sums due on the said mortgage had been discharged, and that a large balance was due on that account from the firm to the plaintiff.

The bill further stated that delays having taken place in the payment of the instalments, under the letter of [351] license, an examination took place in 1834 of the plaintiff's affairs, and that on the 1st of October in that year a meeting of the principal creditors took place, at which Isaac Cook attended on behalf of the firm of Robert Farquhar & Co., when a resolution was signed by the parties, which, after reciting that a proposal had been made by the plaintiff to pay a composition of 5s. in the pound on the remaining instalments, and that J. A. Jones had stated his unwillingness to guarantee such payment, it was thereby agreed that such composition should be accepted, provided all the creditors should come in and sign the resolution within fourteen days. And J. A. Jones did thereby agree to pay the composition of 5s. in the pound to the parties, as stated in the schedule thereto annexed.

The bill then stated and charged that the debt of Robert Farquhar & Co. was

stated in the schedule to the resolution as amounting to 1269l. 12s. 10d., although the debt due to that firm in 1831 had been reduced by the means aforesaid, especially by the arrangement of September, 1834; that Cook concurred in the resolution and agreed to accept the composition; that previous to the action, which had lately been brought against the plaintiff, he had frequently applied to the defendant to come to an account with him, and had offered to pay what should be found due from him on taking such account; that these applications and offers had been refused; and that John Maund had prevailed upon Mary Ann Maund to commence an action against the plaintiff on the covenant in the deed of December, 1831; that she had accordingly commenced such action, and sought, notwithstanding the said payments, to recover the sum of 1269l. 12s. 10d., being the whole amount of the sums secured by the said two promissory notes, and the sum secured by mortgage; and that she had delivered a bill of particulars on that footing; but that she had no interest in the action, having brought it under the indemnity of John Maund, **[352]** or that she had allowed John Maund to bring it in her name.

The bill further charged that the debt due to the partnership, at the time of Mary Ann Maund's retirement, had been discharged by subsequent payments by the plaintiff to the successive firms of Robert Farquhar & Co.; that the plaintiff was prevented, by the strict rules of law, from setting up those payments in defence of the action; and that he could not safely proceed to trial without an inspection of the accounts of the partnership; that frequent payments had been made by him to the partnership without taking vouchers; that there were various omissions in the partnership books of items which should have gone to his credit, and that those omissions were fraudulent and intentional; that the sale of the copyholds was fraudulent and ought to be rescinded.

The bill which was filed against the present partners and all the persons who, since 1827, had been partners of the firm of Robert Farquhar & Co., or their representatives, prayed that the resolution of the 1st of October, 1834, might be declared binding on the defendants; that an account might be taken of the dealings and transactions between the plaintiff and the successive partnerships of Robert Farquhar & Co., and of what was due to the plaintiff in respect of those transactions, the plaintiff being ready and willing to account &c.; and that Mary Ann Maund might be restrained, by injunction, from prosecuting the action, and that the other defendants might be restrained from commencing or prosecuting any other action &c.

To this bill the defendant, Mary Ann Maund, demurred generally, for want of equity.

Mr. Simpkinson and Mr. Rogers, for the demurrer. The deed of December, 1831, contains an express recognition by the plaintiff of the debt of 1249l. 12s. 9d. for **[353]** which the action is brought; and he again recognizes the debt by the deed of January, 1832, which recites the former deed, and by the resolution of October, 1834. This is totally inconsistent with the allegation in the bill that the debt has been satisfied or reduced. At all events, however, this case comes within the principle of *Frietas* v. *Dos Santos* (1 Y. & J. 574), in which it was held that a general charge of mutual dealings would not sustain a bill for an account. In the present bill the whole statement of mutual dealings is that the plaintiff has supplied to the defendants "divers large quantities of goods, wares, and merchandizes." Such a general allegation is not sufficient to entitle the party to an account in equity. Some one instance, at least, of particular dealing should be stated. He says indeed that the demand made against him at law has been reduced by subsequent payments; but if that allegation will entitle a party to account in equity, a bill may be filed against any tradesman who brings his action to recover a debt. [The Lord Chief Baron. In a long and intricate course of dealing it might be a good ground to come into equity to have subsequent payments ascribed to the discharge of the original debt. That might be difficult at law.] Mary Ann Maund is trustee for the surviving partnership. If so, and it could be proved that she had assigned over the choses in action of the partnership, a court of law would take notice of it in estimating the quantum of set-off. But here it is shewn that subsequent to her retirement there were deeds to which the plaintiff was a party, and in which he recognized the existence of the whole debt; therefore, even if the payments were such as he states, he could not avail himself of them in the action.

But there are other grounds on which this bill is not sustainable. The plaintiff

prays that the agreement or resolution at the meeting of the creditors, by which they **[354]** agreed on certain conditions to take 5s. in the pound, may be enforced. [The Lord Chief Baron. He does not state what the conditions were.] Nor that he complied with them, or that one shilling has been paid under them.

Again, the bill is bad for multifariousness. The plaintiff seeks to involve Mary Ann Maund in the accounts of five different partnerships, although she was a partner for only one year; and likewise in a litigation to set aside a purchase by John Maund of an estate in which she has no interest. *Whalley* v. *Dawson* (2 Sch. & L. 367) and *Salvidge* v. *Hyde* (Jac. 151) are authorities to shew that a bill so framed is not sustainable. Besides, supposing the bill could be sustained simply as a bill to set aside the purchase by John Maund, the parties who hold the legal estate of the copyholds in trust for John Maund are not all before the Court.

Lastly, the plaintiff has no right in equity, while he continues the contest at law: *Cockerell* v. *Cholmeley* (3 Russ. 565). [The Lord Chief Baron. Where the case consists of a single point, as in ejectment, if the party says, I have an equitable defence, the Court says, you must give judgment in ejectment; but not where the case is long and intricate, as in matters of account.]

Mr. Spence and Mr. B. Gaselee, for the bill. It is contended that the bill is multifarious, because Mary Ann Maund has no interest in the transaction of the purchase by John Maund. That is not the correct representation of the case, because she was a party to the purchase deed, and by that deed the mortgage debt was considerably reduced. [The Lord Chief Baron. The agreement for purchase was between the plaintiff and John Maund.] The allegation in the bill is that it was arranged between John **[355]** Maund and the other defendants, or some of them that the land should be sold to John Maund only.

Upon the question of account, this case differs from that of *Frietas* v. *Dos Santos*, because there an account was sought of one transaction only. Here, dealings and transactions of every possible shape are stated to have taken place between the parties from 1827 till the present time. But the plaintiff has a further equity, to which your Lordship has already adverted. During the time Mary Ann Maund was a partner, a debt was due from the plaintiff to that firm; but various payments have been made to the successive partnerships in discharge of that debt. Now, if Mary Ann Maund was permitted to proceed at law, these subsequent transactions with subsequent firms could not be taken into account. [The Lord Chief Baron. Admitting you have a right to an account against A., what right have you against B.?] Mary Ann Maund is a trustee for John Maund; it is expressly so stated in the bill. [The Lord Chief Baron. She may have assigned to John Maund, and, though he opens an account with you afterwards, he may still be entitled to receive the money in her hands. So far she is a trustee for him, but you have not given credit to her in that character. To supply that defect, you want to get a discovery that she sold her interest to him, and an admission from him as a witness that he has received the money. That is a bill of discovery against a witness as well as a party. All that appears at present is that Mary Ann Maund's interest is a debt, for which you have given a mortgage. The money produced by the sale of the mortgaged premises must go in discharge of that.] We submit that we are entitled to more. The bill alleges that all the principal and interest on the mortgage has been paid, and that a large balance remains due to the firm of which John Maund is a party, who is also the party to derive the benefit of the action. The **[356]** defendant, therefore, admits that there is a balance due of the monies paid in discharge of the mortgage. We could not get that at law. Another point is that the action has been brought on the covenant; and how can a settlement by agreement be set up as a defence at law to such an action? We could not plead an agreement, not under seal, to such an action.

Mr. Simpkinson, in reply, was stopped by the Court.

THE LORD CHIEF BARON. This is a bill to restrain an action of covenant, brought by the defendant, Mary Ann Maund, to recover a debt due to her as the surviving partner of a firm, which existed in the year 1832. It is not alleged by the bill that any of the items which formed the debt were affected with fraud. If they were, and the bill had been brought to set aside the transactions on which they were founded, it ought to have been confined to her alone; but the bill is brought against several persons, members of successive firms, for an account; and then the suggestion is that the plaintiff being indebted to her in a sum acknowledged, he has had dealings

with subsequent firms which he ought, upon an account taken, to have considered as in payment of the original debt. But such subsequent payments give rise to no conclusions of law or equity, in regard to the reduction of the original debt, except under certain circumstances. If Mary Ann Maund had consented that those payments should be taken in reduction of the debt, and had given notice to the subsequent firms of such her consent, she would have been bound by payments made to them under that understanding. The several firms would then be witnesses to prove the payments so made to them, and that being evidence of the authority which she had given to them to receive the money, the defence at law to an action of this [357] nature, brought under such circumstances, would be complete: and if the money were paid, it would require no deed or release to prove the payment.

But it is said that John Maund is the assignee of her interest, and as regards her debt has become in equity the creditor of the plaintiff. Certainly, if John Maund took an assignment of her interest and security, and she afterwards sued as his agent, I will not say that a bill of discovery might not have been filed against both to ascertain the relation in which they stood to each other. The unity of interest apparently existing between them might in such case make it a proper subject of a bill of discovery; but no rule is better established than that you cannot combine a bill of discovery in aid of proceedings at law with a prayer for equitable relief, where no equity appears on the face of the bill; for then, in point of fact, you are seeking discovery without paying for it. But in that view of the case, supposing that John Maund might be a party to a bill of discovery, or, if you please, to a bill for equitable relief—what have the other partners to do with it? In fact by making them parties, you seek to discover from the various partners evidence to know what they would say as witnesses for the plaintiff at law, in order if necessary to contradict them. Such a bill of discovery however is not usual, except in the case of a bill against a devisee, and the witnesses to a will.(*a*)[1] There is, I believe, scarcely another case in which a court of equity has allowed a bill to be brought against a party and the witnesses also.

But then it is said that this is a matter of account. If I could see that a difficult and perplexed course of mutual dealings had existed between the plaintiff and the Maunds, I might think that a bill for an account would properly lie between them. But what right has the plaintiff to have an account of his transactions with other firms all taken [358] in one suit, the object of which we will admit for the sake of argument, to be to get an account from Mrs. Maund? What interest has Mrs. Alyse and the other partners in the account between the Maunds and the plaintiff? They may be witnesses to particular accounts; but any private agreement between the Maunds, which makes them representatives of each other, does not affect the other partners. The only ground I can find for an account would be matters between them; the plaintiff alleging that by means of their acts, the mutual relation of debtor and creditor had been reversed between him and Mrs. Maund, and the opposite party denying that fact. If the plaintiff has a right to a more extensive account than that, I see no reason why, upon any action being brought by a banker upon any security in his hands, the defendant might not file his bill for an account against all the individuals who, through a long series of years, might have been partners in succession with the party bringing the action. But it is clear that he could not do that; and taking, in the present case, the other partners to have been joined for the mere purpose of discovery, all the information which they could give would be equally available as evidence at law.

Upon the whole, I think this bill is bad in setting up a partial case of equity in connection with the case for discovery, and in introducing improper parties into the record. I am of opinion, therefore, that the demurrer must be allowed on both points.

Demurrer allowed.(*a*)[2]

(*a*)1 See *Glyn* v. *Soares*, ante, vol. 1, p. 681.

(*a*)2 The decision in the foregoing case relative to the payments made subsequently to the retirement of M. A. Maund is scarcely to be reconciled with the decision upon a similar point in *Pemberton* v. *Oakes*, 4 Russ. 154. See Collyer on Partnership, 355, 378. But it was strongly urged by counsel in that case, though the argument seems to have made no impression on the Court that payments made to a new partnership would not primâ facie go in discharge of a debt due to a preceding partnership.

[359] MOSES *v.* LEVI. Jan. 19th, Feb. 18th, 1839.—A testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss. The executors, having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose. The Diss executor having made default in payment of one of the legatees in that neighbourhood: Held, that the other executor was responsible for the default.—Where a part of a legacy had been paid to a married woman, under circumstances which primâ facie shewed that the husband had assented to, or had at least ratified, such payment, it was referred to the Master to inquire how much of the legacy had been so paid; and he was directed to give the executors credit for the sums received by the wife, either with the husband's express approbation, or under such circumstances as made her his agent for that purpose.—Although a court of equity will give protection to an executor who hands over his testator's assets to his co-executor, for the payment of the testator's debts in a due and ordinary course of administration, the principles upon which that protection rests do not apply to the case of an executor handing over the assets for the payment of the testator's residuary legatees.

The testatrix in this cause, who lived at Stow-in-the-Wold, in the county of Gloucester, bequeathed the residue of her property amongst her nephews and nieces, some of whom resided in the west of England, and others in the neighbourhood of Diss, in the county of Norfolk. She appointed the defendants, William Williams, of Diss, and William Thackwell Williams, of Clifton, to be the trustees and executors of her will; and she declared that her said trustees should not be answerable, the one for the other of them, but each only for his own acts, deeds, and defaults; and by no means for any involuntary loss. By a codicil she named, as executor, another party, who lived in Devonshire, but who did not prove the will.

The testatrix died in 1833. Shortly after her decease the defendants, who had taken upon themselves the administration of her estate, went to the office of Wilkins and Kendal, who were the testatrix's solicitors, and lived at Stow-in-the-Wold, and executed to them a power of attorney, authorizing them to get in the personal estate of the testatrix, and, particularly, to sell the stock in the funds, and to receive the produce, and to hand over the same to the defendants respectively, in such proportions as would be sufficient for payment of the residuary legatees resident in their respective neighbourhoods. Accordingly, the stock was sold, and the produce amounted to 2337l. 8s. 4d., and a portion of it, amounting to 671l. 16s., was paid over to William Williams.

[360] The bill was brought by the plaintiff as administrator of his wife Ann (formerly Ann Williams), one of the nieces and residuary legatees of the testatrix, claiming the sum of 190l. 15s. 4d. as her share of the residue, and seeking to charge the defendant, W. T. Williams, with that amount, in consequence of his co-executor, William Williams, having made default in payment of it. It appeared that the bequest was made to the plaintiff's wife by her maiden name of Williams; but that, at the time of the death of the testatrix, she was married to the plaintiff, who was serving in the Marines at Chatham. She, however, continued to live in the neighbourhood of Diss, and, as it should appear, under her husband's name; though, upon that point, the evidence was not explicit. The plaintiff proved his marriage, and the recognition of himself and his wife, as married people, by the parties living near Diss; and, with a view to shew that the defendant had always known of his marriage, he read the deposition of John Moses to the effect that Ann Moses had been uniformly treated as the wife of the plaintiff by several of her relations, and, amongst others, "by the defendants in this cause."

The defendant, W. T. Williams, by his answer, denied that he ever was acquainted with the fact of the plaintiff's marriage until after the filing of the bill. He stated that he had left William Williams to pay Ann Williams' share of the residue under the following circumstances:—That having met William Williams by appointment at

Stow-in-the-Wold, they there jointly satisfied and discharged the funeral and testamentary expenses of the testatrix, and all her debts and legacies which were payable at that place; and it was then agreed between them that for the greater convenience of administering the estate of the testatrix, William Williams should receive so much of the personal estate as should be required to pay the legatees living at and in the neighbourhood of Diss; and that he, the **[361]** defendant, W. T. Williams, should receive so much as should be required to pay the legatees living at Clifton and the west of England. That the residuary personal estate was accordingly divided between them for such purposes.

The defendant then entered into evidence; and, with a view to shew that Ann Moses had concealed her marriage, and that she had received a portion of the money now claimed, he read a letter which he had received from the plaintiff since the filing of the bill, of which the following was an extract:—"This letter is concerning my wife's property left to me by her late aunt. She sends me a letter to Plymouth barracks informing me of her aunt's death. This was in 1834. You and William Williams were appointed executors; and she told me 70l. was left, of which my wife had 40l. Ann's not telling me of this, and placing the money in the hands of Mr. Ward, was by no means right. I think it extremely wrong my wife should not have told my aunt she was married; especially as it was so near her aunt's death. She took off her rings that she might pass for a single woman, which I think it was not becoming for a wife to do—by no means."

Mr. Simpkinson and Mr. Booth, for the plaintiff. This is not the case of money coming into the hands of one executor without the concurrence of his co-executor or of money misapplied by one without the knowledge of the other. The money came into the hands of the defaulting executor by the act of W. T. Williams; not by an ordinary authority, but by an authority given to the two attornies Wilkins and Kendal; by the two executors joining in a power of attorney, by virtue of which the stock was sold. If any portion of that money was misapplied, both the executors would be liable for that misapplication: *Lord Shipbrook* v. *Lord Hinchinbrook* (11 Ves. 252), *Underwood* v. **[362]** *Stevens* (1 Mer. 712), *Langford* v. *Gascoyne* (11 Ves. 333), *Clough* v. *Bond* (3 M. & C. 490). These cases establish that where any executor does any act by which the money of the testator comes into the hands of his co-executor or any other person, he is liable for the misapplication of that money. Now, here it is not denied that it was by W. T. William's concurrence that this money came into the hands of his attorney, and then into the hands of his co-executor; but it is alleged by the answer that this was done for the purpose of enabling W. T. Williams to pay a certain class of legatees in the neighbourhood of Diss. Supposing such an arrangement could take the case out of the general principle, which we deny, it is difficult to see how it applies to the plaintiff, who, at the time of the death of the testatrix, was at Chatham. Again, it is stated that some part of the money was paid to the wife; but even if it were, it cannot be taken as payment to the husband; especially as it is clear upon the evidence that the defendant knew of the marriage of Ann Williams with the plaintiff.

Mr. Piggott, for the defendant W. T. Williams. It may be doubted whether this bill is sustainable, having been filed by the plaintiff, as the administrator of his wife, before he had taken out administration, and thereby clothed himself with the legal character of administrator. But at all events, this is a very hard case upon the defendant, who did what he thought was convenient for the distribution of the assets in the neighbourhood of Diss. The testatrix, who lived at Stow-in-the-Wold, had several nephews and nieces, some of whom resided at Diss, and others in the West of England. She selects two persons to be her executors, the one residing at Diss, the other at Clifton, and she expressly provides that they shall not be **[363]** answerable for each other's default. It was clearly the intention of the testatrix herself, independently of the arrangement between the executors, that one should administer for the Diss legatees, the other for those in the west of England. By the codicil she appoints another person living in Devonshire to be joint executor with the others. If he had proved the will, there would have been an executor for each of the neighbourhoods in which the legatees lived. Then has this executor done more than act upon the intention of the testatrix? And if not, is he answerable for the misconduct of his co-executor? From the time that the arrangement was made with W. Williams, to the time of filing the bill, no application was made to him on behalf of the plaintiff.

It is said that he knew of the plaintiff's marriage; but there is nothing to shew that he had any reason to know of it; and all the plaintiff's evidence upon that point consists in the testimony of his own brother, who says that Ann Moses was treated as the plaintiff's wife by the "defendants in this cause." Probably he only refers to the defendants living at Diss; but, at all events, W. T. Williams positively denies that he ever had any knowledge of the marriage till after the filing of the bill. The plaintiff's evidence, therefore, upon this point fails; being only that of one witness, uncorroborated by circumstances, and contradicted by the answers. *Evans* v. *Bicknell* (6 Ves. 184).

This defendant, then, having no personal knowledge of the misapplication of the money, the question is whether the arrangement between the executors, and the division of the property under it, was justifiable. In *Bacon* v. *Bacon* (5 Ves. 331) the payment was made to the co-executor on grounds much less strong than exist in the present case, and yet was supported. There the executor paid money to his co-executor on the mere representation that there **[364]** were debts, and it was held that he was not chargeable with the loss occasioned by his co-executor. That case was approved of in *Chambers* v. *Minchin* (7 Ves. 193), *Langford* v. *Gascoyne* (11 Ves. 335), and *Joy* v. *Campbell* (1 Sch. & L. 341). In *Davis* v. *Spurling* (1 Russ. & M. 66) it is laid down by Sir John Leach that, where an executor hands over the assets of his testator to his co-executor, he will be liable for their misapplication, "unless they are so handed over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt." Is there any difference between that and handing over the assets for payment of a particular legacy or share of the residue? Where an executor lives at a distance from the place of residence of the legatees, he is clearly justified in appointing an agent, and is not responsible for the agent's default: and if he may employ an agent, surely he may employ his co-executor for that purpose. *Adams* v. *Claxton* (6 Ves. 226).

On these grounds, it is submitted that the bill must be dismissed; but should the Court think otherwise, it will be necessary to consider the effect of the letter written by the plaintiff to the defendant. It is clear, from that letter, that the plaintiff knew that a legacy had been left to his wife, and that she had received a portion of it. Not having written to the defendant to stop the further payment of it, he must be considered as having ratified what the wife did in relation to it; and, in fact, to have adopted his wife as the agent to receive it, or, at all events, to the extent of 70l.: *Harris* v. *Lee* (1 P. W. 482). If the plaintiff, therefore, is entitled to any relief against W. T. Williams in this suit, there must be an inquiry whether Williams paid to the plaintiff's wife any part of the sum of 190l., which was his share of the residue.

[365] Mr. Turner, for the other defendants.

Mr. Simpkinson, in reply. The objection that the plaintiff files his bill in the character of administrator of his wife, and that, when this bill was filed, he had not taken out administration, is answered by the case of *Humphreys* v. *Humphreys* (3 P. W. 395). With respect to the main question in this cause, there is a great difference between the case of money advanced to a co-executor for the payment of debts and money so advanced for the payment of legacies. The co-executors are bound to pay the debts in the first instance, and a creditor may file a bill against them without a previous application for payment. The case of *Bacon* v. *Bacon* was put upon the ground of necessity; and the doctrine there held is confined to debts. But in this case, admitting the validity of the arrangement between the executors, which we do not, it was the duty of W. T. Williams, when he concurred in this property going into the hands of his co-executor for the purpose of being paid to the people at Diss, to ascertain that they did live at Diss, and whether any of them were married. And, at all events, even admitting that W. T. Williams has not been guilty of the grossest neglect, why is the whole loss to be borne by this plaintiff?

Feb. 18th.—ALDERSON, B. This is a bill filed for payment of a share of the residue which the plaintiff, as the administrator of his wife, claims under a will of which the two defendants, William Williams and William Thackwell Williams, were appointed executors. It appears that the testatrix died in 1833, and that the will was afterwards proved by the defendants, who paid, in the first instance, all debts and specific legacies, That part of their duty having been discharged, there remained a residue to be **[366]** divided among a given number of persons, amongst whom was Ann Moses, the wife of the plaintiff, whose ascertained share of the residue was 190l. 15s. 4d. There is

no dispute as to this part of the case, and the only question is whether both defendants are not liable to make good the residue to the present plaintiff as such administrator.

An objection was taken to the bill on the ground that the plaintiff had taken out letters of administration subsequently to the time when the bill was filed; but to this objection, I think, the answer given at the bar was perfectly satisfactory. In the first place, the plaintiff had, at the time he filed this bill, an equitable interest in the fund; and, secondly, it appears from the case cited from Peere Williams, that the administration, when granted, relates back to the time of the death of the intestate, which was before the filing of the bill. Therefore I think, in this respect, that the bill is well founded, and that the objection cannot be sustained.

Then it appears that the money, 190l. 15s. 4d., was handed over by the defendant William Thackwell Williams to William Williams, his co-executor, who resided at Diss in Norfolk, for the purpose of being paid to Ann Moses, the person entitled to the legacy; and it is suggested that William Thackwell Williams was entirely unacquainted with the fact of her being married, and that he trusted to William Williams, who resided very near the spot where she was actually to be found, to pay the legacy to her; and a variety of cases were cited, beginning with that of *Bacon* v. *Bacon* (5 Ves. 331), to shew that where an executor or administrator is guilty of no laches or negligence in the administration of the testator's estate, and a loss has arisen to the estate from an accident over which he had no controul, he is not to be held personally responsible for the loss, even though he **[367]** may have handed over some of the monies to his co-executor for the payment of debts. Looking, however, at the circumstances of this case it appears to me that I cannot acquit William Thackwell Williams of negligence in the administration of this estate, and therefore on that ground alone I should be disposed to say that he ought to be held responsible on the present occasion. He might have made some inquiries, and might easily have ascertained whether this woman was married or not, and he ought to have had some correspondence with the husband, and to have ascertained where he was before he paid over the money to William Williams. It appears that the husband was not at Diss at the time the money was paid; that there was no correspondence with him; and that the executor was not even aware of the existence of such a person; and the excuse made for this is that the executor was ignorant of the marriage. But a few inquiries would have enabled him to ascertain this fact, and therefore I cannot acquit him of negligence; and if the case stood on this ground alone, it appears to me that it would come within the principle of *Lord Shipbrook* v. *Lord Hinchinbrook* (11 Ves. 252), *Underwood* v. *Stevens* (1 Mer. 712), and *Langford* v. *Gascoyne* (11 Ves. 333), in which it is laid down generally that if an executor permits his co-executor to obtain possession of money which he had at any time in his own possession, and afterwards the co-executor misapplies the money, both executors are personally responsible; and that it would not fall within the principle of *Bacon* v. *Bacon* (5 Ves. 331) and that class of cases in which it was held that the executor shall be allowed the benefit of what he has handed over to his co-executor in the due and ordinary course of administration of the testator's estate.

[368] But it appears to me that there is another ground on which this case may be put. The case of *Bacon* v. *Bacon* and those which followed it, were cases in which the executor placed money into the hands of his co-executor, for the purpose of paying debts and specific legacies, and one of them was a case in which the executor was trustee of an individual legacy. This is the case of a residue which it is the duty of executors, having assets in their hands, to divide rateably amongst the legatees. The case of *Bacon* v. *Bacon* seems to me only to decide that where there is no neglect on the part of the executor who hands over the money, and he does this in the due course of administration, the loss by the co-executor may be considered as if it were a loss by the testator himself; and, therefore, that the other executor is not to be rendered accountable for money which, under the circumstances, may be considered as never having come into his hands. But here the executors were bound to pay over the residue to the parties entitled to it. What is their excuse if they do not? All that they had to do was to pay certain shares of this residue; and, supposing there had been no negligence on the part of William Thackwell Williams, the plaintiff would have received his share with the rest of the co-residuary legatees. It does not appear to me, therefore, that the plaintiff, who has been guilty of no fault, is to lose his legacy

through this arrangement between the executors. But inasmuch as it appears that William Williams has paid some portion of the legacy either to the plaintiff or his wife acting as his agent, I propose to refer it to the Master to inquire how much of the legacy has been so paid, and let the Master, in taking the account, give credit to the executors, for the sums actually received by the plaintiff's wife, either with the plaintiff's express approbation, or under such circumstances as made her his agent for that purpose; and subject to this enquiry let it be declared that **[369]** both executors are liable to pay what, if anything, is due to the plaintiff for principal and interest of the sum accruing to him in right of his wife's share of the residue.

Decree accordingly.

COWGILL *v.* LORD OXMANTOWN. 1839.—A. being entitled, under his marriage settlement, to a life interest in certain freehold estates, with remainder to the use of trustees for a term of 1000 years, to secure a jointure and portions, with remainder to himself in fee, conveyed part of the lands to B. in fee, in exchange for other lands. B.'s heir afterwards having contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A. had no power to exchange the lands in fee. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the terms of a power of sale and exchange, given to the trustees under the settlement: Held, under these circumstances, and likewise on the ground that the after-executed deeds were grossly inaccurate, that the purchaser was not bound specifically to perform the agreement.—Semble, that the after-executed deeds, although the surviving trustee of the marriage settlement was a party to them, did not make the transaction between A. and B. a due execution of the power.

[S. C. 3 Jur. 313.]

By indentures of lease and release, dated respectively the 21st and 22nd February, 1809, and made between Edward Cunliffe Lyster, of the first part, William Kaye, of the second part, Mary Ewbank, spinster, of the third part, and William Kaye and William Cunliffe, of the 4th part, reciting an intended marriage between Edward Cunliffe Lyster and Mary Ewbank: It was witnessed that in consideration of the marriage &c., Lyster granted, bargained, sold, and released certain freehold premises, subject to the life interest of his mother therein, to the use of himself, Edward Cunliffe Lyster, for life; and, after his decease, in case his intended wife should survive him, to the use and intent that she should receive an annuity or yearly rent charge of 500l. a-year for her life, with the usual powers of distress and entry, and subject thereto to the use of the said William Kaye and William Cunliffe, their executors, administrators, and assigns, for the term of 1000 years, upon trust to secure the jointure, and to raise 10,000l. for the children of the marriage; and subject thereto to the use of Edward Cunliffe Lyster, his heirs and assigns. And it was by the said indenture of release declared that it should be lawful for the trustees, or the survivor of them, or the executors, &c. of such **[370]** survivor at any time or times during the life of the said Edward Cunliffe Lyster, with his consent and approbation, testified in writing under his hand and seal, to make sale of or exchange for any hereditaments situate in any part of England, all or any of the said hereditaments at such price or sum, or prices or sums, and either together or in parcels, and for or in lieu of such other hereditaments and premises of equal or superior value, or for such other equivalent in lands, tenements, and hereditaments, as, by the said trustees, should be thought reasonable. And it was thereby agreed and declared that the lands so to be purchased in lieu of or taken in exchange for the lands comprised in the settlement, should be conveyed to the trustees and their heirs upon the trusts of the settlement; and that when so soon as they should be so conveyed, the lands originally comprised in the settlement should be and remain free and discharged from the uses, trusts, covenants, provisoes, and conditions thereof, and should be settled to such uses as the purchaser or his appointees should appoint.

The settlement was executed, the marriage took effect, and there were several children of the marriage.

In September, 1820, Mr. Lyster, conceiving himself entitled to sell or exchange the

settled property, made an exchange of some part of it with William Cowgill, the father of the plaintiff, and conveyed those premises to William Cowgill in fee. Upon the death of William Cowgill, the lands so taken by him in exchange descended, or were considered to descend to his son, Bryan Cowgill, the plaintiff, who, in October, 1836, entered into an agreement for the sale of them to the defendant.

Upon an investigation of the title, on the part of the defendant, it was found that the lands, so conveyed to William Cowgill, were subject to the uses of Lyster's marriage settlement. The defendant, therefore, refused to complete the purchase, and brought an action to **[371]** recover the deposit. The plaintiff, accordingly, filed the present bill to restrain the action, and for a specific performance of the contract, insisting that, at the time of the contract, he could make a good title to the premises. By the decree made at the hearing of the cause, the usual reference as to title was made to the Master.

Pending the reference to the Master, the vendor, in order to remedy the defendant's objection to the title, procured the execution of fresh deeds, with a view to convert the exchange which had been made between his father and Lyster into an exchange under the power contained in the marriage settlement. Accordingly, by indentures of lease and release, dated the 4th and 5th of July, 1838, Lyster conveyed the lands which he had received from Cowgill to William Kaye, the surviving trustee under the settlement, upon trust to convey the same to the uses of the settlement. And by indentures of lease and release, of the 6th and 7th of July, 1838, executed by Kaye, of the first part, Lyster, of the second part, certain mortgages, of the third and fourth parts, and the plaintiff, of the fifth part, reciting the settlement, the original exchange between Lyster and William Cowgill, the death of William Cowgill; and that the exchange having been ineffectual, Lyster had proposed to the trustee to render it effectual under the settlement, to which the trustee, being of opinion that it would be beneficial to the children of the marriage, had assented: It was witnessed &c., that Kaye thereby revoked the old uses to which the lands stood limited under the settlement, and, by the consent and direction of Lyster, conveyed the premises to the plaintiff in fee.

The Master having, notwithstanding the deeds of July 1838, reported that a good title could not be made to the premises, exceptions were taken to his report. In addition to the main objection to the title, which was that Lyster had no power originally to convey the premises in **[372]** fee, and that the deeds of July, 1838, were not a due execution of the power under the settlement, the defendant insisted that those deeds were full of gross inaccuracies, and for that reason, independently of any others, were not a sufficient muniment of title. It appeared that they were full of clerical errors, and in many places referred to the settlement as of February, 1820, instead of February, 1809.

Mr. Boteler and Mr. Shadwell, for the exceptions. Upon an investigation of the title on behalf of the defendant, it was objected that the lands which Lyster professed to convey in exchange to William Cowgill were subject to the uses of the marriage settlement. To remove that objection, Lyster, the plaintiff, and the surviving trustee under the settlement, undertook to make a new exchange which should put an end to the uses of the settlement. Lyster, therefore, conveyed to the trustee of his settlement the lands which he had received from Cowgill, and by another deed the trustee conveyed to Cowgill the lands comprised in the settlement. We contend that by these means the trustee revoked the uses of the settlement and limited new uses in such a manner as to give an effectual exchange under the settlement. The case of *Bartram* v. *Whichcote* (6 Sim. 86) shews that an exchange at common law is not what is meant in these cases. The parties have not even taken money for owelty of partition, but have taken land for land. In common intendment, therefore, they have done what the power of exchange justifies. It is immaterial whether the trustee conveyed to Lyster or to Cowgill by Lyster's direction. All the persons who join in the conveyance to Cowgill are sui juris and unite in making up to him a fee simple, by which his title is perfected. [The Lord Chief Baron. The uses of the settle-**[373]**-ment can only be revoked upon good consideration, and for the purpose of the trusts of the settlement. The question is whether the exchange is in compliance with the terms of the power.] When the revocation took place, Lyster was in of his old estate. But the defendant's main objection is that the exchange was not made between the proper parties, and upon that point he relied before the Master upon the case of *Eaton College*

v. *Bishop of Winchester* (3 Wils. 483). That case, however, is not adverse to the plaintiff, because here the power of exchange had clearly no reference to an exchange at common law. One of the incidents to an exchange at common law is that the estates must be equal in quantity, but here the trustees had no estate at all. In *Bartram* v. *Whichcote* the parties had not equal estates.

Mr. Simpkinson and Mr. Bird, contrà. The question is whether the deeds of July, 1838, on which the plaintiff relies, create such a title as the purchaser is bound to accept—whether they amount either to an exchange or to a ratification of a former exchange between Lyster and Cowgill. Lyster was seized of an estate in fee, subject to trusts for jointure and for his children. The trustees had no legal estate; the settlement contained a collateral power for the trustees to make sale of, or convey in exchange the settled hereditaments for other hereditaments; and the premises taken in exchange were to be vested in them, or the survivor of them, or the heirs of the survivor. The parties being so interested, Lyster and Cowgill executed deeds of the 26th and 27th of September, 1820, for the exchange of their respective lands. If that exchange was good as between Lyster and Cowgill, then a difficulty would arise with reference to the exchange (as they call it) of 1838. If, on the other hand, that exchange was **[374]** void, the deeds of 1838 purporting to confirm that exchange, and not creating a new exchange, would be equally ineffectual. But, admitting that the exchange of 1820 was not absolutely void, it is not pretended to be said that a good title could be made under it; and then the question arises whether for the purpose of rendering that transaction effectual a proper use has been made of the power of sale and exchange contained in the settlement. Now, we contend that this power was not intended to be used for the purpose of making good a former ineffectual exchange, but to be exercised proprio marte; that it was not, therefore, properly exercised in this case, and that a purchaser is not compellable to take a title depending upon it. In *Wheate* v. *Hall* (17 Ves. 86) it was held not to have been the intention of the donor to give the power for the purposes for which it was there attempted to be exercised, and the purchaser was released from his contract. The case of *Read* v. *Shaw* (Sugd. Powers, Appendix, No. 21) is very applicable to the present case. There the power was attempted to be exercised, not for the purpose for which it was originally created, but in order to make perfect a former invalid transaction, and it was considered that the purchaser was not bound to take a title depending on such a use of the power. The same principles apply to the present case. Besides, the plaintiff admits that this exchange is good for nothing as a common law exchange. [The Lord Chief Baron. I do not apprehend that the power confines him to an exchange at common law.] It is not perfectly clear that the settlor did not intend a common law exchange. But supposing he meant merely a conveyance by mutual assurances, the power even in that view of the case has not been properly followed. The uses of the settlement were to be revoked, and the lands in settlement were to be conveyed "when and as soon as" the lands taken in **[375]** exchange had been conveyed to the trustees. Upon those lands being vested in the trustees, and not before, they had power to revoke. The power, therefore, has not arisen, for Cowgill has never signed or sealed a single instrument to the trustees. Admitting that his not doing so in the first instance could be cured by a subsequent arrangement, he has not even in 1838 joined in any conveyance to the trustees, although it is clear that having taken a defective estate from Lyster, he could avoid Lyster's estate.

The other objection is that these deeds are full of the grossest inaccuracies, and that such multiplied documents are injurious to the title of the estate.

Mr. Boteler, in reply, observed that in *Wheate* v. *Hall* the object was to defeat the will of the party, while here the exchange was for the benefit of the cestui que trust, and was adopted by the trustee; and that in *Read* v. *Shaw* the trustees invested the money received from the sale of the lands in an annuity instead of other lands; and were therefore guilty of a fraud on the power. He then contended that the argument on the other side was chiefly drawn from considerations relative to common law exchanges, and was not applicable to the present case.

THE LORD CHIEF BARON. I shall take time to consider this case. Without deciding that the title is either good or bad, it may appear upon examination that it is not such as the defendant ought to be compelled to take. The circumstance that the title may be made good is not a reason for compelling him. At present I am inclined to think that the deeds of July, 1838, were merely the confirmation of a

bad exchange; but it must be remarked that the case of *Read* v. *Shaw* is not an express decision upon that point.

[376] THE LORD CHIEF BARON. The title to this property is founded on the marriage settlement of Mr. Lyster, who conveyed the lands in question to the plaintiff's father in fee. The plaintiff having come into possession of them, contracted to sell them to the defendant, and it was then discovered that Lyster had no title to convey them absolutely to the plaintiff's father, because he had already vested them upon certain trusts under a settlement, and had given the trustees a power of sale and exchange. In order to remedy this defect of title, the plaintiff has procured the execution of fresh deeds, in order to bring the transaction between his father and Lyster within the terms of the power of exchange; and the question therefore is whether that has been done by the parties which places the vendor in the situation of insisting on the specific performance of the agreement made by the defendant for the purchase of this estate. I have great difficulty in saying that the purchaser is bound to accept such a title. This was not a direct sale or exchange under the settlement, but a proceeding taken upon an emergency in order to satisfy what was imperfectly done before. Whether that was a proper exercise of the power contained in the settlement is extremely doubtful; and as many nice questions depend on the exercise of powers of this nature, I am much disposed to think that the means which have been taken to make this exchange effectual within the terms of the power are not sufficient for that purpose.

But there is another objection which appears to me to have great weight in this case. The conveyance made by the trustee to Cowgill, which was executed with a view to rectify the original transaction, contains so many misrecitals, and so many inaccurate references and false dates, that it is scarcely possible that that deed should be available for the defendant as part of his title deeds. Upon the whole, therefore, putting both objections together, it appears to me that there is enough to induce this Court to **[377]** say that the defendant ought not to be compelled to take such a title as this. I think, therefore, that the Master has decided right, and that the exception must be overruled.

The plaintiff's counsel, conceiving that the Lord Chief Baron had not given an express decision upon the validity of the execution of the power, asked for permission to prepare new deeds of conveyance in lieu of the incorrect instruments of July, 1838.

THE LORD CHIEF BARON. The situation of the parties has varied so much during the long interval of time that has elapsed since the contract took place, that even if new deeds were prepared, I should think it inconsistent with justice, under the circumstances of this case, to decree the specific performance of the contract.

The Court then ordered the deposit to be repaid to the defendant, and the case of *Lord Anson* v. *Hodges* (5 Sim. 227) was mentioned as an authority entitling the defendant to interest on his deposit, but this point was not pressed.

HARDY *v.* SHARPE. Feb. 2nd, 1839.—A joint attachment having issued against husband and wife, under which the husband had been put under arrest: Held, that the wife not answering was in contempt, and must either join in the husband's answer or clear her contempt upon motion to answer separately, founded on special circumstances.—Semble, that upon a joint attachment against husband and wife for want of an answer, the wife not joining in the answer, will be in contempt unless the husband is out of the jurisdiction.

This was a motion on behalf of a defendant who was a married woman, and against whom an attachment had been obtained for want of an answer, for liberty to answer separately from her husband; the notice of motion stating **[378]** that the matters in difference between the parties arose in right of the wife.

The order, dated the 14th of January, for the attachment against the wife, appeared thus in the minute book: "On motion of Mr. R. informing the Court that the plaintiffs had exhibited their bill &c., and that an attachment had been issued against the defendants, W. Fox and Elizabeth, his wife, for want of their answer to the said plaintiff's bill, under which attachment the said defendant W. Fox had been arrested, and was now in the custody of the Warden of the Fleet for want of the said answer, the said Mr. R. now prayed for the reasons by him alleged that an

attachment might be issued and executed against the said Elizabeth Fox, who refuses to put in her answer to the said bill, which is ordered."

Mr. Wilbraham, for the motion. The order of the 14th of January was irregular, inasmuch as a previous order should have been obtained for the wife to answer separately, before an attachment was issued against her. But waiving that objection, the plaintiffs cannot object to this motion, inasmuch as they have attached the wife separately. Their proceeding against her in this manner is an express warrant for the present application, which is founded on the separate rights of the wife. *Tarleton* v. *Dyer* (10 Ves. 442), *Bunyan* v. *Mortimer* (6 Madd. 278).

Mr. Rogers, contrà. This is a joint attachment, and the wife is bound to answer jointly with her husband. The attachment issues against her, not because she individually does not answer, but as part of the process to bring in the joint answer of the husband and wife; for want of which the husband is under arrest. In *Carleton* v. *M'Enzie* the husband was abroad. Unless special **[379]** cause be shewn, the wife has no power to put in a separate answer. The mere statement that the matters in difference arise in right of the wife is not sufficient for that purpose.

Mr. Wilbraham, in reply.

ALDERSON, B. I think that I must take the case as it stands upon the order of the 14th of January. Upon the construction of that order, it appears to me that the attachment against the wife was for not putting in a joint answer. Until, therefore, she joins in the answer the attachment must remain, unless she states circumstances sufficient to satisfy the Court that she ought to be permitted to put in a separate answer. No such circumstances appearing in the present case, I cannot order her to put in a separate answer so long as she is in contempt for not putting in a joint answer.

Motion refused.

ABERDEEN *v.* CHITTY. Feb. 2nd, 1838.—Receiver appointed before answer in the case of an equitable mortgage, by deposit of title-deeds.—A decree for sale of an equitable mortgage security not being within the stat. 7 Geo. 2, c. 20, the Court will in such case exercise its general jurisdiction in ordering the costs to be paid by the defendant.

[S. C. 8 L. J. Ex. Eq. 30.]

In January, 1838, the defendant requested the plaintiff, who was an attorney, to procure for him the loan of 300l. The plaintiff accordingly applied to the Directors of the Honiton Branch Bank of England, who acceded to the application by discounting a bill drawn by the plaintiff upon the defendant, and accepted by him at three months after date payable at Messrs. Williams & Co., London. As a further security both to the bank and to the plaintiff for the repayment of this bill, the plaintiff deposited with the bank the title deeds of a freehold estate to which he was entitled, and at the same time gave the bank a memorandum in writing stating the object of the deposit. The defendant also delivered a memorandum to the plaintiff, whereby he acknowledged that the 300l. bill had been **[380]** drawn and procured to be discounted for his accommodation, and agreed that in the event of the plaintiff's becoming liable to pay the 300l. or the interest, &c., the title deeds so deposited by him with the Honiton Bank should be held by them for the plaintiff's security as well as their own. A few days before the bill became due, the defendant wrote a letter to the plaintiff, in which he requested a renewal of the bill for three months longer, and enclosed his promissory note for the amount payable to the plaintiff's order, requesting the plaintiff at the same time to take up the bill, and stating that the title deeds would of course remain a security as before. In compliance with this application, the plaintiff having indorsed and procured discount for the defendant's promissory note, took up the bill. The note, when it became due, was dishonoured, and the plaintiff paid the amount, upon which the title deeds which had been deposited with the bank were delivered over to him.

The plaintiff not having obtained payment of the principal debt, and there being an arrear of interest and a sum due to him for expenses, filed the present bill in December, 1838, praying that he might be declared to be an equitable mortgagee of the premises comprised in the title deeds; that the usual accounts might be taken:

that the defendant might be ordered to pay the balance due to the plaintiff for principal, interest, and costs; or that the premises might be sold.

The defendant having entered an appearance, but not having put in his answer,

Mr. Abraham, for the plaintiff, moved for a receiver, upon the plaintiff's affidavit stating the foregoing circumstances.

Mr. Dixon, for the defendant. This is an application against a person having the legal estate, before answer **[381]** filed, and no reason suggested. In *Lloyd* v. *Passingham* (16 Ves. 69, 70) Lord Eldon says: "Though cases of fraud combined with danger to the property may arise as to which a court of equity may interfere on affidavits, notwithstanding the objection to that course; yet the Court interposes by appointing a receiver against the legal title with reluctance, compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger, if the intermediate possession should not be taken under the care of the Court." Here, the plaintiff asks for a receiver before answer, without suggesting any special ground. He does not allege by his affidavit, though he does by his bill, that the security is not more than sufficient. It is a mere claim on a promissory note which ought not to have been brought into this court.

Mr. Abraham, in reply. The proposition is not true that in the case of a mortgage waste, or any detriment to the property, must be shewn in order to induce the Court to appoint a receiver before answer. It may be so in the case of an executor, but not in the case of a mortgage. It is enough to shew that this is an equitable mortgage, and that the party will not pay: *Tanfield* v. *Irvine* (2 Russ. 149). [Alderson, B. There Lord Eldon acted on the ground that the absence of the debtor deprived the creditor of all remedy.] There are other cases in point: *Shakel* v. *Duke of Marlborough* (4 Madd. 463), *Davis* v. *Duke of Marlborough* (1 Swanst. 74), *Duckworth* v. *Trafford* (18 Ves. 283).

ALDERSON, B. (after hearing Dixon's reply to the cases cited for the plaintiff). I think this case is one of considerable danger to the plaintiff unless the Court interfere. **[382]** It is a clear case of equitable mortgage, and the question is whether there is any apparent reason to apprehend that the party will be in a worse situation if the appointment of a receiver be delayed. I think there is.

Motion granted.

Feb. 13th.—Mr. Dixon now moved, under stat. 7 Geo. 2, c. 20, for a reference to the Master to take an account of principal and interest due on the mortgage, the mortgagor admitting the principal to be due.

Mr. Abraham, contrà, said that the bill praying a sale the case was not within the stat. 7 Geo. 2, and therefore the Court, in directing an account, would do so in the exercise of its general jurisdiction, and would put the defendant to the terms of paying not only the costs of the mortgage but of the dishonour of the promissory note, &c.

THE LORD CHIEF BARON ordered that it should be referred to the Master to inquire what was due to the mortgagee for principal, interest, and costs, and costs properly incurred touching the deposit of the security, and to fix a day for payment; in default whereof the property was to be sold, &c.

TOULMIN *v.* COPELAND. Feb. 2nd, 1839.—An appeal from the Master to the Court, relative to the production of deeds before the Master, must be made by way of exception, and not by way of motion; and the Court will direct the Master to certify upon this point in such form as to allow of exceptions being taken to his certificate.

[See p. 625, post.]

The decree having directed that the parties should produce before the Master all such documents as he should think proper, and the Master having refused to allow the production of certain deeds which the plaintiffs desired to **[383]** have produced, they were now about to move the Court for the production of those deeds, when—

Mr. Knight Bruce and Mr. G. Richards, for the defendant, objected that the application to the Court should be by way of exception, and not by way of motion, and they cited *Chennel* v. *Martin* (4 Sim. 340).

Mr. Simpkinson and Mr. Duckworth, contrà. *Chennel* v. *Martin* only decides that, where the Master certifies, the objection to his certificate must be by way of excep-

tion. Here there is no certificate, because the Master could not certify that the defendant had books, but that it was not necessary to produce them. Had he been of opinion that the books ought to be produced, and the defendant had refused to produce them, he would have given a certificate of default, and then exceptions might have been taken to his certificate. As it is, a motion for their production is the right course: Grant Ch. Pr. vol. i. p. 409 (3rd edition; and see Seton on Decrees, p. 13).

ALDERSON, B. I do not see that there is any settled rule of practice in this Court to bind me on the present occasion. I am therefore disposed to grant an order such as shall directly raise the question in issue. Let the Master certify what documents have been proved to his satisfaction to have been in the possession of the defendant, and what have been produced; and then certify whether or not he is satisfied with the production of those which have been produced.

Order accordingly.

[384] BERRINGTON *v.* EVANS. Feb. 19th, 20th, 1839.—By an indenture executed by a debtor of the one part, and certain scheduled creditors of the other part, the debtor covenanted that he would pay the respective debts, with interest, on a given day, and in the event of non-payment by that time, "he hereby engages to sell so much of his estates as shall be found necessary for that purpose:" Held, that this was a mere personal undertaking on the part of the covenantor, and that even if it were not it would give the creditors no specific lien on his lands, so as to enable them in a suit for the administration of his assets to receive payment pari passu with the judgment creditors.—Where a bill prays for the payment of debts in a due course of administration, a bond creditor cannot claim payment pari passu with a judgment creditor, on the ground that the bill is filed on behalf of all the specialty creditors, even though the assets may have been partially distributed pari passu, in the belief that there would be no deficiency.

The bill was filed by the plaintiffs on behalf of themselves and all other the specialty creditors of Sir Watkin Lewes, who died intestate, praying to have his real and personal estates applied in a due course of administration (see ante, vol. i. p. 434). The cause was heard in December, 1821, when the usual decree was made. The Master afterwards made his report, in the first schedule of which he set forth the names and classes of the specialty creditors who had come in to prove their debts, and it being considered that the assets were sufficient for the payment of those creditors, it was, on further directions, ordered, after making provision for costs and for debts for which certain parties had specific liens, that the residue of the assets, consisting of the produce of the real estates, should be apportioned among the creditors according to the amount of their respective debts.

After this order was made, a judgment was pronounced in the House of Lords in a cause of *Morgan* v. *Evans* (see 3 Clarke & Finn. 159), under which the estate of Sir Watkin Lewes was called upon to pay very large sums of money to the estate of Morgan. The consequence was that Lewes's assets were not sufficient to pay his specialty creditors in full, and a question was therefore now raised upon the Master's subsequent report as to the priorities of the creditors. The classification of creditors appeared to be as follows—namely, judgment creditors; creditors upon bonds and other specialties who had obtained judgments; an annuity creditor who had obtained a judgment; bond creditors; and covenant creditors.

[385] The bond creditors rested their claim to come in pari passu with the judgment creditors upon a circumstance which will be noticed in the argument.

The covenant creditors rested a similar claim upon the terms of a certain indenture. By that indenture, dated the 6th of June, 1811, and made between Sir Watkin Lewes of the one part, and certain creditors whose names and seals were thereunto subscribed and fixed, of the other part, reciting that Sir Watkin Lewes had been unable to discharge the debts due to the said creditors, it was witnessed that in consideration of the covenants thereinafter contained on the part of Sir Watkin Lewes, the creditors, parties thereto, did thereby give and grant to the said Sir Watkin Lewes free liberty and licence to go, pass, repass, from &c., to &c., without being subject to arrest, until the 6th of June, 1813, the said Sir Watkin Lewes performing the covenants and agreements thereinafter contained; and the said creditors for themselves &c., did thereby severally covenant with the said Sir Watkin Lewes, his executors, adminis-

trators, and assigns, that they and their respective executors and administrators would not, before the 6th of June, 1813, sue, arrest, or detain the said Sir Watkin Lewes, otherwise than was authorized or provided for by those presents. And the said Sir Watkin Lewes did thereby for himself, his heirs, &c., covenant with the said other parties that he would on or before the 6th of June, 1812, well and truly pay the interest due and to grow due on the said respective debts, and would on or before the 6th of June, 1832, well and truly pay the said several debts with all interest that should be due on them. And the said Sir Watkin Lewes further covenanted that he would at the request of the creditors deliver warrants of attorney in due form of law, at their suit, for better securing the repayment of the principal debts with interest. Then followed these words: "And in the event of the nonpayment of the debts so as aforesaid covenanted to be paid by the **[386]** said Sir Watkin Lewes, he hereby engages to sell so much of his estates as shall be found necessary for that purpose."

Mr. Simpkinson and Mr. Duckworth, for some of the judgment creditors. It is clear that judgment creditors whose judgments are docketted, as is the case here, have precedence over other specialty creditors in the administration of legal assets: Williams on Executors, vol. i. p. 726, *Robinson* v. *Tonge* (3 P. W. 398), *Sharpe* v. *Earl of Scarborough* (4 Ves. 538); and these are legal assets, there being no charge upon them by the will. Then we say, notwithstanding that these transactions took place before the late statute,(*c*) that the judgment creditors are to be paid out of the produce of the entirety of the estate, and not merely, by analogy to the proceedings in elegit, out of the produce of a moiety. The **[387]** only case which militates against this proposition is *Stileman* v. *Ashdown* (2 Atk. 477; Ambl. 13), but that case was not followed in *Tunstall* v. *Trappes* (3 Sim. 300). The case of *Leahy* v. *Dancer* (1 Molloy, 313) is also an authority upon this point.

It appears that one of the scheduled creditors is the grantee of an annuity secured by bond and covenant. He has also obtained a judgment to the amount of the penalty in the bond. He proved for the arrears of the annuity not as a judgment creditor but under the covenant. He has received a proportionate payment in respect of those arrears, and now the question is, the assets being deficient, in what way his claim should be dealt with. He says he is now entitled to be considered as a judgment creditor, and to have priority as a judgment creditor over the other specialty creditors, and that what he has received, though received by him only as creditor by covenant, is to be applied pro tanto in discharge of his present claim as a judgment creditor. We do not dispute that he may waive his claim by covenant, and resort to his claim by judgment; but, the assets being insufficient, he must do equity, and can only be admitted as a judgment creditor on the usual terms in such cases, namely, upon having a value set upon the annuity at the time of the death of the intestate, not exceeding the amount of the judgment; *Franks* v. *Cooper* (4 Ves. 763): and the arrears which have been paid must be taken as paid to him in satisfaction of the debt; and the residue must be paid to him with interest from the first Oct. last, under the new act (1 & 2 Vict. c. 110, s. 17). There are several bond creditors in the same

(*c*) Stat. 1 & 2 Vict. c. 110, s. 11, by which it is enacted "that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof shall be directed, at the suit of any person, upon any judgment which shall be recovered in any action in any of her Majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity.

situation. With respect to the bond and covenant creditors who have obtained no judgments on their securities, it is impossible to see how they can claim pari passu with the judgment creditors.

[388] Mr. John Wilson, for others of the judgment creditors, observed that, admitting the real estates to be mere equities of redemption, it would not take away the priority of the judgment creditors, inasmuch as a judgment creditor has always a right to redeem: *Foly's case* (2 Freem. 49), *Symmes* v. *Symonds* (4 Bro. P. C. 328), *Sharpe* v. *Earl of Scarborough*. He added that the decision in the latter case was fully corroborated by the decree as stated in the registrar's book (R. L. 1798, B, fo. 515). *Bothomly* v. *Lord Fairfax* (1 P. W. 334) was a case of the same nature.

Mr. Wilcock, for the heir at law of a purchaser of several judgments.

Mr. G. Richards, for the bond creditors who had obtained judgments.

Mr. Purvis, for the covenant creditors. If the covenant in the indenture of June, 1811, were a mere covenant to pay debts, no doubt the judgment creditors would rank first. But this covenant charges the lands of Sir Watkin Lewes, and I have a right in this Court, having an incumbrance upon the property under a deed, to rank with the judgment creditors. By that indenture Sir Watkin Lewes expressly covenanted that if he did not perform the stipulations for payment therein contained, he would charge his lands with the amount. A covenant of that nature creates a lien on the real estates of the covenantor, although no estates are specifically named. In *Roundell* v. *Breary* (2 Vern. 482) a person on the marriage of his son covenanted by the marriage articles that he would settle lands of 150l. a-year on the son and the issue of the marriage. The father died before any settlement was made; and **[389]** the son then entered upon the land and settled it upon a second wife, who had no notice of the articles on the first marriage. Upon a bill filed by persons claiming under the articles to have the lands settled in pursuance of the covenant, it was held that the articles were a lien on the lands whereof the father was then seised, although no particular lands were mentioned in the articles. In *Prebble* v. *Boghurst* (1 Swanst. 309) a person on his marriage executed a bond in a certain penalty, conditioned to be void if he should at any time during his life become seised of any lands in possession, and should settle them on his intended wife and her issue by such conveyance as counsel should advise, and to such uses as should be thought requisite. The marriage took effect, and there were several children of the marriage. The wife then died, and the husband married again, and subsequently became seised of real estates. Upon his death, leaving several children by the second marriage, it was held that all the real estates of which he became seised during his life were subject to the covenant contained in the settlement made on the first marriage. In *Metcalfe* v. *The Archbishop of York* (6 Sim. 224) a vicar, whilst the stat. 13 Eliz. c. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Eliz. The Vice-Chancellor held that the covenant was a subsisting charge on the new living, and His Honour's decision was affirmed on appeal (1 M. & C. 547). Now this covenant gave all the parties who executed the deed of June, 1811, a right to come into this Court for the specific performance of it. They had a right to ask for the sale of the estates **[390]** of which the covenantor was seised. The words "his estates," though general, are not more so than the corresponding words in the case in Vernon; and whether they apply to estates of which he was then seised, or to after-acquired estates, is a point which would be settled before the Master. It is submitted, therefore, that the covenant creditors who come in under this deed are invested with all the rights of parties who have an equitable lien upon land. Equity does not regard the mere deed, but the substance of the transaction, that is, the charge. In some cases a bond has been held in equity to operate as a charge on lands. These parties had a right to redeem the mortgages. What difference is there between the case of a party creating a legal charge on his land by judgment, and a party by deed declaring that all his creditors who shall sign that deed shall have a charge on the land?

Mr. James, for a bond creditor. The question is whether that has not been done in this suit which gives this creditor an equity equal with that of the judgment creditors. This is a suit on behalf of all the specialty creditors. That shews that the assets should be divided equally amongst all the specialty creditors. If the

plaintiffs in this suit had intended to exclude bond creditors, they should have filed a bill on behalf of themselves and all other the judgment creditors. If the bond creditors are to be excluded from an equal apportionment of the funds, non constat that it was to their interest to come in. The suit has hitherto proceeded upon the principle that all the specialty creditors should have equal shares. Can any of them now alter their course and claim a priority?

But, supposing the judgment creditors to be allowed their priority, the covenant creditors are entitled to no preference. Creditors by covenant cannot, except under circumstances giving them a special lien, acquire priority **[391]** over bond creditors. The cases which have been cited in their favour did not, in fact, involve the interests of creditors, but were simply cases in which the deeds of covenant were held to be good against volunteers. This was a mere personal engagement by Sir Watkin Lewes. It was not a direct lien upon the land, but in the nature of a bond. It was a security not called into action.

Mr. Simpkinson, in reply. The case made for the bond creditors depends on the particular frame of this suit. Now, the bill is brought by certain of the judgment creditors on behalf of themselves and all other the specialty creditors of Sir W. Lewes, calling on the Court to distribute the assets in a due course of administration. There is no prayer that the debts may be paid pari passu. How, then, is that a waiver by the judgment creditors of their priority? As to the proceedings in the suit, we do not seek to call back any apportionment that has been made.

As to the case of the covenant creditors, the authorities which have been cited, except that of *Metcalfe* v. *Archbishop of Canterbury*, were cases of volunteers. In those cases the party positively and unequivocally bound himself to settle the whole or a portion of his lands. It was not a covenant to sell but to settle. In the case in Vernon the Court enforced the covenant against the heir-at-law as a volunteer. As against the heir relief might be had in such a case, but not as against creditors. Besides, there is no pretence for saying that the judgment creditors had notice of this charge, admitting it to be a charge. It is clear, however, that it is not a charge upon any specific lands, and therefore creates no lien: *Freemoult* v. *Dedire* (1 P. W. 429), *Williams* v. *Lucas* (id. 430, note (1)). It was a mere personal undertaking on the part of Sir Watkin; he does not even mention his heirs.

[392] Feb. 20th.—ALDERSON, B. I think that the judgment creditors are entitled to the priority which they have claimed. It seems also to be conceded that the annuity creditors are, under the peculiar circumstances, entitled to the same relief as the judgment creditors, the proper deductions being made.

As to the bond creditors, the question which has been made is whether under the frame of the bill and the course of these proceedings the judgment creditors have not waived that priority to which otherwise they would have been entitled? I think not. The bill in substance prays that the debts may be paid in a due course of administration. It is true that all the creditors have hitherto been admitted to receive the amount of their claims pari passu with the judgment creditors, under the reasonable expectation of all being paid in full; but I think, under the circumstances which have since occurred, that the claims of the bond creditors must be postponed to those of the judgment creditors.

With respect to the covenant creditors, I am of opinion that they have not made out their covenant to be a special charge on the realty. It does not appear to me that the covenant entered into by Sir Watkin Lewes was anything more than a personal undertaking; but even if it were, the case of *Williams* v. *Lucas* (1 P. W. 430, n.) shews that the words of it are too general to create a specific lien upon his lands. For these reasons, the claims of the covenant creditors must also be postponed to those of the judgment creditors.

Order accordingly.

[393] BARKER *v.* GREENWOOD. Feb. 20th, 1839.—Under special circumstances a witness was ordered to be examined before the master as to collateral facts connected with the same points upon which he had been examined before the decree.

[S. C. 8 L. J. Ex. Eq. 66; 3 Jur. 770.]

This was a motion on the part of the defendant for liberty to examine Churchill before the Master, as to the particulars of his demand against Barker.(*a*) Churchill had been examined by the defendant, before the decree, relative to the fact of his having dealt with Barker, and as to the amount of the balance which he claimed to be due to him, which circumstances were likewise proved by certain letters and documents; but no evidence had been given upon the point upon which the decree directed an inquiry, namely, as to the items constituting the alleged demand. It appeared that Churchill's clerk who was acquainted with the particulars was dead.

Mr. Simpkinson and Mr. Kenyon Parker, for the motion, cited *Rowley* v. *Adams* (1 M. & C. 543), and observed that, Churchill's clerk being dead, the evidence required by the decree could not be obtained without the aid of Churchill's own testimony. The decree had directed an inquiry as to the minute particulars of Churchill's demand, and there would be a failure of justice if this motion were not complied with.

Mr. Swanston, Mr. Ellison, and Mr. G. Richards, contrà. The substance of the defence at the hearing was that Churchill, having a claim upon Barker, and being indebted to the defendant Greenwood, was entitled, under the circumstances of the case, to set off, in his account with Greenwood, the balance which was due to him from Barker. With a view to that defence the defendant examined Churchill as to the amount of that balance. The **[394]** present application therefore is irregular; being, in substance, an application for liberty to re-examine Churchill upon the same matter upon which he was examined before the decree. In all the cases where liberty to re-examine has been granted, care has been taken that the same matters shall not be inquired into, and for that purpose the Master is generally directed to settle the interrogatories: *Smith* v. *Graham* (2 Swanst. 264. See ante, p. 227), *Vaughan* v. *Lloyd* (1 Cox, 312), *Earle* v. *Pickin* (1 Russ. & M. 552). Here the defendant expressly seeks to examine upon the same points, with a view, it is believed, of attempting to impeach some securities in the hands of the plaintiff. Besides, the witness is incompetent on the ground of interest. [Alderson, B. He has been a bankrupt, but has obtained his certificate.] Though he has obtained his certificate he has not released his estates.

Mr. Simpkinson, in reply. The case of *Vaughan* v. *Lloyd* is an authority in favour of this application; shewing that the Court will not refuse leave to re-examine a witness even upon the same points, under certain circumstances. Here the points to be inquired into are not substantially the same as those upon which the witness was originally examined. No evidence was then entered into as to the particulars of the demand, which is one of the main objects of the decree. It is alleged that the defendant seeks to impeach certain securities. It may be admitted that he seeks to explain under what circumstances they were given. Suppose, for instance, he has given his acceptance without consideration; the bill importing primâ facie to have been drawn for value received, how is the contrary to be proved without his evidence? [Alderson, B. That would be taking his evidence against the document.] It would be for value received in one sense, that **[395]** is, on account; therefore the evidence would hardly be against, but explanatory of, the document. There was a running account between Barker and Churchill as principal and agent. [Alderson, B. You may produce letters to shew that these were accommodation bills, though expressed to be for value received.]

ALDERSON, B. I think the defendant ought to be allowed to prove collateral facts which will enable him, with other assistance, to prove what he wants. But the witness must not be examined directly as to the balance.

Ordered that Churchill be examined vivâ voce before the Master, not as to the fact of any direct payments forming the balance, but as to collateral facts, tending with others proved by documents or the evidence of third persons, to prove the fact of such payments.

(*a*) See the case reported, ante, vol. 2, p. 414; and upon the minutes of the decree see p. 420.

BROWN *v.* BROWN. 1839.—In a suit for the appointment of new trustees the Court refused to insert a clause in the will authorizing the new trustees to appoint others in their room.

The suit was instituted for the appointment of new trustees.

Mr. Shadwell, for the plaintiff, suggested that the Court might order the insertion of a clause in the will, authorizing the new trustees to appoint others in their room. He said that this had been done in a case which had lately occurred in the Rolls Court, but he admitted that *Bayley* v. *Mansell* (4 Madd. 226) was against the application.

ALDERSON, B. I think there is no foundation in principle for such an application; though, if there were any reported authority in its favour, I might consider myself bound by it.

Application refused.

[396] EX PARTE ATHORPE; IN THE MATTER OF THE HULL AND SELBY RAILWAY ACT. Feb. 2nd, 1839.—Upon the construction of a Railway Act, held, that the costs given by the act in relation to the payment of certain dividends had reference to the costs of obtaining the order for payment, and not to the costs of the payment itself.

By the 45th section of the statute 6 Will. 4, c. lxxx., for making a railway from Hull to Selby, it is enacted that where the company shall purchase lands of incapacitated persons under the authority of the act, it shall be lawful for the Court of Exchequer to order the reasonable costs, charges, and expenses attending the purchase, and also all the costs, charges, and expenses of the investment of the purchase-money in government or real securities, and of the re-investment of the same securities in other lands, "together with the necessary costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and for the payment of the dividends and interest of the government or real securities upon which such purchase-money may be invested, &c., to be paid by the company."

Mr. Kenyon Parker, in support of a petition to have certain purchase-money invested under the act, suggested that the costs of payment of the dividends should be borne by the company.

Mr. E. P. Cooper, contrà.

ALDERSON, B. The costs referred to in the 45th section are the costs of the order for payment of the dividends; not the costs of the payment of the dividends.(*a*)

[397] EX PARTE CHAPLIN; IN THE MATTER OF THE PUBLIC UNDERTAKING MONIES CUSTODY ACT. Feb. 20th, 1839.—The words "Government security or securities" held not to apply to Exchequer Bills.

[Distinguished, *Band* v. *Fardell*, 1855, 7 De G. M. & G. 628.]

By the 3rd section of statute 1 & 2 Vict. c. 117, which provides for the custody of monies subscribed for parliamentary undertakings, it is enacted that the deposits to be paid into the bank in the name of the Accountant-General of this and other courts shall, until the same be paid out of court, be invested in the 3l. per cent. consolidated or 3l. per cent. reduced Bank annuities, "or any government security or securities."

Mr. Hibbert, in support of a petition for the investment of certain deposits, proposed that they should be laid out in Exchequer Bills.

ALDERSON, B., held that the words "government security or securities" would not apply to Exchequer Bills.

(*a*) The same point was decided by the Lord Chief Baron, April 15th, 1839, upon the construction of the same act.

DAVYS *v.* BOUCHER. Feb. 15th, June 24th, 1839.—Testator by his will gave to his son and to his two daughters, M. and B., 100l. each; and, after the death of his wife, he gave all his freehold estates at R. or elsewhere to his son in fee, subject and charged as thereinafter mentioned; and he gave and devised to his daughter M., her heirs and assigns, a yearly rent-charge of 50l., and a similar rent-charge to his daughter B., to be paid and payable out of, and charged and chargeable upon his estates at R., free of all deductions; and in case either of his daughters should die without issue before her rent-charge should be payable, he gave one moiety of the annuity so devised to her, to his other daughter and directed that the other moiety should no longer be a charge on the premises. After the execution of his will the testator purchased a freehold estate at P., and devised it by codicil to his two daughters in fee, as tenants in common. After the execution of the codicil the two daughters married. On the marriage of M., which took place first, the testator gave a bond for securing 1000l. as an immediate provision for the marriage, and 400l. to be payable as a further provision at his death. Upon the marriage of B. the testator settled the whole of the P. estate, and 400l., as a provision for that marriage: Held, that the provisions so made upon the marriages of the testator's daughters did not amount to an ademption of the benefits given to them by the will.—Where a parent, or person in loco parentis, gives a legacy to a child by way of portion, and afterwards makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by will, and a Court of Equity will presume he meant to satisfy the one by the other. But this doctrine applies only to legacies, and not to a bequest of a residue, or to a devise of real estate; and to hold that the doctrine applies to devises of real estate, would be to repeal the 6th section of the Statute of Frauds.—Where a testator made bequests to his two daughters, and afterwards settled portions upon them: Held, that the evidence of one daughter was not admissible to prove that the testator did not intend to adeem the legacy given to the other daughter, it being likewise in evidence that the testator intended to provide for his two daughters equally.

[S. C. 3 Jur. 674.]

Thomas Davys by his will, dated the 17th of February, 1829, gave unto each of his children, Thomas **[398]** (the present plaintiff), Mary and Betsy, the sum of 100l.; and he gave and devised to Patience Davys, his wife, all his freehold messuages and estates, in the parish of Raddington or elsewhere, for her life, if she should so long continue his widow, with power of leasing; and from and after her death or second marriage, he gave and devised all and singular his said messuages and estates, in the parish of Raddington or elsewhere, unto and to the use of his son Thomas Davys his heirs and assigns for ever, subject and charged, as thereinafter mentioned; and he gave and devised unto and to the use of his said daughter Mary, her heirs and assigns for ever, one clear annuity or yearly rent-charge of 50l. And he gave and devised unto and to the use of his said daughter Betsy, her heirs and assigns, for ever, one other clear annuity or yearly rent-charge of 50l.; and his will was, and he thereby expressly declared, that the aforesaid two several annuities or yearly rent-charges of 50l., and 50l. should issue, and be paid and payable out of and charged and chargeable upon all and singular his said freehold messuages and estates, situated in the said parish of Raddington, free and clear from all land-tax, and all other rates, taxes, and deductions. And the testator directed that the annuities should be paid quarterly, and that if they should be in arrear, his daughters, their heirs and assigns, should have powers of entry and distress upon the premises, and in case either of them should die before the annuities should become payable, without leaving issue, he gave one moiety of the annuity devised to her unto his other daughter, her heirs and assigns, and directed that the remaining moiety should no longer be a charge on the said messuages and premises. All the rest, residue and remainder of his personal estate, he gave to his said wife, and appointed her sole executrix of his will.

After the execution of his will the testator purchased **[399]** certain freehold estates called Petton, and Petton Balls, in the parish of Bampton, and by a codicil to his will, dated the 14th of April, 1831, after confirming his will, he gave and devised the

last-mentioned estates to his said two daughters, their heirs and assigns, as tenants in common.

In April, 1832, Mary Davys married the defendant, Charles Boucher, on which occasion the testator, as a provision for his daughter on her marriage, executed a bond for 1400l. to Charles Boucher the elder, the father of the defendant Boucher. Of this sum 1000l. was to be paid shortly after the marriage, with interest in the meantime, and the remainder (400l.) was to be payable at the testator's death.

At the latter part of the year 1833 Betsy Davys, the testator's other daughter, married the defendant Robert Williams, on which occasion a marriage-settlement was executed, by which the testator conveyed the whole of the estates, called Petton, and Petton Balls, to trustees upon certain trusts for the benefit of Robert Williams and his intended wife and their issue, and he also gave his daughter the sum of 400l., by way of additional portion.

The testator died in January, 1833, and his widow in June, 1835. Soon afterwards Betsy Williams died, leaving her husband and two sons surviving her.

In November, 1835, the defendants, Mr. and Mrs. Boucher, who had received no part of the bequests made to Mrs. Boucher by the testator's will, filed their bill in this Court against the plaintiff, who was administrator de bonis non of the testator, praying an account of the legacies bequeathed by the testator's will, and that so much thereof, as the personal estate of the testator was insufficient to satisfy, might be declared to be a charge upon his real estates devised to or vested in the plaintiff, as his heir-at-law, &c.

In consequence of the suit so instituted against the [400] plaintiff, he in Hilary Term, 1836, filed the present bill against Mr. and Mrs. Boucher and Robert Williams and his eldest son, Robert Williams the younger, praying that it might be declared that the provision made by the testator for his two daughters, on the occasion of their respective marriages, was a satisfaction and ademption of the benefits given to them, respectively by his will; that the defendant Charles Boucher and Mary his wife, were not entitled to be paid the legacy of 100l. given by the will to Mrs. Boucher out of the real estates devised to the plaintiff and his heirs, nor to the annuity of 50l., given by the will to Mrs. Boucher and her heirs; and, further, that the defendant, Robert Williams, was not entitled to be paid out of the real estates so devised to the plaintiff as aforesaid, any part of the legacy of 100l., given by the will to Mrs. Williams, and that neither he nor his son R. Williams the younger, were entitled either in possession or remainder, to the annuity of 50l. given by the will to Mrs. Williams and her heirs. The bill likewise prayed an injunction to restrain all legal proceedings against the plaintiff in respect of the annuities.

In support of the bill the plaintiff gave evidence of declarations made by the testator at various periods of his life, but more especially upon the occasion of his daughter Betsy's marriage, to the effect that he meant to provide for his daughters entirely in his lifetime, and not by his will. One witness in particular stated that shortly previous to the marriage of Betsy Davys the testator told him that he meant to give Betsy the Petton estate and money as good together as 1500l., and that as soon as she was married he would alter his will and give the land at Raddington to the plaintiff. Several other witnesses deposed to the declarations of the same nature.

The case made by the defendants was, that the value of the property devised to the plaintiff, after allowing for the annuities and legacies charged upon it by the will, consi-[401]-derably exceeded, though it was not quite double, the fortune coming to each of the daughters under the will and codicil, and they submitted that from this circumstance, and from expressions and declarations made use of by the testator, of which they gave evidence, that he did not intend to adeem the portions given to his daughters by his will, but, on the contrary, to add them to the marriage portions. It appeared clear from the evidence on both sides that it was the testator's intention to provide for his daughters equally.

In order to shew the testator's intentions in regard to his daughter, Mrs. Boucher, at the time of her marriage, the defendants relied on the deposition of Charles Boucher the elder, which was to the following effect:—That shortly before the marriage the deponent met the testator by appointment, when the deponent proposed to settle on his son an estate at Upton, called Lyddons Ground, which the deponent had then lately purchased, and to give him half of his farming stock and effects, and to take

him into partnership with him in his farming business; that the testator then proposed to settle upon his daughter a thousand pounds; that the deponent did not approve of this proposal, observing that it was not at all sufficient considering what the deponent intended to do for his son; that the testator in reply said that he had given her double as much as that upon his will; to which the deponent answered that a will might be altered; that the testator then said that he never intended to alter his will, nor ever would; and at the same time, turning round towards Benjamin Boucher, his solicitor, he observed to the deponent: "There's one that can tell all about it;" that an agreement was ultimately come to at this meeting that the testator should secure 1400l. by his bond as a provision for his daughter upon her marriage; that the testator, at the same meeting, stated to the deponent something respecting a further provision on behalf of his daughter, **[402]** besides the sum of money so to be settled or secured immediately on the marriage, observing that he had given her a great deal more by his will than what he then proposed to settle; that the deponent understood and believed that such further provision or fortune was to be made by the testator for his daughter by his will, and that upon this understanding the deponent made such settlement upon his marriage as he had originally proposed.

The defendants likewise entered into some but not very strong evidence to shew that the testator was on bad terms with the plaintiff. Upon this point the defendant, Williams, examined Mrs. Boucher, who likewise deposed on his behalf to a dying declaration of the testator that he had given the Petton estate to Betsy, and that he meant to make the fortunes of all his children as equal as possible. This evidence, however, was rejected for the reason given in the judgment of the Court.

Mr. Temple and Mr. Puller, for the plaintiff. In cases of this nature the law implies an intention on the part of the testator, that the portions given on the marriage of his children should be in satisfaction of the provisions previously made for them by his will, and it is altogether an anomalous proceeding to allow the defendant to enter into evidence to rebut that implication of law. To use the language of the learned counsel in *Lord Durham* v. *Wharton* (10 Bligh, N. R. 538), it is a settled rule of a Court of Equity, that a legacy given by a father to a child is adeemed by a portion subsequently advanced by the father to or upon the marriage of such child; and the case of *Powys* v. *Mansfield* (6 Sim. 528; 3 M. & C. 359) shews that a subsequent advance is an ademption of the previous legacy, notwithstanding it is less in point of value. Here, primâ facie, the specific gift of the Petton estate adeems the former gift; and it is for the defendants **[403]** to shew that, notwithstanding the conduct of the testator on the marriage of his daughter Betsy, it was not his intention to disturb the provisions of his will. That, however, is difficult to prove, because it goes to this—that settling the Petton estate on Betsy alone, he did not mean to take away from his other daughter the interest which she took in that estate under the codicil. No one, however, can doubt that that interest was adeemed by the settlement afterwards made upon Betsy. The question therefore is whether the bond for 1400l. and the Petton estate constitutes an ademption of the reversionary rent-charges of 50l. a year by the will.

Upon the general doctrine of the ademption of a legacy by a subsequent settlement made by a parent, the observations of Lord Eldon, in *Ex parte Dubost* (18 Ves. 151), are very explicit and comprehensive. In addition to what is there said, it may be observed that it is not necessary in the case of legacies, though it is in the case of debts, to shew that the testator had the legacy in his mind when he made the settlement. There are some cases of legacies, where the testator had even forgotten the former provision which he was held to have adeemed: *Upton* v. *Prince* (Ca. T. T. 71), *Warren* v. *Warren* (1 Bro. C. C. 305). [Alderson, B. In those cases the will was subsequent to the settlement.] The principle is the same. The rule applies even where there is a difference between the limitations of the prior and subsequent gifts; as where the first gift is to the party's wife absolutely, and the second to her for life, with remainders over: *Weall* v. *Rice* (2 Russ. & M. 251), *Lloyd* v. *Harvey* (id. 310), *Watson* v. *Lord Lincoln* (Ambler, 325). Here the second provisions were clearly preferable to the first. It cannot be contended that either the bond for 1400l., of which 1000l. was payable immediately, or the Petton estate was not a superior provision to a reversionary **[404]** rent-charge of 50l. No argument can be raised upon the difference in the nature of the provisions, that is, in reference to their consisting of lands or money; because it is clear from the extrinsic evidence that the testator, in speaking of making up the fortunes of his daughters to 1500l., and using

other like expressions, had a specific money value in his mind. Upon the general doctrine on which the case depends *Thellusson* v. *Woodford* (4 Madd. 436), and *Jones* v. *Morgan* (2 Y. & C. 403), are in point.

Mr. Spence and Mr. Sutton Sharpe, for the defendants Charles Boucher and wife. This is not the case of a money legacy, as in *Lord Durham* v. *Wharton*, or the case of an original gift being qualified by a subsequent one, as in the other cases which have been cited. At all events, if this is to be treated as a money-legacy, it lies upon the plaintiff to shew that the 1500l. which he says the testator intended to give to each of his daughters was actually advanced. What a testator does in these cases is of far greater importance than what he intends, though even upon the testator's declared intention, the plaintiff must fail in this suit; for this case is not distinguishable from *De Beze* v. *Mann* (2 Bro. C. C. 165), where a sum advanced upon the marriage of a daughter was held not to be a satisfaction of a legacy given to her by her father, there being evidence of his declarations that she should have more at his death. That case was much noticed and commented upon by Lord Eldon, in *Trimmer* v. *Bayne* (7 Ves. 517), where his Lordship admits the efficacy of parol declarations in these cases. But putting the parol evidence entirely out of the case, and resting simply on the acts of the testator and the documents, it cannot be said that the 1400l. bond was given in satisfaction of all the bequests of the will and **[405]** codicil; at the most, it would only be an ademption of some of them. The value of the Petton estate was about 1000l. After making provision of the 1400l., what does the testator do? He revokes the devise of half the Petton estate by giving it to his other daughter. Could it be said he had done enough for his daughter Mrs. Boucher? This consideration alone would dispose of the question without the aid of the parol evidence, but the evidence is clear as to the testator's declaration, that he would provide further for that daughter by his will. In the face of those declarations, it would have been a fraud on Boucher the father if the testator had altered his will; and, in fact, when he did alter the disposition of the Petton estate, he did so by another solicitor, thereby shewing that he thought what he did was fraudulent. Another question is whether it is possible to revoke the devise of a freehold annuity by the gift of another species of property; but that will be argued for the other defendant. A legal devise could not be revoked by such a provision.

Mr. Simpkinson and Mr. Follett, for the defendants Williams and son. The plaintiff has treated this case as the common case of a money legacy given by a parent to a child. It may be admitted that quoad the legacies of 100l., a presumption of satisfaction would arise by a subsequent gift of 200l. But the reversionary rent-charges were not in the nature of portions given to the daughters. The very fact of these gifts being reversionary does away with the notion of a father providing for his children. It was no provision at all. Then what was the intention of the testator as apparent from his acts? He gives all his reversionary personal estate not to the plaintiff but to his wife. He afterwards purchases the Petton estate and gives it to his two daughters as tenants in common. On his daughters' marriages he makes a settlement on them and their children. It is contended that the settle-**[406]**-ment so made, of property which neither by the will nor the codicil was given to the plaintiff, was not to enure to the benefit of the wife or daughters, but to that of the plaintiff, who under the will would have taken nothing except 100l. and the estate at Raddington, liable to two rent-charges. So that these legacies are to be adeemed at the expense of the children or wife, or any person except the plaintiff. It is not denied that the legacies of 100l. might raise the question, and that on that point evidence is admissible; but the plaintiff's own evidence shews that the testator never meant to revoke those legacies, for they speak of his saying that his daughter would have so and so, and 100l. after his death. Then they say (for that must be their proposition) that the settlement of the Petton estate, on the marriage of Betsy Williams, operated as a revocation of the devise of the rent-charge in the preceding will. Supposing it does, what right have they in this Court? The devise of the rent-charges is a legal devise, and if revoked at all it is revoked at law. They admit, however, that it is not revoked at law, for they say that we intend to distrain for the arrears, and they ask for an injunction. But if this devise is not revoked at law, it would be a new mode of revoking a legal devise to say that this settlement is a revocation of it in equity. The statute of frauds (stat. 29 Car. 2, c. 3, s. 6) requires that a devise should be revoked in a certain manner, and that which is not a legal

revocation cannot be a revocation in equity. And, if it is a mere legal question between the parties, this court will not decide it.

But, supposing your Lordship should be of opinion that this question may be decided in equity, then it is to be considered whether, quoad the rent-charge, evidence is admissible in support of the proposition made on the other side. Does any case go so far as to raise a presumption **[407]** that a settlement of Blackacre is in law or equity a revocation of a devise of Whiteacre? They must go the length of saying that, if the whole of the Petton estate had been devised to Betsy Williams, the settlement on her marriage would have been a revocation of the other provisions made by the will: because they say it is a portion, and a gift of a portion by a father to his child raises a presumption that he did not intend to give a double portion. But the Court will not lean against a double provision, where the extrinsic evidence afforded by the circumstances of the case is in its favour. In reference to this subject, the observations of Sir John Leach in *Weall* v. *Rice* (2 Russ. & M. 267) must be considered as applied solely to the circumstances of that case. If they were intended to be general, the practice of the Court is laid down much too largely, and the reasoning would amount to this—that in the teeth of the testator's clear intention, as apparent on the face of his will, the presumption is against a double provision, and such presumption may be aided by extrinsic evidence. No doubt the evidence was properly received in the case of *Weall* v. *Rice;* but none of the authorities on which that case was decided support the proposition laid down in the judgment in that case. *Pole* v. *Lord Somers* (6 Ves. 309), *Farnham* v. *Phillips* (2 Atk. 215), *Freemantle* v. *Banks* (5 Ves. 79), *Druce* v. *Denison* (6 Ves. 385). Here, however, as far as the extrinsic evidence goes, it shews that the testator did intend a double provision.

Then, as to the intrinsic evidence. The provision made by the will and codicil for Mrs. Williams was 50l. a year rent-charge, and half the Petton estate. The provision by the settlement was the Petton estate, and a sum of money amounting, as we say, to 100l. only (though the bill says 400l.) and an "I O U" for 200l. more. Was this **[408]** a revocation of the rent-charge of 50l.? It is settled that in order to make out a case of satisfaction of one provision by another, you must shew that the two provisions were ejusdem generis; you cannot satisfy a money provision by land or vice versâ. They must be of the same description, in order to raise what Sir John Leach calls the intrinsic evidence: *Goodfellow* v. *Burchett* (2 Vern. 298; 3 P. W. 226, cited), *Chaplin* v. *Chaplin* (3 P. W. 245), *Bellasis* v. *Uthwatt* (1 Atk. 426). In *Watson* v. *Lord Lincoln* (Ambler, 325), the only case of which the principles seem in favour of the plaintiffs, the decision was the other way; for there it was held that the money portions were not a satisfaction as to the real estate.

The doctrine that in order to make out a case of ademption the two gifts must be identical, seems to rest on this principle—that each is treated as the payment of a debt due from the testator, of the amount of which he is the sole judge, and that the subsequent advance operates as a payment of the debt, and therefore operates to revoke the gift of the same debt contained in the will: *Ex parte Dubost* (18 Ves. 151, 153, 155), *Hartop* v. *Whitmore* (1 P. W. 681), *Ellison* v. *Cookson* (1 Ves. jun. 107, 108), *Wetherby* v. *Dixon* (19 Ves. 411), *Shudall* v. *Jekyll* (2 Atk. 518). But this principle cannot apply where both or either of the gifts are of real estate, unless in the same manner as it applies where the gifts are of personalty, that is, by taking the identical subject-matter of the devise out of the will, and making that the subject of the subsequent provision.(*k*) In *Rider* v. *Wager* (2 P. W. 328) the subsequent pro-**[409]**-vision was of the same subject-matter as the devise in the will (namely, real estate), and it was treated as a case of revocation. But here it is impossible to hold that the settlement of the Petton estate was a revocation of the devise of the annuities. That the two gifts must be equally certain and definite, and, ejusdem generis, is likewise apparent from the cases of *Freemantle* v. *Banks* (5 Ves. 85), and *Holmes* v. *Holmes* (1 Bro. C. C. 555).

Mr. Temple, in the course of his reply, referred to *Brown* v. *Peck* (1 Eden, 140), as an authority to shew that the doctrine of ademption and satisfaction may be applied to devises of real estates. He likewise, in answer to an observation of the

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(*k*) In *Jones* v. *Morgan*, ante, vol. 2, p. 403, where the gifts were not identical, the Court held that the subsequent provision was in satisfaction of the former; but that was the case of two marriage settlements.

Court—that there could be no ademption of a residue, mentioned *Fazakerley* v. *Gillibrand* (6 Sim. 591).

June 24th.—ALDERSON, B. This was a bill filed by Thomas Davys praying a declaration by the Court that certain provisions made by his father Thomas Davys, on the occasions of the respective marriages of Mary and Betsy his daughters, were an ademption of the benefits given to them by his will.

The facts are shortly these: By his will dated the 17th of July, 1829, the testator, after giving legacies of 100l. each to his daughters Mary and Betsy, then devised his freehold estate at Raddington in the county of Somerset to his wife for life, if she should so long continue his widow, and after her death or second marriage then to his son in fee, subject and charged with a clear annuity of 50l. to Mary his daughter, her heirs and assigns for ever, and with a similar annuity to Betsy: and the will afterwards provided, that in case either of his daughters should die before the annuities became payable, without leaving law-**[410]**-ful issue, one half of such annuity should go to the surviving daughter, her heirs and assigns for ever, and the remaining half should no longer be a charge on the estate devised to her. Then follows a devise of all the residue of his estate to his widow and executrix for her absolute use. Subsequently to his will, the testator purchased other estates called Petton and Petton Balls, and on the 14th of April, 1831, he, by a codicil to his will, devised those estates in fee to his two daughters as tenants in common.

This was the state of circumstances at the time of the marriage of Mary Davys on the 10th of April, 1832, with the defendant Charles Boucher, and, on that occasion, the testator executed a bond for 1400l., with interest on 1000l. payable immediately, and with interest on the rest, 400l., payable from his death as a portion to his daughter. It is contended that this provision was an ademption of the benefits contained in his will.

Subsequently, on the marriage of Betsy Davys with the defendant Robert Williams, at the end of the year 1832, a settlement was made by the testator of the estates of Petton and Petton Balls upon her and the issue of that marriage, and a sum of money was also advanced by him amounting to about 400l. altogether. And this advance, it is contended, adeems the provision made by the will for Betsy Davys.

The principles on which these questions turn may be shortly stated. Where a parent, or person in loco parentis, gives a legacy to a child by way of portion, and afterwards, upon marriage or any other occasion calling for it, makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by will, and a court of equity will presume he meant to satisfy the one by the other. Now, I think it may also be taken that the legacy of a portion means a legacy of a definite sum, that being, as Lord Rosslyn expresses it in *Freemantle* v. **[411]** *Banks* (5 Ves. 85), its meaning ex vi termini. Hence the bequest of a residue does not fall within the rule. Further, in order that there may be an ademption, it is required that the provisions should be ejusdem generis. Thus, in *Holmes* v. *Holmes* (1 Bro. C. C. 555), a bequest of 500l. was not adeemed by an advancement by a gift of one half of a stock of jewellery made on the occasion of the parent subsequently taking his son into partnership.

Subject, however, to those restrictions, I think it may be stated that mere difference of amount, and that slight circumstances of difference in the times of payment and the like between the portion given by will and the advancement subsequently made will not prevent the presumption that one is an ademption of the other. But, as far as my researches have extended, I do not find any instance of this principle having been extended to devises of real estate, and I think so to extend it would be to repeal that provision of the Statute of Frauds which applies to the revocation of wills of real estate. *Brown* v. *Peck*, which alone was cited for that purpose, certainly does not prove it. That case went off on a collateral ground altogether, and the only argument which it could be considered to afford is, that this difficulty was not suggested in argument, the case not requiring it, in order to produce the decision—a very slight argument certainly to found so important a position upon.

Now, if we apply these principles to the present case, it will be found that the annuities given by the will are not ejusdem generis with the provisions made upon the marriages of the two daughters. The advancement of one is by an advance of money by bond—of the other by a settlement of land and advance of money. The gift by will is an annuity as to each daughter, not certain but contingent as to amount,

depending upon the event of survivor-[412]-ship between the sisters, and of one of them dying without issue before the death of their mother, and not to be payable, at all events, until after the death or second marriage of their mother—a totally uncertain period of time.

Upon this ground I should, therefore, be of opinion that the presumption did not arise. But if it did, I think the parol evidence in the case shews also that at the time of making both advances the testator intended them to be in addition to the provisions of his will. This is abundantly clear as to Mr. and Mrs. Boucher; and though the evidence on the part of Robert Williams and his son is not in this respect so strong, yet their case is much justified by the evidence on the part of the plaintiff as to the equal provision which the testator is stated to have expressed his intention to make between his two daughters. Upon the whole, therefore, I think the plaintiff has failed in making out his case, and that the bill must be dismissed with costs.

An objection was taken at the hearing to the deposition of Mary Boucher tendered in evidence for the defendants Williams and his son. I have considered the question and have not acted upon that deposition. I do not receive it as evidence in the cause. Upon that point, the case of *Murray* v. *Shadwell* (2 Ves. & B. 401) was cited by Mr. Simpkinson; but it appears to me that that case is distinguishable from the present; for here the evidence is adduced to shew what the testator meant to do with respect to Mrs. Williams; and as the other evidence shews that he intended to leave his daughters equally provided for, Mrs. Boucher is directly interested in increasing the amount of her sister's provision.

Bill dismissed.

[413] CATTELL *v.* CORRALL. Feb. 18th, June 24th, 1839.—The conditions of sale represented that a deed under which M. C. claimed an interest in the estate was a forgery, and that the vendor had made his affidavit to that effect, and, therefore, that the purchaser should not take any objection to the title by reason of that deed. The purchaser afterwards refused to complete the purchase, brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine. In this state of circumstances, it was held by a court of law that the purchaser was precluded from rescinding the contract, on the ground that the statement of the plaintiff turned out to be untrue, and by a court of equity that the vendor, in case he could make a good title in other respects, was entitled to a decree for the specific performance of the contract, with costs.—Notes of counsel at the back of his brief, in a trial at law, admitted as evidence in a suit in equity.

[S. C. at law, 4 M. & W. 734. See further, 4 Y. & C. Ex. 228.]

In February, 1836, the plaintiff, as the owner of certain freehold property situate at Daventry, advertized the same for sale by public auction, whereupon certain particulars and conditions of sale were printed and circulated. Before, however, the sale took place, the plaintiff and defendant signed an agreement for the sale of the premises to the latter by private contract, and the defendant paid a deposit in part discharge of the purchase-money. In the agreement were comprised all the conditions of sale which had been printed for the purpose of the auction, amongst which was the following:—"That the premises are to be sold subject to a yearly rent or annual sum of 2l. payable during the life of Mary Cattell, the sister of Thomas Cattell the vendor; and which said Mary Cattell having given notice that, in consequence of a certain alleged indenture, bearing date August 19th, 1817, whereby she alleges the said Thomas Cattell conveyed all his estate and interest in the premises now offered for sale unto one Richard Webb (now deceased), and the said Mary Cattell, for the term of his the said Thomas Cattell's natural life, upon certain trusts in the said alleged indenture contained, and that no conveyance of the above premises could be made without the concurrence of her the said Mary Cattell, and who thereby declared she should refuse to execute any such conveyance, the said Thomas Cattell has declared that the said alleged indenture is a fabrication, and has made his solemn affidavit that he never executed any such indenture, and that such indenture, as far as concerns any supposed signature, or mark of the said Thomas Cattell, is a forgery; and the opinion

of Sir John Campbell, his Ma-[414]-jesty's Attorney General, and Mr. Koe, of the Chancery bar, have been taken as to the necessity of the said Mary Cattell concurring in the sale; and the opinions of both—copies of which will be produced at the sale—were in favour of the said Thomas Cattell being able, by virtue of the provisions of the recent statute for abolishing fines and recoveries, to make a good title to the said premises without the sanction and concurrence of the said Mary Cattell; and the vendor is also prepared to prove, that on the trial of a certain action of replevin in *Such* v. *The said Mary Cattell and Another*, at the last Northamptonshire Summer Assizes, the presiding Judge, Mr. Justice Vaughan, expressed himself favourably to the right of the said Thomas Cattell to convey without the concurrence of the said Mary Cattell; the purchaser, therefore, shall not make any objection on account of the said alleged indenture, nor be entitled to call for any sanction, concurrence, release or other assurance, act or deed whatever, by or from the said Mary Cattell; but if the purchaser shall think fit, in order to indemnify him or her against all actions, suits, and other proceedings, claims and demands by the said Mary Cattell, a portion of the purchase-money (not exceeding the sum of 200l.) may remain as a charge by way of mortgage on the premises, at interest after the rate of 4l. 10s. per cent. per annum, payable to the said Thomas Cattell, his executors, administrators, or assigns, and that such charges, at the option of the purchaser, shall remain on such security during the life of the said Mary Cattell, and for a period not exceeding twelve months after her decease, but the purchaser is to be at liberty at any time, by giving six months' notice in writing to the said Thomas Cattell, his executors, administrators or assigns, to pay off the said mortgage."

Upon an investigation of the title to these premises, it appeared that Samuel Cattell, the father of the plaintiff, devised them subject to the annuity of 2l. to his daughter [415] Mary Cattell, to his wife for life, with remainder to the plaintiff, who was his second son, in tail, with remainder to the testator's right heirs: that the testator died in 1817, leaving his wife surviving him, and that in the same year, and before the death of the widow, which did not occur till 1832, a deed was executed purporting to bear date the 19th August, 1832, and to be made between the plaintiff of the one part, and Richard Webb (since deceased) and Mary Cattell of the other part, whereby it was expressed that, in consideration of 10s. and other good considerations, the plaintiff granted released and confirmed to the said Richard Webb and Mary Cattell, their heirs and assigns the remainder or reversion of the plaintiff in the premises expectant upon the decease of his mother, to hold, &c., during the life of the plaintiff, in trust of their own proper authority, and without the further concurrence of the plaintiff, to let and demise the premises and to receive the rents and profits, and thereout, in the first place, to discharge the annuity of 2l. due to Mary Cattell, and to pay the expenses of all repairs, and to reimburse themselves all costs, and, lastly, to pay the surplus to the plaintiff, his executors, administrators and assigns. And the deed contained a proviso that nothing therein contained should operate beyond the plaintiff's life-interest in the property.

The defendant, in consequence of this deed, refused to complete the purchase of the premises, and brought his action against the plaintiff to recover the deposit. The plaintiff then filed the present bill to compel the specific performance of the contract, alleging that the deed was a forgery, and that the defendant had notice of it. The cause came on for hearing before the Lord Chief Baron in Hilary Term, 1837, but, inasmuch as it was suggested that the validity of the deed might be tested in the action, the hearing of the suit in equity was postponed until after the result of the action should be known. The [416] action was afterwards tried before the Lord Chief Baron, when the jury found a verdict for the defendant (plaintiff at law) for the amount of the deposit, and also in favour of the validity of the deed; subject however to several questions for the opinion of this Court sitting in banc, as to the right of the defendant, under all the circumstances, to rescind the contract. Upon these questions the Court gave judgment in Hilary Term last (see 4 Mees. & Wels. 734), holding—first, that whether the representation of the deed being a forgery were a warranty upon which the plaintiff might maintain an action or not, the plaintiff had no right to rescind the contract, because the representation turned out to have been untrue; and, secondly, that by the stipulation "that the purchaser should not make any objection on account of the alleged indenture," every species of objection to the title on the part of the purchaser, arising out of the alleged deed,

was interdicted, and he was precluded from insisting either upon the existence of the deed, or upon its legal effect and operation as a defect in the title which he had agreed to take.

The cause now came on for hearing. Both parties entered into evidence. On the part of the plaintiff his solicitor proved that he had called the defendant's attention to the stipulations as to the deed; that he had also produced to him a copy of the deed, and had offered for his perusal the opinions of the Attorney-General and Mr. Koe, and that the defendant appeared to be satisfied with the terms of the contract. On the part of the defendant, the deed was proved by Line, one of the attesting witnesses.

In the course of the cause the plaintiff's counsel offered in evidence certain notes which had been taken by the plaintiff's counsel at law, and written at the back of his brief, in an action of replevin brought against the plaintiff by Mary Cattell. The object of this evidence was to **[417]** shew that on the trial of that action Henry Line was called as one of the attesting witnesses to the execution of the deed, but that, although on his examination in chief he stated he had attested the execution of the deed by the plaintiff, yet, on his cross-examination, he admitted he had no recollection of the plaintiff having executed the deed, and that his only reason for believing he had done so was, that the names of Henry Line and his wife appeared as attesting witnesses.

The defendant's counsel objecting to the production of this evidence—

ALDERSON, B., held that the evidence was admissible, and mentioned a case in which Mr. Baron Bayley had admitted evidence of the same nature.

The cause then proceeded on the merits.

Mr. Temple and Mr. Girdlestone, for the plaintiff. First, it is not necessary, in order to make a good title to the defendant, that Mary Cattell should join in the conveyance. This was a mere voluntary deed not conveying any estate to her, but solely in the nature of a direction to her as trustee. It was a mere voluntary act revocable by a bonâ fide conveyance to a purchaser for valuable consideration: *Pulvertoft* v. *Pulvertoft* (18 Ves. 84). This point was not decided by the Court in banc, but it is worthy of consideration in determining the plaintiff's right to a specific performance. But, secondly, the ground on which the plaintiff mainly rests his case is this—that where the plaintiff in equity has a legal right to the execution of the contract, and has been guilty of no fraud or suppression, a court of equity will never refuse to grant him a decree for specific performance. In reference to the execution of con-**[418]**-tracts, where there is no fraud or suppression, there is no distinction between courts of law and equity. This Court, in its legal character, has already decided that the untruth of the plaintiff's statement as to the forgery of the deed is not a ground for rescinding the contract. In equity this court will not come to a different conclusion unless that statement was founded in fraud. Then the question is whether the plaintiff has not fairly represented, under the conditions of sale, the interest which he intended to offer for sale. If the purchaser has full notice of what it is that he is going to contract for, it is no answer to say that he has contracted for a bad title. This has been recently under the consideration of the Lord Chancellor, in the cases of *Southby* v. *Hutt* (2 Myl. & C. 207), and *Adams* v. *Lambert* (in Ch. 24th Nov. 1838), in both of which his Lordship thought that the vendor had not sufficiently stated what he contracted to sell; but in both of those cases it was admitted that if the conditions of sale fairly represent the degree of doubt to which the title is exposed the purchaser cannot, in answer to a bill for specific performance, insist on the badness of the title. [Alderson, B. But in a late case in which it was stipulated that the title of the lessor should not be produced, yet as it came out from other evidence that the title was bad, the purchaser was discharged from the contract.] No doubt if the purchaser gets evidence aliunde, he may avail himself of it; but, on the other hand, the conditions of sale may be so stringent as to preclude him from so doing; and the length to which courts of equity will go in decreeing specific performance may be judged of from those cases in which it has been held that if a purchaser contracts with notice of the existence of a lease, he is bound by it though he has not seen it; it being his duty to look at it: *Hall* v. *Smith* (14 Ves. 426), *Walter* v. *Maunde* (1 J. & W. 181), *Cosser* v. *Collinge* (3 M. & K. 283).

[419] Mr. Simpkinson and Mr. Bird, for the defendant. The question is not whether the defendant is entitled to be relieved from the contract, but whether, under

the circumstances, this is a contract of which the Court will grant the specific performance; regard being had to the rule that the party seeking such relief must not have been guilty of suppressio veri or suggestio falsi. Here, the conditions of sale are a gross misrepresentation. They begin with a positive averment that the deed executed by Mary Cattell is a forgery, and that the plaintiff has made an affidavit to that effect. The case, therefore, is one of those where the plaintiff, having made a false declaration, is not entitled to that relief which the Court, as a matter of discretion and not of right, will award to plaintiffs acting bonâ fide: *Cadman* v. *Horner* (18 Ves. 10), *Brealey* v. *Collins* (1 Younge, 317). The tenor of the agreement is not such as to put the defendant on his inquiry, but rather to put him off his guard. The plaintiff does not say he believes the deed to be a forgery, but that it positively is so; and the indemnity which he offers to give does not extend to the claims of third persons, but only to that of Mary Cattell. He clearly may object to the title, so far as it is affected by third persons. [Alderson, B. For anything that appears on the agreement, the plaintiff might be tenant in fee, whereas he is only tenant in tail, and there is an elder brother. Mr. Girdleston. The contract refers to the act for abolishing fines and recoveries. Alderson, B. Those words are too vague to be acted upon.] The point adverted to by your Lordship is another ground for refusing this relief, for it is essential that the defendant should have such a conveyance as will bar the estate tail, and that cannot be done without the aid of Mary Cattell. But it is said that this deed is voluntary; and, therefore, that Mary Cattell's interest will be barred, under the **[420]** statute of Elizabeth, by the conveyance of the premises to a purchaser for a valuable consideration. There is great difficulty in holding that, because she has a claim under that deed, not only for her rent-charge, but for all re-imbursements in respect of repairs. But supposing that the deed was voluntary, can the purchaser be compelled to take a title depending on the destruction of such a deed? *Smith* v. *Garland* (2 Mer. 123), and *Johnson* v. *Legard* (Turn. & Russ. 281), are authorities to the contrary.

Mr. Temple, in reply. The Court has never said that where there has been notice to the purchaser of a voluntary settlement, it will not decree specific performance against him. Here, there was notice that the plaintiff was dealing with a property incumbered with a voluntary conveyance; and, therefore, *Buckle* v. *Mitchell* (18 Ves. 100) will govern this case. Besides, it cannot be said that Mary Cattell was a donee under this deed. She was a mere receiver of the rents. However, the main ground on which the plaintiff relies is that there has been no suppressio veri on his part. [Alderson, B. The correct way of putting the case seems to be this: Suppose there was a waiver of the objection on the part of the defendant, on the supposition that the affidavit was true, and it turns out, without any wilful falsehood being intended, that the affidavit is false—is or is not the defendant bound by this conditional waiver when the condition is broken?] Under the contract, provision was made for the contingency of the deed being valid, and the court of law has decided that the clause in the agreement, as to that point, is sufficiently comprehensive to bind the defendant.

June 24th.—ALDERSON, B. In this case I am bound by the decision of the Court of Exchequer, already pronounced.

[421] We have decided, after consideration, that the defendant is not at liberty to take the objection to the title upon which he now relies. Upon the supposition, therefore, that the plaintiff never executed the deed dated the 19th of August, 1817, there must be a decree for a specific performance, in case the plaintiff is able to make a good title in other respects; and the cause may be referred to the Master, with a direction to that effect. But, if the plaintiff be able to do this, and, upon the facts, it seems very clear that he is, it is probably for the interest of the defendant that the Master should at once settle the conveyance; and, in that case, there must be a decree for a specific performance, and with costs.

Decree accordingly.

GIRDLESTONE *v.* STANLEY AND OTHERS. April 26th, 1839.—The commissioners under the Tithe Commutation Act (6 & 7 Will. 4, c. 71) have no jurisdiction to interfere with suits for tithes which were pending in the Court of Exchequer when the act was passed.

[S. C. 3 Jur. 382.]

This was a motion on the part of the defendants to stay proceedings in the suit until the Tithe Commissioners should have made their award pursuant to the stat. 6 & 7 Will. 4, c. 71.

The bill was brought by the rector of Alderley, in the county of Chester, against certain occupiers within that parish, for an account and satisfaction of the great and small tithes. The suits had not proceeded to a hearing, and the present motion was founded on the affidavit of the assistant tithe commissioner; stating in substance that he had appointed a day of meeting for the hearing of the several claims of the plaintiff and the defendants, at which and divers subsequent meetings, counsel had attended, and evidence had been taken on oath as to various alleged prescriptive payments, &c.; that the witnesses had been examined and cross-examined; that the meetings having commenced on the 18th January, had not concluded on the 5th February, and that they had been, from **[422]** necessity, postponed till April; that the questions were important and complicated, and that the deponent would be unable to make his award until the matters in difference had been determined.

Mr. James Russell and Mr. J. M. Mathew, for the motion. The 45th section of the act expressly provides that commissioners shall have power to stay the proceedings in suits pending. They are to be a jurisdiction to settle moduses and customary payments subject to an appeal. [Alderson, B. The suits intended by the 45th section are only such as will impede the award of the commissioners. Otherwise it would give the Commissioners the power of determining the costs of a suit in this Court. The question of costs may be more material than the question of tithes. The words "whereby the making of any such award shall be hindered" apply to all that goes before. If not, the Commissioners may have the power of determining all the boundaries of all the lands in the kingdom, whether subject to tithes or not. The words "hearing and determining the same" mean, that the Commissioners have power to determine the right on which the suit is pending, but not the suit itself. The Lord Chief Baron appears to have expressed a different opinion in *Wetherell* v. *Weighill* (ante, p. 244); but it was not necessary in the case before his Lordship to determine the point.] The suit is of great extent, involving questions as to a great variety of ancient customary payments made before the time of legal memory, farm moduses, district moduses, parochial moduses. Taking it in the limited view in which your Lordship puts it, and assuming that the Commissioners have no right to determine the suit, yet the material question in the suit is as to the validity of these customary payments, and there is no disposition on the part of the Commissioners to waste **[423]** money in litigation. On that ground, therefore, it may be expedient to grant the motion. Besides, the Commissioners say they cannot make their award till the suit is disposed of. If so, the suit does impede the award of the Commissioners.

ALDERSON, B. I entertain no doubt in the present case. I am of opinion that the motion must be refused with costs. I am not prepared to say that the Commissioner is wrong in deciding upon the validity of the moduses. He may have concurrent jurisdiction with this Court to determine that question: but the Court also has jurisdiction to determine the suit now before it. As to the extent to which the decree will go, that is altogether another question, because it may be that, before the decree is made, the award of the Commissioners may determine the question what in future shall be received by way of rent-charge in lieu of tithes hereafter to accrue due. But, with respect to tithes already due, the Commissioners have no power to make any award; and if I were to stop the proceedings in this suit the parties might be wholly remediless. This is a question to be determined in this Court, and this Court alone. So the question as to the costs of this suit is to be determined in this Court alone. And I cannot presume that the legislature would ever have dreamed of giving jurisdiction to the Tithe Commissioner to determine nice questions depending on equity pleading, or evidence affecting not only the validity of moduses but other important questions. I cannot think that such matters were meant to be decided by persons who have, generally speaking, received no legal education. But, independently of the presumed intention of the legislature, the words of the act of Parliament do not warrant this conclusion. What was the jurisdiction given to the Tithe Commissioners by the 45th section of the act? It was, that in case of any impediment to their award arising **[424]** from suits depending, they might remove those impediments for the purpose of making their award. That is not necessary here.

Incidentally, the same question may have to be determined for the purposes, both of the Commissioner and of this Court. When this cause comes to a hearing, I shall determine it upon the evidence before me. The Commissioner will also make his determination according to the evidence before him—receiving, as I presume he will, my decision, as I shall do his facts, with all respect. But the 45th section gives the Commissioners no power to determine anything but what may prevent them from making their award. For that purpose, but for no other, they may determine any question as to the existence of a modus, or any question as to the boundary of lands, or any other point in difference. If the words of the 45th section are not restrained in that manner, it would give to the Commissioners power to determine the boundary of any man's lands in the kingdom. That is the rational limit to be placed on the words of the act. If, for instance, a district modus were required to be settled, then, in order to see what lands were covered by the modus, it would be necessary for the Commissioners to have a particular power to ascertain the boundaries; but not a general power to settle boundaries. That construction gives full effect to the 45th & 89th sections. The only section which admits of any doubt is the 50th; but upon examination it will be found to have reference not to suits and differences generally, but to such suits and differences, that is, such suits and differences as prevent the making of the award. The necessity of the case may give the Commissioner jurisdiction in some cases; but it appears to me that the necessity of the case does not give him jurisdiction here.

Motion refused.

[425] MADGE *v.* RILEY. April 26th, 1839.—The "request in writing," mentioned in stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, means a private request by the party requiring the transfer under that Act: therefore, service of an order of the Court, by which the transfer was directed to be made, does not amount to "a request in writing," within the meaning of the act.

An order had been obtained that the defendant, M. A. Riley, the surviving trustee and executrix under the will of the testator in the cause, might, within three weeks after service of a copy of that order, transfer a sum of 1328l. 12s. 9d., 3l. per cent. consols, standing in her name and that of the deceased trustee, into the name of the Accountant-General of this Court in trust in this cause. And it was further ordered that service of a copy of that order on the servant of the defendant at her usual place of abode might be deemed good service.

The defendant not having complied with this order, although due notice of it had been served at her place of abode,

Mr. Simpkinson, for the plaintiff, now moved that the Governor and Company of the Bank of England might be ordered to transfer the stock into the name of the Accountant-General, in trust, as directed by the former order, and he submitted that the service of a copy of that order on the defendant amounted to a "request in writing," under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, that statute not requiring the notice to be signed by the party signing it.

ALDERSON, B. It seems to me that the order of the Court cannot be put on the footing of a request. The Court makes the order for the purpose of vindicating its own authority. The request must be by the party, though I do not know that it need be signed.

Motion refused.

[426] CLAYTON *v.* THE EARL OF WINCHELSEA. April 28th, 1839.—The rector of C. brought his bill for an account of tithes, charging that the defendants sometimes pretended that the lands were discharged from tithes by reason of various moduses, &c., and at other times that the lands were extra-parochial, whereas the defendants had divers papers and documents in their possession which would shew the plaintiff's title, and especially that the lands were in the parish of C. Plea of no titheable matters overruled.—Semble, that a plea of no titheable matters may enumerate specially all the tithes demanded, but it must deny the perception not only of each species of article, but of any one article in that species.

[S. C. 3 Jur. 819; and see p. 683, post.]

The bill, which was filed by the plaintiff as Rector of Cottingham, otherwise Cottingham-cum-Middleton, in the county of Northampton, stated that part of that parish was situate in the bailiwick of Rockingham and in Rockingham Forest, and comprised, amongst other lands, Benefield Lawn or Park and three other enclosures named in the bill. That, by an act passed in the second and third year of the reign of King William the Fourth, so much of the forest of Rockingham as was situate within the bailiwick of Rockingham was dis-afforested and enclosed. That, from time immemorial to the passing of the act, the soil and freehold of the said lawn and enclosures had been vested in the Crown, and had been held by prescription in right of the Crown free of tithes. That by virtue of the act, the lawn and enclosures had been conveyed to and were vested in the defendant, the Earl of Winchelsea and his heirs, and that other lands mentioned in the bill, which were in the same parish and had likewise been dis-afforested, were conveyed to and vested in the same defendant and in the defendant Sir Arthur B. de Capel Brooke and his heirs. That by means of the forestal and other rights and privileges of the Crown, the lands in question had for many years remained uncultivated, and no titheable matters or things had been taken from them; but that since the passing of the said act, the defendant, the Earl of Winchelsea, and his tenant, the defendant, Thomas Meadows, had occupied the Benefield Lawn and the three enclosures, and greatly cultivated and improved them, and that the defendant Sir A. de Capel Brooke had likewise occupied the other lands mentioned in the bill, and greatly cultivated and improved them. That, since the passing of the act, the defendants had respectively had growing and arising on and from the said lands and premises, so held and occupied by them respectively, as afore-
[427]-said, great quantities of corn, grain, and pulse, &c. [Here followed the allegation which was met by the plea.]

The bill then stated that there were due from the defendants considerable sums of money in respect of the before-mentioned titheable matters, and that the plaintiff had frequently applied to them to discover to him the particulars, numbers, and quantities of such titheable matters so received by them and to account for the same, but that they had refused so to do, pretending various moduses, exemptions, and discharges, &c., and also pretending that Benefield Lawn was extra-parochial, and that for that reason the tithes thereof were not due to the plaintiff. In contradiction to the latter pretence, the bill charged that various distresses had taken place upon Benefield for poor's rates and highway rates for the parish of Cottingham.

The bill then charged that the defendants have now or lately had in their possession, custody, or power, or in the possession, custody, or power of their respective solicitors or agents, divers deeds, documents, awards, maps, plans, surveys, estimates, books, accounts, receipts, and writings mentioning, or referring to, or containing some entries or entry relating to the matters aforesaid, or some of them, and in particular to the title of the Crown of England to the aforesaid land and premises, and in particular also to the said alleged moduses, exemptions, and discharges from or by which particulars, if produced, the truth of the several matters and things hereinbefore stated, and the title of plaintiff to the aforesaid tithes or some of them will appear, or may be deduced or proved or which will furnish evidence important and useful to plaintiff with reference to the matters in question in this cause, and that in particular the said defendants the Earl of Winchelsea and Thomas Meadows, have now, or lately had in their possession, custody, or power respectively, and in the possession, custody or power of their **[428]** respective solicitors or agents, divers deeds, &c., in which the said lawn or some part thereof is mentioned or described or referred to, as situate within or as part of the said parish of Cottingham.

The bill then, after suggesting that the defendants ought to set forth the schedule of the documents before-mentioned, prayed an account of the tithes.

To this bill the defendant, the Earl of Winchelsea, put in the following plea:—

That this defendant hath not since the passing of the act of Parliament, in the bill in that behalf mentioned, had growing or arising on or from any part of the lands or premises in the bill mentioned, any corn, grain, pulse, or grass, whether clover or other grass, which he has mowed or cut, or made into hay. And that this defendant hath not kept or fed on the said lands, or any part thereof, any ewes or other sheep which have been shorn or yielded any wool, nor any lambs, nor any cow which has produced calves or milk; nor kept, fed, or agisted on the lands and premises in the bill mentioned, or any part thereof, any horse or barren or unprofitable cattle, sheep

or lambs; nor kept on the said lands and premises, or any part thereof, any hens, ducks, or poultry, which have produced divers or any eggs, chickens, ducklings, or other poultry; nor hath this defendant had any fruit, or garden-stuff, growing or renewing upon the said lands and premises, or any part thereof; nor hath this defendant had growing or renewing upon the said lands and premises, or any part thereof, any wood, coppice, or plantation, from which he has cut or felled any young trees, poles, or saplings, or underwood; nor hath this defendant had growing or renewing upon the said lands and premises, or any part thereof, any other titheable matters or things, whether great or small tithes; and this defendant doth therefore plead the matters aforesaid to the said bill, and the relief and discovery thereby sought.

[429] Mr. Simpkinson and Mr. G. L. Russell, for the bill. That which is called a plea to the present bill is no more than an insufficient answer. It does not tender that kind of issue which it is necessary to tender on a plea. The question is not reduced to one simple point, but, on the contrary, ten or a dozen different issues are taken. The case of *Wing* v. *Murrells* (11 Price, 723) decides that such a complicated sort of plea is not admissible. No doubt the issues here taken all converge to the point that the plaintiff is not entitled to an account; but if that mode of framing a plea is allowable, a plea may be used in all cases. There are other objections to the plea in point of form, such that the word "and" is used instead of the disjunctive "or," and that the plural alone is used as to the titheable matters of which the defendant denies the perception; for instance, that he has not had any "sheep or lambs," "hens, ducks, or poultry," "titheable matters or things," it being evident that, consistently with the plea, he may have had one of each of these things. Again, this plea should have been accompanied with an answer to the charge of the possession of the books, papers, and documents: *Hardman* v. *Ellames* (2 M. & K. 733), *Jones* v. *Davis* (16 Ves. 265). The charge as to papers and documents is not in the usual form in this case, but is directed to particular matters, and it expressly avers that the papers and documents sought would furnish evidence important and useful to the plaintiff in the matters in question; or, in other words, would furnish evidence which would overrule the plea.

Upon that point, therefore, this case is distinguishable from *Macgregor* v. *The East India Company* (2 Sim. 454) and *Forbes* v. *Skelton* (8 Sim. 335), which perhaps may be relied upon on the other side. *Harland* v. *Emerson* (8 Bligh, N. R. 62).

Mr. Boteler and Mr. Stuart, for the plea. The plea in **[430]** substance reduces the defence to a single point: namely, that the defendant has had no titheable matters during the term stated in the bill. Negative pleas have been allowed ever since the time of Lord Thurlow: *Hall* v. *Noyes* (3 Bro. C. C. 489), *Drew* v. *Drew* (2 Ves. & B. 159), *Warrington* v. *Mothersill* (7 Price, 666). Here the plea amounts to a simple negative that the defendant has had any titheable matters or things. Admitting the particular negatives to be surplusage, the general negative that he has had any titheable matters or things will be sufficient. It is the same in the case of a general plea of no partnership, where a number of circumstances constituting the partnership are stated in the bill.

Secondly, the averment that the defendant has taken no titheable matter or things is sufficient, without adding the words "or matter or thing" in the singular.

Thirdly, it is not necessary for the defendant to answer the charge as to books and papers, that charge being merely general: *Sanders* v. *King* (6 Madd. 61), *Thring* v. *Edgar* (2 S. & S. 274), *Watkins* v. *Stone* (id. 560). If the plaintiff had made a specific charge anticipating the defence, and calling for documents removing the defence, the defendant would have been bound to answer any charge as to such documents. If, for instance, the plaintiff had alleged that though the defendant pretended that he had taken no titheable matters, yet the contrary was the truth, and the defendant had in his custody papers, &c., which would shew that he had taken such titheable matters, it would have been necessary for the defendant to answer this charge. But, according to the recent decisions, it is not necessary to answer a general charge as to papers and documents: *Baldwin* v. *Peach*.(*g*) [The Lord Chief Baron. Where **[431]** the bill is simply for an account, it is difficult to see how the charge as to books and papers can be otherwise than general.]

Mr. Simpkinson, in reply. It is not denied that there may be such a plea, as a

(*g*) 1 Y. & C. 453. The second marginal note in this case is too general.—J. C.

plea of no titheable matters. But this is not a general plea of that nature, but a plea denying a string of facts, and then throwing them at the head of the Court to draw an inference from them. *Wing* v. *Murrells* is completely in point. *Baldwin* v. *Peach* was not the case of a negative plea. It proceeded on a fact not stated in the bill, namely, that the defendant had been twenty years in adverse possession. It was, therefore, clearly unnecessary to answer any charge which the bill made, as evidence of a totally different statement of facts. [The Lord Chief Baron. If there had been a charge to meet the defence of adverse possession, as, for instance, if the plaintiff had charged that there were in the defendant's power divers letters and documents, which, if produced, would shew that he had not been in adverse possession for twenty years, the defendant must have answered that charge.] That is precisely the same principle upon which *Hardman* v. *Ellames* was decided.

THE LORD CHIEF BARON. I have formed an opinion upon this case in the course of the argument. The principles which all the cases establish, though some of them approach to the doubtful confines of it, is this: that a plea which covers every thing that the defendant is bound to answer is admissible, though framed in the negative: and here, if all the allegations of the plea made a complete answer to the bill, I should have thought it a good plea. The old practice was to put in a full answer to the whole bill, but it was afterwards held that if a party, by pleading collateral matters, as, for instance, an act of Parliament, could shew that the plaintiff had no title, he **[432]** might do so. In such case he admits the whole bill, but pleads certain matters, independent of the bill, to protect him; then, if those matters are not deemed sufficient, he must put in a full answer. The next step was for a party to put in a negative plea, that is to say, a plea negativing the title of the plaintiff, as stated on the record. It required some struggle in the courts to establish that practice, but the arguments derived from good sense at length prevailed; and it was held to be competent for the defendant to adopt that sort of plea, provided that from the point pleaded to was deduced an answer to the whole bill; as in the case of the plea of no heir. So, other matters were held to be a proper subject for a plea of this nature, though in the negative form. In the case in the House of Lords (*Harland* v. *Emerson*, 8 Bligh, N. R. 62), though the form of the plea was in the affirmative, yet, in substance, it was a negative plea, denying the plaintiff's title ex parte maternâ.

Now, what are the circumstances required to support a negative plea? They must be such as will serve as a defence for you, though you admit every thing in the bill except the matter expressly negatived. If the plea is not sufficient for that purpose, you must support it by an answer. In the case like that in the House of Lords, though you might deny that the plaintiff was heir ex parte maternâ, yet if you did not also deny that you had documents which tended to shew that he was heir ex parte maternâ, you would be required to answer a charge to that effect. The principle, therefore, is that where a party selects a part of the bill, which he denies by his plea, if there be any part which calls for a discovery as to the matter upon which he pleads, the plea is not good unless he supports it by an answer.

It was argued by the counsel for the defendants that the bill ought to have specified more distinctly the object for which the production of the documents, alleged to be **[433]** in the custody of the defendant, was sought, and that an answer ought not to be given to a charge, as to papers and documents, unless it is made in very specific terms. It is true that, in one sense, the charge in the bill is not very specific, as applied to this case. But if Lord Winchelsea had selected any of the inducements in the plaintiff's bill constituting his title, and had denied those inducements, he must have denied that he had documents to prove the statements in the bill. It is said that he has selected something else, and that, therefore, no specific denial as to that part of the bill is necessary; and, certainly, in one sense, there is ground for that observation. Here, no doubt, the charge in question is a general charge; but then it is a charge relating to the only thing required by the bill. The form of the plea shews that the bill is reduced to a mere bill for discovery of titheable matters. You admit that the matters mentioned in the bill are titheable, but you deny that you have taken any titheable matters. Try it another way. Suppose, instead of a plea, he were to put in an answer to this bill. He might say, I admit all that you have stated in your bill, except one thing. I admit your title—I admit that the lands are titheable—but I deny that I have taken any titheable matters. His answer would be incomplete without denying that he had books from which the

truth of all the allegations in the bill would appear. Now, then, reverting to the plea, if the plaintiff is not entitled to the same denial in this case, he would be without the advantage he would have had if an answer had been filed instead of a plea. If the defendant were compelled to produce the books, it might appear that he was mistaken in his plea and that he had taken titheable matters.

Upon the whole it appears to me that the plaintiff is not necessarily bound in his charge relating to papers and documents to make a separate allegation as to each matter to which he conceives those documents to apply, and that the **[434]** defendant, by selecting for the purpose of his plea, certain parts of the bill to which the charge of papers and documents does not expressly apply, is not thereby relieved from answering the general charge. No doubt, if the plaintiff charges matter to meet by anticipation the defence, he must charge specially that which would assist him upon the particular point on which he conceives the defence will rest; but as to the general main object of the bill, it is not necessary to make a specific charge, because the bill itself is a charge.

As to the other point, I think that if the defendant had pleaded generally that he had taken no titheable matters or things, the plea would have been right without further words. But if he pleads in a negative form to all the particulars stated in the bill, he must take care that the negative is pursued throughout, and that there is no negative pregnant. Therefore perhaps the allegation that he has taken "no ewes," &c., without adding words in the singular number, is not sufficient. But in overruling this plea I wish to proceed upon the broad grounds which I have already stated, and which appear to me to meet the substantial justice of the case. Should I feel any doubts upon the case, I will mention it again.

Plea overruled.

BLAKE *v.* WHITE. April 22nd, 1839.—Courts of Equity will carry into execution their orders and decrees for costs by charging the Government stock of the debtor under the provisions of the statute 1 & 2 Vict. c. 110; and, for that purpose, it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute.

[S. C. 3 Jur. 749.]

Mr. Koe, for the defendant, had obtained an order nisi on the 31st January last, to shew cause why the capital stock, now standing in the books of the Governor and Company of the Bank of England, in the name of the plaintiff, General Blake, should not be charged with the sum of 28l. 11s. 8d., the amount of the taxed costs of a **[435]** motion made in this suit by the plaintiff, which had been refused with costs. The order had been obtained on the affidavit of the defendant's solicitor, setting forth the order dismissing the motion with costs, and stating that the Master had reported the amount of the costs due, that a subpœna for the costs had been issued, that application had been made to the plaintiff's solicitor for payment of the costs, and that the deponent had used every endeavour to serve the plaintiff with a copy of the subpœna, but that he had not been able to find him. The deponent by his affidavit further stated that he had lately been informed, and verily believed, that there was stock in the public funds exclusively belonging to the plaintiff.

Mr. Cooper, for the plaintiff, now shewed cause. First, it may be doubted whether it was the intention of the legislature, in framing the stat. 1 & 2 Vict. c. 110, to extend the summary provisions for charging stock to Courts of Equity. For, suppose the plaintiff was trustee of the stock or had already charged the stock in favour of various persons, how is such a case to be dealt with except by a bill in equity, to which those persons might be parties? I admit, however, that the Vice Chancellor has made orders like that which is now asked for, notwithstanding this difficulty (see section 18). But, secondly, the defendant has made no application for payment of the money in the manner prescribed by the practice of the Court, and therefore the order nisi is irregular. He should have shewn by his affidavit, not only that he had used due diligence to serve the subpœna, but that the Court, being satisfied of his diligence, had granted him an order for substitution of service on his clerk in Court and at his last place of abode. His proceedings, therefore, are wanting in one particular, and the order must be discharged.

[436] Mr. Koe, contrà, contended that sufficient diligence had been used.

ALDERSON, B. The question is whether this is not like a judgment at common law, where it is not necessary to serve the party with notice of process. I think it is. The order, therefore, must be made absolute, unless the plaintiff, within a fortnight, pay the costs of the present application, together with the 28l. 11s. 8d., and interest on that sum.

Order accordingly.

GLENNIE *v.* IMRI. May 3rd, 1839.—Where an action was brought on a bill of exchange which had been given for goods sold and delivered, and the party to whom the goods were sold alleged that he had been fraudulently deceived in his contract, the goods delivered being inferior both in quality and quantity to what he had ordered: Held, that he could not maintain a bill for an account and for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill of exchange by the damages which he claimed for the alleged breach of contract, and that, as this is not the subject of set-off at law, it cannot be the subject of account in Equity.—Courts of equity will not take an account of debts one way and damages the other way.

[S. C. 3 Jur. 432.]

The bill stated that the plaintiff was, and had been for one year before the filing of the bill, the registered proprietor of the *Court Gazette*, and also had been for several years the registered proprietor of other newspapers and periodical publications. That during the said periods he had had dealings with the defendant, who was a paper manufacturer, for paper, and had from time to time purchased of him various quantities of paper to a large amount, and had from time to time paid to the defendant various sums of money, and had accepted and duly honoured various bills of exchange for paper supplied as aforesaid, and by the means aforesaid a running account arose between the parties, and was subsisting at the time of filing the bill. That the plaintiff had made various complaints of the bad quality of the paper, but continued to deal with the defendant in consequence of his promising to provide better paper, and to make good what was bad. That the plaintiff thus continuing to deal with the defendant, on the 4th of May, 1838, gave the defendant a bill of **[437]** exchange for 186l. at seven months, payable to the defendant's order; and, upon such bill becoming due, and on the plaintiff informing the defendant that the paper was then lying in the warehouse on account of its bad quality, the defendant offered to renew the bill, and he did so for 193l., the renewed bill bearing date the 19th of December, 1838. That when such latter bill was running, one of the defendant's travellers called on the plaintiff, when the plaintiff informed him, as the fact was, that he had 300 or 400 reams of the paper lying useless, and was therefore afraid to give him further orders. That the agent or traveller then assured the plaintiff that Imri was manufacturing paper equal to the best, when the plaintiff produced a *Court Gazette* and asked whether Imri could furnish paper equal to that. That the traveller said he could, and the plaintiff then gave him an order for eighty reams of that quality at 2l. or 2l. 2s. per ream. That on the day when the paper so ordered was to be delivered, the defendant's agent called with a bill for 84l. at two months, and a bill for 80l. at four months, which the plaintiff, though he had not seen the paper, accepted, relying on the quality of the paper supplied being equal to that of the sample. That after accepting and delivering to the agent such bills of exchange, the plaintiff discovered, as the fact was, that the proper quantity of paper had not been delivered, and that what had been delivered was so inferior as to be utterly unfit for the purpose required. That the plaintiff communicated this to the defendant, and said he would refuse to pay the bills, unless the defendant would change the paper or find better. That the defendant refused to take back the paper or make any allowance, and that when the first bill became due he returned it to the defendant, stating the reason before mentioned.

The bill then charged that the plaintiff had in his possession a great quantity of paper, which the defendant was bound to take back. That upon proper accounts **[438]** being taken, a balance would be found due to the plaintiff from the defendant. That the plaintiff well hoped that the defendant would have taken back the paper, &c., but that he had refused so to do, and had actually commenced an action on the

bill for 193l. That the plaintiff was induced by fraud to accept the bills for 84l. and 80l., and would not have accepted them or the bill for 193l. if he had known the paper was so inferior, or the defendant would have refused to take it back; and, as evidence thereof, the plaintiff charged that the first paper was better than the last. That the plaintiff, in consequence of these acts of the defendant, had been obliged to purchase other paper to make the *Gazette* uniform.

The bill then, after charging generally that the accounts between the plaintiff and defendant were extensive and complicated, and could not be taken at law; and also that the defendant had divers books, papers, &c., in his possession, whereby the truth of the matters stated in the bill would appear, prayed that an account might be taken of all the dealings and transactions between the plaintiff and the defendant, and of all the paper furnished to the plaintiff by the defendant, and of all sums paid by the plaintiff to the defendant on account of paper supplied, and of all the paper which the plaintiff had on hand, and that allowance might be made in respect of all paper not furnished according to sample; and that a general account might be taken and the balance ascertained and paid; and that the defendant might be decreed to take back all the paper which the plaintiff had on hand, and which was not fit for use, and that the bills for 193l., 84l., and 80l., might be delivered up to be cancelled, or that the same might stand as securities only for what was due, and for an injunction to restrain the action.

To this bill the defendant demurred generally for want of equity.

[439] Mr. Simpkinson and Mr. Stevens, for the demurrer. Independently of general rules of pleading, the plaintiff, according to his own statement, has no claim to the equitable interference of this Court. He complains of the inferiority of the paper, but instead of returning it renews the bill for 186l., and while that bill is running gives a fresh order. What right, then, has he to ask for an injunction to restrain the action on this bill? Again, this is not such a case of mutual dealings as will support a bill for an account. It is merely a case of money paid on the one side, and paper supplied on the other. *Moses* v. *Lewis* (12 Price, 502) and numberless other authorities clearly shew that a bill for an account of such transactions cannot be supported. Even in cases of fraud, it is only where Courts of law are unable to meet all the circumstances of the case that Courts of equity will interfere (Mitf. Pl. 3rd ed. p. 98). In *Kemp* v. *Pryor* (7 Ves. 237) the facts of which were very similar to the present, Lord Eldon, after much consideration, ultimately allowed the demurrer. In the first instance, his Lordship was disposed to support the bill on the ground that the plaintiff could not, under the circumstances of that case, redeliver the goods; but he afterwards came to the conclusion that the Court had no jurisdiction to entertain such a bill. That case was much stronger than the present; because, there, the fraud could not be discovered until after the arrival of the goods in America. In *Harry* v. *Sandon* (14 March, 1807) the bill alleged that the plaintiff ordered some wine of the defendant; that the wine was valued as it lay in the binns, that the plaintiff paid the amount of the valuation, and that the wine was delivered to him; that the valuation was afterwards discovered to be much too high, and that the money had in fact been obtained by fraud, the defendant having represented that **[440]** the wine in each binn was of the same quality, whereas the wine at the bottom of some of the binns was of an inferior quality; and as evidence of this, the bill charged that some of the same sort of wine had been sold to J. S., who had found it to be inferior. The bill prayed discovery and an account; and although it was argued that the fraud of the transaction gave the Court jurisdiction, a general demurrer to the bill was allowed.

Mr. Keene and Mr. O. Anderdon, for the bill. The bill alleges, and the demurrer admits, that the plaintiff was for many years the editor of other papers and periodical works besides the *Court Gazette*, and that as such editor he had various dealings and transactions with the defendant; that the defendant supplied him with paper for all those works, and that payment was made partly in bills and partly in cash; and that by these means a running account subsisted between the parties. This then is a sufficient statement of mutual dealings of a complex nature to give a Court of Equity jurisdiction to decree an account. There is no authority to shew that the nature of the account required is to be set forth in detail in the bill; and in *Wellings* v. *Cowper* (9 Ves. 473, cited) this Court went the length of saying that an account may be taken in Equity between a tradesman and his customer in all cases where there is no more than a single payment.

With respect to the other material allegations of the bill, it expressly states that the renewal of the bill for 186l. took place upon the express understanding that the plaintiff should have a proper allowance in account; that he had contemplated a cessation of dealings with the defendant, but upon the representations of the defendant's agent he was induced to give further orders and to accept two subsequent bills. The bill then states that the paper **[441]** supplied was inferior to the sample, and that the bills of exchange were obtained from him by means of fraud.

Considering all the allegations of the bill, it is submitted that a sufficient case is stated both for an account and for what is undoubtedly within the jurisdiction of this Court, the delivery up of these bills of exchange to be cancelled, or at least a declaration that they may stand as securities only for what is due. Upon all the points made by the bill, the expressions of Lord Eldon in *Kemp* v. *Pryor* are strongly in favour of the plaintiff. The bill in that case was simply for an account and for a commission to examine witnesses, and it related to one insulated transaction merely—and yet Lord Eldon in his first judgment uses these expressions, "Another point, upon which it is not by any means clear that this bill may not be maintained, is that if fraudulent conduct may either be confessed by the answer or proved, I am not sure, a person taking the articles under these circumstances has not a right to say in equity, he is entangled in so much of difficulty as to the point of rescinding the contract by re-delivery, that the articles ought not to be considered sold for any other purpose than this; that he may have an issue, if necessary; or that the quantum of damages may be settled by a Court of Equity; being incapable of being accurately settled but by an account of the sales." [The Lord Chief Baron. Does a Court of Equity settle damages?] These are the expressions of his Lordship, and the only difference between that case and the present is that there the goods, in consequence of having been sent abroad, were not re-delivered; here, on the contrary, the bill alleges that the defendant refused to take them back. It does not appear from the subsequent judgment of Lord Eldon in that case, that he altered his general opinion upon the subject, though, under the circumstances, he allowed the demurrer. Speaking of the plaintiff's case as stated in the bill he says, "The general **[442]** aspect of it is rather that of a man who made a contract of purchase, and determines to adhere to it as such. He might have defeated the contract. He might have taken to the article for which he never contracted, submitting to pay upon the worth of it; and then in an action, the value of the goods actually delivered only, not of those which should have been delivered according to the contract, could have been recovered; and if paper had been floating in the world under such circumstances, the necessity of protection might have supported a bill in this Court." Now these observations are strongly applicable to the present case, which involves several contracts, fraudulent misrepresentations in order to effect these contracts, and floating paper to secure them. In *Jervis* v. *White* (7 Ves. 413) Lord Eldon adverts to the same principles.

Mr. Simpkinson, in reply, was stopped by the Court.

THE LORD CHIEF BARON. I am of opinion that this demurrer must be allowed. The account which a court of equity adjusts must be one of debtor and creditor, and not an account of debts one way and of damages the other way. The plaintiff has given a bill of exchange for paper which turns out to be not of the quality for which he stipulated. He states, however, that he has kept the paper, and never returned it, and actually gave the bill of exchange after he knew that the paper did not suit. Under these circumstances, what is the case which he offers to the Court for an account? It is this, that he ought to be allowed to debit the defendant with an account of the paper in hand, and strike a balance on that footing. Let us see whether he could do that at law; for if he could not at law, he cannot in equity. Now, if an action were brought against him on this bill of exchange, **[443]** and he were to set up this case by way of defence, a court of law would say to him, you cannot reduce the contract, you must pay the bill and bring an action for the fraud. In cases of this sort, where no bill of exchange is given, it has been decided that if a party accepts the goods which have been purchased by him, it may be a question whether he did not accept them on a quantum valebant, or whether he ought to pay for the goods supplied and bring his action for the fraud. But it was never doubted that, where a bill of exchange is given for goods supplied, it is a separate contract. The plaintiff cannot be allowed to split that contract. If he is deceived in his contract by the party who recovers on the bill of exchange, he has no remedy in that action. It is therefore not

a case of set-off, but of breach of contract, and for that he must recover damages in another action. Now, a court of equity may, incidentally to the relief which it grants, ascertain damages. But the mere question of damages never gives a court of equity jurisdiction. You cannot come into equity for that. Then, if the plaintiff has no defence at law by set-off, how can a court of equity, on the ground of set-off, relieve him by having the account taken in this Court? It cannot be done.

Then as to that of the bill which seeks to restrain the action on the bill of exchange. A court of equity will entertain jurisdiction as to this species of relief, where the whole consideration for which the instrument was given fails. In that case the Court acts on the ground of fraud; as if a person, in consideration of a bill of exchange, agrees to send one thing in a cask, and sends another, and the party to whom it is sent returns it; then a court of equity would restrain an action brought against him on the bill. But it will not do so except where the party states such a case as would be a good defence to an action brought against him by the holder of the bill. The question, therefore, comes to this—could the party who seeks this **[444]** relief, set up the case which he now makes, as a defence to an action on the bill brought by the present holder of it, that is to say, the defendant in equity? Here the party alleges that he gave the bill in consideration of paper supplied to him, which he says turned out to be of a bad quality, but it does not appear that he ever returned the paper; or that he ever offered to return it except for the purposes of this suit. If the case were at law upon an action on the bill, the Judge would tell the jury that this was no defence to the action, and that all the party could do would be to bring his action for damages.

With respect to the plaintiff's allegation that there are complicated accounts, the mere calling them so will not be sufficient to entitle him to an account, and for the reasons I have before stated, no credit in account is due to him. All that appears is that he has imprudently given a bill of exchange for goods which he has not looked at, which he has kept in his possession, and a considerable portion of which, for any thing that appears to the contrary, he may have used.

I think this case is like that of *Kemp* v. *Pryor*, which was remarkable in this—that Lord Eldon hesitated, in the first instance, as to whether he should allow the demurrer. The ground he took was that the party could not act for himself after he had discovered the fraud. But, on the subsequent occasion, he would feel that which every common lawyer would feel on the statement of the case; that it was matter of damages, and not matter of set-off. I cannot say that if it were matter of set-off, it would necessarily call forth the jurisdiction in equity. Matter of set-off does not, it is true, take away that jurisdiction, but it calls upon the discretion of the Judge to see that the items of the account are proper for the consideration of a court of equity. There are items so complicated that a jury could not in a day take the account, and the matter would be left to the decision of an arbitrator. Such a case as **[445]** would go before an arbitrator is a proper subject of account for the Master's office; but there are other cases of a more simple nature, and which might be taken within a reasonable compass of time, as to which a court of equity would not assume jurisdiction to take the account. The ground, however, which I take in allowing this demurrer is that the subject-matter in which this account is sought to be taken is not matter of set-off, but matter of damages.

Demurrer allowed.

DIXON *v.* SNOWBALL. May 3rd, 1839.—If upon motion to confirm the order nisi to dismiss the bill for want of prosecution, the plaintiff appears and gets special leave to amend, and undertakes to file his replication, he cannot afterwards re-amend his bill upon a motion of course, although the re-amendments may be the necessary consequence of the defendant's answer to the former amendments.

[S. C. 3 Jur. 458.]

The defendant in this case having obtained an order nisi to dismiss the bill for want of prosecution, upon motion to make the order absolute, the plaintiff shewed, as special cause against the application, the necessity of amending the bill, whereupon the motion was dismissed, and the plaintiff was put to file his replication. The plaintiff afterwards moved for liberty to withdraw his replication and amend his bill;

specifying in the notice of motion the intended amendments, and, upon a special case made by affidavit, he obtained an order, dated the 3rd November, 1838, by which he was at liberty to amend his bill in the several particulars therein mentioned. The bill, which was originally of 153 folios, was by these amendments swelled out to 403 folios. An answer was put in to these amendments, but the plaintiff took exceptions to the answer. The defendant submitted to answer the exceptions. Notwithstanding these lengthened proceedings, the plaintiff, on the 28th April last, obtained as of course an order to amend his bill, and that the defendant might answer the amendments and exceptions at the same time.

[446] Mr. Simpkinson, for the defendant, now moved that the order of the 28th April might be discharged, and that the costs of this application might be paid by the plaintiff to the defendant. He contended that the plaintiff being put to file a replication amounted in this Court, as in Chancery, to an undertaking to speed the cause; that it was only on the strength of that undertaking, and upon a special case made by affidavit, that he had been allowed to amend; and that he could not, after giving that undertaking, be permitted to amend again upon a motion of course.

Mr. Dixon, contrà. Where exceptions to the answer are submitted to, it is the practice for the plaintiff, as of course, to have an order to amend, and that he may answer exceptions and amendments at the same time: 2 Fowl. Pr. 20. The present amendments are rendered necessary by what has already taken place. By the answer to the amended bill a document has been discovered, and has been produced under an order of the Court. It is absolutely necessary to amend the bill upon this.

Mr. Simpkinson, in reply, said that upon a special case being made, the Court might possibly give the party leave to make further amendments; but that after the proceedings which had taken place, it was contrary to all practice to amend upon a mere motion of course.

THE LORD CHIEF BARON (after consulting with Master Spranger). There seems to be no settled practice in cases like the present. The order to amend in the first instance is upon special application, and implies that the plaintiff has been guilty of some delay. Though the Court will pass over that, and allow time to amend, I do not see that that purges him of what was the origin of the **[447]** obligation. It seems to me, therefore, in the absence of cases upon the subject, that if, after such an order, implying that he is guilty of delay, the plaintiff is desirous of making further amendments, he must make a special application; shewing, at the same time, that the necessity of the proposed amendments has arisen from facts which he did not know before.

Motion granted.

RAWLINS *v.* DALTON. May 4th, 1839.—Where a bill which was brought for payment of an annuity secured upon real estate charged that the defendant ought to discover whether there were any prior incumbrances to the plaintiff, and if there were, to set forth their names, the nature of their claims, and their priorities, a plea setting forth the particulars of one incumbrance prior to the plaintiff's, and averring that the prior incumbrancer ought to be made a party to the suit, was overruled.—Where a plea of want of parties had been submitted to, and the bill amended by adding the required party, a plea for want of parties to the amended bill (which might have been equally available as a defence to the original bill) was overruled.—Where a bill states that A.'s is the only incumbrance, a plea averring that B. is a prior incumbrancer, without also averring that B. was a prior incumbrancer at the filing of the bill, and thenceforth so continued until the filing of the plea, will be insufficient.

[S. C. 3 Jur. 478.]

By an indenture, dated the 16th of May, 1829, the defendant Dalton granted an annuity of 495*l.* to the plaintiff, which was secured by a judgment and warrant of attorney, and, on the same day, the defendant conveyed certain real estates to Richardson upon trust, to secure the annuity. The defendant afterwards granted to the plaintiff a second annuity of 422*l.*, which was secured by indorsement on the former deed, dated the 2nd September, 1829, and charged upon the premises already conveyed to Richardson. Upon the death of Richardson, the mortgages became vested in the defendant Beavan, who was Richardson's executor.

The bill charged that Richardson was receiver of the estates as well as trustee for the plaintiff, and that upon his death considerable sums were due from him to the plaintiff for arrears of the annuity; that all charges upon the property, prior to that of the plaintiff's, had been paid off; and that if, as the defendants sometimes pretended, there were other incumbrances, they ought to set forth their names and residences, and what interest they claimed, and their respective priorities.

[448] The bill, after charging in the usual terms that the defendants had in their possession divers deeds, &c., whereby the truth of the matters stated in the bill would appear, prayed an account of what was due to the plaintiff in respect of the annuities, and payment out of the rents and profits of the mortgaged estates.

To this bill the defendant Beavan pleaded certain indentures, by which it appeared that one Sambrooke was an incumbrancer on the property prior to the plaintiff, and he averred that such incumbrance was, at the time of filing the plea, a subsisting incumbrance, "and that process is not prayed by said bill against the said T. G. Sambrooke, and he is not made a party to the said bill. All which matters and things this defendant doth aver to be true, and he doth plead the same to the said bill, and to the whole of the discovery, and to the whole of the relief thereby prayed," &c.

This plea was submitted to, and the bill was amended by making Sambrooke a party, and by the addition of several charges, to the effect that there was no mortgage or charge affecting the property in question at the time of filing the bill, save the incumbrances vested in Beaven or some of the parties to the suit; that all charges prior to these had been fully paid and satisfied; that no persons, save the parties to the suit, had or claimed any interest in the property, and that the defendants had in their power divers papers and documents which would shew that all the charges save those vested in the parties to the suit had been satisfied and ceased to exist, and that no other persons claimed any interest in the property.

To the bill so amended the defendant Beavan put in the following plea:—

This defendant, by protestation &c. doth plead to the whole of the relief prayed by the said bill, and to the whole of the discovery thereby prayed, except the disco-**[449]**-very sought by so much of the said bill as charges that all the defendants to the said bill respectively have, in their or some or one of their possession or power, divers conveyances &c. [following the words of the bill]. And for plea this defendant saith that by an indenture bearing date the 4th of April, 1829, and made between Robert H. Dalton of the one part, and Clarissa Thackthwaite of the other part, &c. [Here the plea set out an indenture, whereby, after reciting an application by Dalton to Mrs. Thackthwaite for the loan of 2000l., and that the money had been paid and advanced, Dalton conveyed all the manor described in the deed to Mrs. Thackthwaite, for the term of 150 years, to secure repayment of the debt with interest, with a power of sale in default of payment at the time specified in the indenture.] And for plea, this defendant further saith that the lands, tenements, and hereditaments hereinbefore mentioned and comprised in the said indenture, bearing date the 4th of April, 1829, are some of the lands, tenements, and hereditaments comprised in the indenture of the 16th day of May, 1829, in the said bill of complaint mentioned, and on which it is by the said bill alleged that the annuities or yearly sums of 495l. and 422l., in the said bill mentioned, are charged, and in respect of which the relief sought by the said bill is prayed. And for plea, this defendant further saith that no part of the said sum of 2000l. secured by the said indenture of the 4th of April, 1829, has been paid, and that the same, with an arrear of interest, is still due and owing, and is a subsisting charge and incumbrance on all the lands, tenements, and hereditaments comprised in the last-mentioned indenture, and that the said charge or incumbrance, and the said term of years for securing the same, are now vested in the said Clarissa Thackthwaite. And this defendant for plea further saith that process is not prayed by the said bill of complaint against the said Clarissa Thackthwaite, and she is not made a party to the said bill. All which matters and **[450]** things this defendant doth aver to be true, and he doth plead the same to the said bill, except so much of the said bill as is hereinbefore expressed to be excepted from this his plea, and to the whole of the relief thereby prayed, and the whole of the discovery thereby sought, except the discovery sought by so much of the said bill as is hereinbefore expressed to be excepted from this his plea. And this defendant humbly demands the judgment of this Honourable Court, whether he shall be compelled to put in any other answer to so much of the said bill as is herein and hereby pleaded to, and prays to be hence dismissed with his

reasonable costs, in this behalf most wrongfully sustained. And as to the rest and residue of the said bill of complaint, being so much and such part of the said bill as is, in this defendant's said plea, sought to be excepted from his said plea, this defendant not waiving his said plea, but insisting thereon, answering, says he denies that there are, or at any time were, in the possession or power of this defendant, &c., any deeds &c. [following the charge in the bill].

Mr. Swanston (with whom was Mr. Beavan), having opened the plea, admitted, in answer to a question put by the Court, that this was, in substance, a plea for want of proper parties. He mentioned *Harland* v. *Emerson* (2 Bligh, N. R. 62).

Mr. Simpkinson and Mr. E. Montague, for the bill. This plea, being substantially a plea for want of parties to an amended bill after a former plea for want of parties to the original bill, cannot be supported; it being the established practice of the Court not to allow two dilatories: *Anon.* (Moseley, 207), *Ritchie* v. *Aylwin* (15 Ves. 79). It cannot be objected that the two pleas are put in to different bills, because original and amended bills form but one record: Mitf. Pl. **[451]** 3rd ed. 242, *Atkinson* v. *Hanway* (1 Cox, 360), *Salkeld* v. *Phillips* (2 Y. & C. 580), *Ellice* v. *Goodson* (3 Myl. & C. 653). Supposing, however, this objection not to be well founded, the plea is untenable, inasmuch as it admits several of the plaintiff's allegations, and consequently does not extend to the whole relief sought by the bill. It admits, for instance, that all the existing incumbrances are vested in the parties to the suit, and that all other incumbrances have been paid off. These allegations cannot be considered as inferentially covered by the plea, though *Harland* v. *Emerson* may seem to warrant that proposition. But that case was by no means so strong as the present, because there it might be said to be immaterial whether the party was heir ex parte maternâ if the defendant made out that he was heir ex parte paternâ.

Again, admitting the plea to be good as to the whole of the relief, the question is whether it is not overruled by the answer. The discovery sought being incidental to the whole of the relief, if the defendant pleads to the whole of the relief, he cannot answer partially as to the discovery without overruling his plea. Upon this point the same principles are applicable to pleas as to demurrers: *Sherwood* v. *Clark* (9 Price, 259), *Corbett* v. *Hawkins* (1 Y. & J. 421). Now, here, the plaintiff calls for a discovery of the other incumbrancers, if any, who ought to be parties to the suit. He charges that the defendant ought to set forth where they live, what they claim, and what priorities they have. Now, we contend that the former plea was a partial answer to the discovery sought by the original bill; and that the answer so framed overrules the second plea.

Lastly, the plea does not refer to the time when the bill was filed. The plea is that the incumbrance in question is now vested in Mrs. Thackthwaite. The bill charges that all the incumbrances were, at the time of filing the bill, vested in Beavan. It is obvious, therefore, that the **[452]** plea does not cover this allegation of the bill, because the incumbrance may have been vested in Beavan when the bill was filed, and afterwards assigned to Mrs. Thackthwaite.

Mr. Swanston, in reply. This is a plea for want of parties, and it operates as a plea to the whole bill. The observations in Mitf. Pl. p. 280, shew that it is competent for the defendant to plead such a plea. But it is said that he does not allege that there was a want of proper parties at the time of filing the bill. Certainly there is not a distinct allegation to that effect, but the plea is conformable to precedent, and it is not usual to refer to the state of parties at that time. [The Lord Chief Baron. Suppose issue were taken on the plea, according to your argument, you would only have to prove that Mrs. Thackthwaite was entitled at the time of filing the plea.] We plead that by the indenture of the 4th of April, 1829, which was before the filing of the bill, the premises were conveyed to Mrs. Thackthwaite. [The Lord Chief Baron. Still the property might have been transferred. You should have alleged that the property continued in Mrs. Thackthwaite.] According to the precedents, there is in all these cases an interval of time not covered by the plea. But, at all events, this objection is cured by the allegation in the bill that no part of the sum of 2000l. secured by the indenture of April, 1829, has been repaid, and that the same, with an arrear of interest, is still due and owing, and is a subsisting incumbrance on the estate. [The Lord Chief Baron. If this had been an answer instead of a plea, that statement would not have been deemed sufficient.]

THE LORD CHIEF BARON. I am clearly of opinion that the plea must be over-

ruled, on three distinct grounds. The first is that the matter discovered in the plea is part of the discovery sought by the bill, and I never can suppose that courts of equity, which are generally governed **[453]** by the rules of common sense, can allow what ought to have been the subject of an answer, and which the plaintiff seeks to have discovered by his bill, set up by way of plea in order to defeat the bill. There is a class of cases where the relief and discovery sought by the bill are so blended that you cannot separate them, and if you plead to the relief you must answer as to the discovery. Here the party seeks to recover a certain annuity charged on lands, but upon this bill his title to receive payment of the annuity may depend on the existence of prior incumbrancers. One object of the bill is to obtain a discovery of the other incumbrancers, in order to make them parties to the suit. Ought, then, the omission to make the incumbrancers parties to be pleaded to such a bill? But at all events can it be endured that a defendant should plead the want of one incumbrancer, thereby getting the plaintiff's bill dismissed, and his own costs of the dismissal, and then be allowed to plead the same plea again as to another incumbrancer? By the same rule he might go on and plead fifty successive pleas of the same sort. It appears to me, however, that the very nature of the bill, which seeks to know who are the incumbrancers upon the estate, precludes a plea for want of parties in a case like this, and that the defendant should include in his answer to the bill the names of all whom he alleges ought to be, but whom the plaintiff has omitted to make, parties to the bill.

Another objection is that this is a dilatory, and cannot be allowed, unless the amended bill discover new matter on which the defendant may rely, in order to shew that a new party ought to be joined to the bill. If the amendment in the bill consist merely of adding a proper party, it would be contrary to principle and reason to allow a second plea of this nature, because the defendant is bound to disclose all the proper parties whom he knows of in the first instance. Accordingly, the case before Lord Hard-**[454]**-wicke was decided on that ground, although it appears that his Lordship allowed the plea to be set down for argument, to see whether there was any new matter to justify the plea.(*a*) I own I should have gone further, and should have called upon the defendant to answer by affidavit, whether there was any such new matter. At law, the rule of pleading is so strict that no plea in abatement is allowed a second time. Upon the question, whether the two pleas are to be considered as having been put upon the same record, I am of opinion (though I have heard the contrary argued in this Court) that, for certain purposes at least, the original and amended bill form one record, and that the Court may look at all the proceedings, in order to judge of the validity of the second plea.

The third ground of my judgment is that the plea omits to state that the incumbrance in question was not vested in Beavan, but in Mrs. Thackthwaite, at the time the bill was filed. To justify this defect, the counsel for the defendant relies on precedents; but I will not pay so ill a compliment to pleaders in equity as to say that their precedents are drawn in so loose a form. But if they were so, I should be bold enough to overrule them all. It is a question of grammar; and I cannot allow of one mode of construction for them, and another for others. The question put to the defendant by the bill is whether he was an incumbrancer at the time the bill was filed? and he is called upon to state who, at the time the bill was filed, was a prior incumbrancer, if any such there was. In answer to this, he sets up an incumbrancer in another person, and says that that charge is still subsisting and unsatisfied. This may be true, and yet that charge may have been in the hands of Mr. Beavan when the bill was filed. The plea must shew that it was not vested in him at that time.

Plea overruled.

[455] JONES *v.* THOMAS. April 22nd, May 7th, 1839.—The re-examination of witnesses before the Master, even upon points not previously examined into, can only take place under an order made upon special application.—Semble, that if the practice in the Court of Chancery is well settled, and there is no authority for a contrary practice in this Court, proceedings in this Court contrary to the practice in Chancery will be set aside with costs.

[S. C. 7 L. J. Ex. Eq. 66; 3 Jur. 770.]

(*a*) *Anon.*, Moseley, 207.

Mr. Metcalfe, for the defendant James Thomas, moved for liberty to re-examine before the Master certain persons, by name (see ante, p. 227), who had been examined in the cause; the Master to settle the interrogatories. He said it was not intended to examine them upon matters as to which they had been previously examined, and he insisted that this was a motion of course: *Smith* v. *Graham* (2 Swanst. 264), *Rowley* v. *Adams* (1 M. & K. 543).

Mr. Roupell, contrà, said that, in order to sustain this motion, there ought to be a state of facts before the Court founded on affidavits. He cited *Asbee* v. *Shipley* (5 Madd. 467).

Mr. Metcalfe, in reply. If these were new witnesses, we should, according to the practice in Chancery, examine them as of course, without applying to the Court at all. The object of this application is to make them new witnesses.

ALDERSON, B. If the Court is to have no discretion, where is the necessity for applying to the Court? It seems to me that, before I grant this application, I ought to have some knowledge of the facts which have been laid before the Master, so as to be satisfied of the justice of the case. I will, however, inquire into the practice of the Court of Chancery on this point.

May 7th.—ALDERSON, B. The only question in this case was, whether for the purpose of justifying a re-examination, before the Master, of witnesses who had been examined in chief, a mere motion of course, requiring no affidavit, was **[456]** sufficient, or whether the granting of such a motion was in the discretion of the Court. I intimated on the former occasion that the Court had a discretion in cases of this nature; such discretion to be exercised with much caution, if the party had been previously examined as to the same matters, but with a greater degree of liberality in case the interrogatories were to be applied to those matters only which were not included in the former examination; but even then that the Court was to see whether the facts sought to be inquired into were material, and if material, why they were not previously examined into. It was suggested, however, that, according to the practice in Chancery, this was a motion of course, and that no affidavit was necessary to support it, and, having long since learned that it is of no use to speculate on the principles on which the practice of courts is founded, it being often apparently at variance with principle, I thought an inquiry should be made as to the practice of the Court of Chancery on this point. I have, therefore, made that inquiry of two eminent Judges in that Court, Lord Langdale and the Vice-Chancellor, and I am glad to find that the view which I had taken of the practice is correct, and that it is settled by the case of *Purcell* v. *M'Namara* (17 Ves. 434), where it was held that re-examination is not of course, but at the discretion of the Court. In *Swinford* v. *Horne* (5 Madd. 379) Sir John Leach came to a different conclusion, but that decision is not consistent with the practice. I must therefore refuse this motion with costs, the party not having complied with the practice: and, in case the motion is repeated, I shall expect to have an affidavit as to the grounds of the intended examination, and why, if it was material in the cause, it was not entered into in the course of the proceedings before the decree.

Motion refused.

[457] July 1st.—On this day the cause came on for further directions.

The Master having reported against the defendant James Thomas, upon the inquiry as to the 300l. note (see ante, vol. 2, p. 222), and that upon the account taken there was a balance due to the plaintiff, and that he had taxed the bill of costs of the same defendant from 215l. down to 50l., it was ordered that the Master's report should be confirmed, and that the money found due from the defendant to the plaintiff should be paid into Court; that the defendant should pay to the plaintiff all the costs of the suit, that all the deeds and documents in the Master's office should be delivered up to the plaintiff, and that the defendant should, on oath, deliver up all the others in his possession.

MATON *v.* HAYTER. June 4th, 1839.—Witness examined generally at the hearing as to the fact of occupancy and perception of titheable matters, ordered to be examined before the Master as to the particulars of the produce of the farm, and the quantity of titheable matters taken.

[S. C. 3 Jur. 769.]

Motion that the plaintiff might examine T. Scott, in support of a charge taken in by the plaintiff before the Master, notwithstanding his having previously been examined as a witness for the plaintiff at the hearing. The bill was filed by the impropriate rector of Banbury, for an account and satisfaction of tithes. The evidence of the witness had been read at the hearing, to prove the defendant's occupancy, and his having had titheable matters, but he was not examined as to any particular account. It appeared, however, from information received by the plaintiff's solicitor since the coming in of the answer, that Scott, who had been the defendant's servant, could give an account of the titheable matters taken; and as the defendant, by his answer, stated his inability to give such account, the evidence of Scott was necessary in support of the plaintiff's case.

[458] The motion was supported by the affidavit of the plaintiff's solicitor, who stated that he had been informed, and verily believed, that Scott was the only person who could give a correct account of the produce of the farm, and the titheable matters taken.

Mr. Boteler, for the motion, cited *Vaughan* v. *Lloyd* (1 Cox, 312) and *Rowley* v. *Adams* (1 M. & K. 543).

Mr. Koe, contrà, said that the proposition of the plaintiff was in substance to re-examine the witness as to points which he had before deposed to, which could not be done: *Smith* v. *Althus* (11 Ves. 564), *Jones* v. *Thomas* (ante, p. 455). At all events, the plaintiff knew before the hearing that the witness was the defendant's servant, and he might then have examined him as to the proposed points. Besides, the affidavit in support of this motion was not positive, and was therefore insufficient.

The Lord Chief Baron. The affidavit that the deponent "verily believes," is entitled to some credit in the absence of a contrary affidavit. It is in the discretion of the Court to grant this motion, and it appears to me there are good grounds to do it. The examination in chief did not require the evidence now sought for, and accordingly it was not given: the examination therefore will not be as to the same points as before, and the motion must be granted; but let the Master settle the interrogatories.

Order accordingly.

[459] Bailey *v.* Dennett. May 30th, 1839.—The Court will not entertain a bill by a husband to recover property left to his wife, without making her a party to the suit, although the amount of the property may be under 200l.—Where the Court sees that a suit cannot effectually be brought to a hearing without certain parties, it will visit the costs arising from the defect of parties upon the party through whom the defect was occasioned, whether the objection for want of parties be taken by the answer or not.

[S. C. 3 Jur. 844.]

The bill was filed to obtain payment of a legacy of 50l. which had been left to the plaintiff's wife. The wife was not a party to the bill, and it appeared that she was separated from her husband, and living with her father, who was one of the trustees and executors under the will, and who insisted by his answer on a claim for maintenance of the wife as a set-off against the 50l.

The defendants by their answer submitted that the plaintiff was not entitled under the circumstances stated in the bill, to relief in the form prayed by the bill, and craved the same benefit of this objection as if they demurred or pleaded to the bill.

Evidence had been entered into, witnesses examined, and publication passed, and the cause now came on for hearing, when

Mr. O. Anderdon, for the defendants, objected that the wife ought to have been made a party to the suit, and that as the plaintiff could not proceed to a hearing without amending the record, the defendants were entitled to the costs of the day, even though the Court should be of opinion that they had not sufficiently raised the objection by their answer. Upon the point as to costs he cited *Attorney-General* v. *Hill* (3 Myl. & C. 247).

Mr. Keene, for the plaintiff. The bill was filed on the assumption that the wife could not be interested in this legacy; but, whether interested in it or not, *Foden* v. *Finney* (4 Russell, 428), is an authority to shew that, the amount being under 200l.,

the Court will not exercise any equity in her favour. If, however, the Court should be of opinion that she ought to be a party, the bill may be amended by **[460]** making her a co-plaintiff. The defendants, however, will not be entitled to their costs, not having raised this objection by their answer: *Mitchell* v. *Bailey*,(*a*) *Court* v. *Jeffery* (1 S. & S. 106). In the case which has been cited on the other side, the relators themselves asked to have the cause stand over to remedy the defect of parties.

Mr. Anderdon, in reply, observed that *Foden* v. *Finney* had been overruled by *Brett* v. *Greenwell* (ante, p. 230).

ALDERSON, B. In the cases before Sir John Leach, the objection was not taken by the answer, and the bill might not be so completely objectionable on the face of it as the present. Here the plaintiff, by his own bill, shews that there is no foundation for it in its present form. The only question therefore is whether, by the answer, his attention was not sufficiently pointed to the defect, so as to enable him to see that some objection of this nature would be taken at the hearing. I think, considering the frame of the bill, that the answer is sufficiently explicit; and, therefore, even upon the rule acted upon in the cases before Sir John Leach, I should be of opinion that the defendants are entitled to their costs. But I confess I am of opinion that the more wholesome rule is that which has been adopted by the Lord Chancellor, namely, that where the Court sees that the cause cannot be brought to a hearing by reason of a defect of parties, that party shall be made to pay the costs by whose means the defect has occurred.

It was ordered that the cause should stand over, with liberty to the plaintiff to amend his bill by adding a co-plaintiff or otherwise, as he might be advised.

[461] The bill having been amended simply by making the wife a co-plaintiff, the cause again came on for hearing.

A husband filed his bill to obtain payment of a legacy left to his wife, but omitted to make her a party to the suit. Upon the cause coming on for hearing the objection for want of parties was taken, and the plaintiff had leave to amend his bill, which he did by simply making his wife a co-plaintiff, without altering the record in any other respect. Upon the cause coming on again for hearing: Held, that this was a new record, and that no issue being joined upon it, the cause could not be heard.

July 3rd.—Mr. O. Anderdon, for the defendants, now objected that the cause could not be heard, as no issue had been joined on the record as now framed. He contended that the record, as it now stood, was entirely a new record, to which no answer had been put in, and he referred to the remark of the Lord Chancellor in the case of *Milligan* v. *Mitchell* (1 Myl. & C. 443), in reference to the amendment of a record, by adding plaintiffs subsequent to the examination of witnesses. "The plaintiffs having taken the original record from the Court and introduced a totally new record, how could these witnesses, supposing them to have sworn falsely and their depositions to be read, be indicted for perjury? They are depositions in a cause in which the record no longer exists."

Mr. Keene, for the plaintiff. In *Milligan* v. *Mitchell* the order to amend was general, and, besides the alteration as to the parties, considerable new matter was introduced into the bill. Here the alteration is confined to that of making the wife a plaintiff; which is a mere matter of form. The husband is the substantial plaintiff; and if the wife had been joined originally as a plaintiff, she could not have called for an answer separately.

ALDERSON, B. I cannot draw any distinction between this case and other cases of the same sort. This is, in fact, a different suit from that which was originally commenced. It appears to me that the Lord Chancellor has decided the point. I thought, at first, that his opinion might have reference to the alteration in the charges of the bill; but, upon further examination, I think it refers only to the alteration in the parties. The objection, therefore, must prevail.

(*a*) 3 Mad. 61; but see *Hill* v. *Kirwan*, Jac. 163.

[462] KEYS *v.* WILLIAMS. May 4th, 28th, June 14th, 1839.—Where the assignee of a bond-debt had obtained from his debtor an equitable mortgage by way of collateral security, and such security having been sold under a decree of this Court, the produce of the sale was insufficient for payment of the full amount of the debt: Held, that the creditor was not entitled to have the balance paid him under an order of this Court, but must resort to his remedy at law, by bringing an action on the bond in the name of the assignor.—But semble, that where a bond has been the subject of assignment, this Court will exercise jurisdiction, in special cases, to order payment to the creditor of the money due upon the bond; though, quære, whether it will make such an order in the absence of the assignor?

By the decree made on the hearing of this cause,(*a*) it was referred to the Master to take an account of what was due to the plaintiff for principal and interest, upon the security of the bond in the pleadings mentioned, which had been assigned to the plaintiff, and to tax the plaintiff the costs of this suit, including such costs incident and preparatory to the preparing of the draft mortgage and warrant of attorney in the pleadings also mentioned, as the plaintiff would have been entitled to in case the defendant had executed the mortgage. And it was ordered that the defendant should pay the plaintiff what should be found due to him for such principal, interest, and costs at the time and place in the decree mentioned. And, in default of payment within the given time, it was ordered that the estate and premises comprised in the indentures of lease and release mentioned in the pleadings, and also the policy of insurance, should be sold as the Master should direct, &c.

In pursuance of this decree, the Master reported the sum of 350l. to be due for principal secured on the bond, and 53l. for interest, and that these sums, together with the costs, amounted altogether to 510l. 17s. 3d., which sum not being paid at the appointed time, he had sold the estate and policy of insurance, but that the entire produce of the sale amounted to no more than 140l.

The cause now coming on for further directions,

Mr. Simpkinson and Mr. Wilcock, for the plaintiff, submitted that the sum of 140l. should be paid to him; that it should be referred back to the Master to compute subsequent interest and to tax subsequent costs; and that **[463]** such subsequent interest and costs, together with the balance already due, should be paid to the plaintiff.

Mr. Spurrier, for the defendant, said that the Court would not exercise any jurisdiction to compel payment of the balance due upon the bond, but would leave the party to bring his action at law in the name of the assignor. He considered that a Court of Equity, in this and many analogous cases, would give relief only to the extent to which relief in equity was necessary, and that beyond this the remedy was solely at law.

THE LORD CHIEF BARON, entertaining some doubts whether this proposition was true to the extent contended for, directed the defendant's counsel to mention the case again and produce some authorities on the point.

May 20th.—On a subsequent day, Mr. Spurrier mentioned *Sutton* v. *Stone* (2 Atk. 101), *De Ghettoff* v. *London Assurance Company* (4 Bro. P. C. 436, Toml. ed.), and *Motteux* v. *London Assurance Company* (1 Atk. 545), as involving the doctrine for which he contended. The case of *Gardner* v. *Parker* (3 Madd. 184) must have proceeded on the same principle, otherwise the plaintiff would have been entitled to make the obligor of the bond a party, as well as the executors of the donor of the bond. It must have been thought by the counsel and Court in that case that the remedy could not have been fully worked out in equity. It is evident the bill was only brought for a decree to permit the party to proceed at law in the name of the executors of the donor. In *Cator* v. *Burke* (1 Bro. C. C. 434) the point seems to be clearly settled. The Burkes give a bond to Hargrave, and Hargrave **[464]** gives them a counter bond. Hargrave assigns to Cator, who comes into equity and asks payment as against the Burkes and Hargrave. Lord Loughborough asks, why he comes into equity? The plaintiff's counsel do not suggest that he is in equity the assignee of a chose in action, but that

(*a*) See the case reported, ante, p. 55.

if the counter bond is set up at law it will be a fraud, and therefore they seek their whole relief in equity. The bill, however, was dismissed; Lord Loughborough observing that the plaintiff had mistaken both the law and the equity—First, in supposing that the holder of a bond might, where there was no discovery to be made, have a different relief in equity from what he could have at law; and, secondly, in supposing that the fraud, as to the counter bond, might not be made available at law. He added that when the bill was dismissed, the plaintiff might bring his action in the name of the Hargraves; but that if a bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that was given. That case, therefore, is an authority to shew that an assignee of a chose in action, proceeding simply in the character of assignee, has no right to come into equity except to remove obstacles to his recovering at law. But if the Court should be against the defendant on that point, then, as this is the case of a chose in action which has been the subject of assignment, the assignor must be brought before the Court as well as the assignee; and this objection is not made too late, inasmuch as it is not necessary for the defendant to raise it on the pleadings.

Mr. Simpkinson, in reply. In this case an equitable mortgagee obtains a decree for sale, the Court directing an account of what is due for principal, interest, and costs. If the money produced by the sale is more than sufficient to pay the debt, the surplus is paid to the defendant. If it is not sufficient, it follows, by parity of reasoning, that the Court having taken upon itself to decide what is due, **[465]** and having sold the pledge, which is a collateral security, will not do justice by halves, but will decree payment of the deficiency to the mortgagee. In *Cooke* v. *Wiggins* (10 Ves. 191), where a husband executed a bond for securing an annuity to the wife during their separation, and the trustee of the bond had refused to bring an action upon it without an indemnity, the Court of Chancery ordered actual payment of the arrears of the annuity to the wife. Here, in the same manner, the Court has jurisdiction over the whole demand. There are two securities for that demand, and the Court may enforce both.

THE LORD CHIEF BARON. I shall take time to consider this case. The case of *Cator* v. *Burke* has certainly some resemblance to the present, but the point of difference is that there the bond was not actually assigned to Cator, but deposited with him; and the object of the bill was to prevent the setting up of the counter bond—in other words, to turn an unassignable into an assignable security. The whole equity was between the co-defendants. The bond could never be considered more than an unassignable security. The case, therefore, in that respect, is not like the present. As to the want of parties, I think the defendant is right in conceiving himself at liberty to make the objection now.

June 4th.—THE LORD CHIEF BARON said he wished to look at the prayer of the bill. Upon the question of parties, his Lordship mentioned *Brace* v. *Harrington* (2 Atk. 235) and *Ray* v. *Fenwick* (3 Bro. C. C. 25), observing that it appeared to be Lord Hardwicke's opinion that it was not necessary in all cases where the whole interest in a bond was assigned to make the obligee a party. Upon the general question his Lordship referred to *Coles* v. *Jones* (2 Vern. 692).

[466] Mr. Spurrier. That case is very inaccurately reported by Vernon: and, at all events, it appears from the registrar's book that the defendants expressly submitted to the jurisdiction of the Court.

June 14th.—THE LORD CHIEF BARON. I have looked carefully at the prayer of the bill, and I am of opinion that it makes no part of that prayer that whatever balance should upon taking the account be found due to the plaintiff, should be paid from the remaining estate of the defendant; besides, the bill sets forth a power of attorney, which makes it unnecessary for the party who holds it to apply to a court of equity for that purpose. I cannot, therefore, direct that the money shall be paid by the defendant which was due upon the bond. The money which was raised by the sale of the mortgaged estate must of course be applied to the payment of debt and costs as far as it will go; and the plaintiff must seek his remedy in a court of law for the balance. But although I say this, in this particular case, I would not have it understood that I altogether accede to Mr. Spurrier's argument that a Court of Equity will in no case afford a remedy for the purpose of recovering money assigned upon a bond. I think that such a principle can hardly be taken for granted as a general principle, and that it is not consistent with the grounds upon which a court of equity

makes such securities available, nor with decided cases. There are cases in the books where a court of equity has given effect to the assignment of simple contract-debts, and afforded a remedy at equity for their recovery. I have found a case in the Cases in Chancery where debts to a considerable amount were assigned under two different assignments, and the parties were decreed payment of the debt so assigned. I do not mean to say that in ordinary cases, where a party has an easy remedy by suing in the name of the assignor, a court of equity would interfere to afford **[467]** a remedy; but at the same time, I would not have it considered as a general principle that a court of equity will in no case furnish a remedy within itself for giving effect to an equitable assignment.

THE REV. THOMAS LOVICK COOPER, *Plaintiff;* AND JOHN BYRON AND OTHERS, AND JOHN BLADES AND OTHERS, *Defendants.* April 9th, 12th, 13th, May 13th, 14th, 15th, July 4th, 1839.—A modus of 4d. per acre for ancient pasture lands in the hands of an outdweller, the land continuing in pasture, may be good; but where in a suit brought to establish such a modus there was evidence that payments of 1s. per acre had been made by inhabitants as moduses, and that on an issue directed in a tithe suit, the jury had found a modus of 12d. per acre for newly converted land, as well as 4d. per acre for ancient pasture; and where also it was admitted that the greatest part of the land alleged to be ancient pasture had been at one time under the plough, and it was clear that the quantity of land called ancient pasture had greatly varied from time to time: Held, that these and other circumstances which came out in evidence were inconsistent with such a modus as that sought to be established; and the Court refused to direct an issue to try the existence of such a modus.—Land must have continued from all antiquity in pasture to support a modus for ancient pasture, and it is a contradiction in terms to call that ancient pasture which has been for a certain number of years arable and in the last year converted into pasture, merely because it was originally ancient pasture.—A modus may exist that certain lands in a parish have from time immemorial, when in pasture, and occupied by an outdweller, been liable to pay 4d. per acre for all manner of tithe.—A modus that foreigners pay 4d. an acre for ancient pasture land, and 12d. for new converted land is bad.—The probability of the existence of a modus may be judged of from the value of money at the time of legal memory; and therefore if it appears that the modus alleged is nearly equal to the value of rent at that time, this evidence is strong to shew the non-existence of such a modus.

[Reversed 1844, 11 Cl. & F. 556; and see 4 Y. & C. Ex. 269.]

Bill by the rector of Mablethorpe St. Mary cum Staine, in the county of Lincoln, for an account and satisfaction of the great and small tithes for certain pieces or closes of pasture land belonging to certain farms in the occupation or possession of the defendants, and situate within such part of the above united parishes as is called Mablethorpe St. Mary.

The defendants, by their answers, denied the plaintiff's title to those tithes, alleging that before and during all the time of their respective occupation of such lands, these defendants respectively have been outners of the said parish, and have severally dwelt and resided, and do now dwell and reside, in the several parishes and places herein-**[468]**-after mentioned, that is to say, this defendant, John Byron, in the parish of Saleby, in the county of Lincoln, &c., and that no one of these defendants has at any time, during the period in the said bill in that behalf mentioned, dwelt or resided within the said parish of Mablethorpe St. Mary cum Staine; and these defendants have been informed, and believe, and hereby shew, and doubt not but they shall be able to prove that, within that part of the said united parishes which hath been and still is called and known by the name of Mablethorpe St. Mary, there hath been from time whereof the memory of man is not to the contrary, and still is, an ancient and laudable custom, that if any person dwelling out of the said parish of Mablethorpe St. Mary occupies or takes to farm any pasture ground, being ancient pasture ground, lying in the said parish of Mablethorpe St. Mary, he shall pay, and of right ought to pay, and hath paid to and for the use of the rector for the time being of the said parish of Mablethorpe St. Mary, down to the union and incorporation of the said parishes of Mablethorpe St. Mary and Staine, and from thenceforth, and always afterwards, down

to, and at the present time unto and for the use of the rector for the time being of the said parish of Mablethorpe St. Mary cum Staine, upon every first day of August in each year, or as soon after as demanded, the yearly sum of 4d. an acre for every acre of such ancient pasture ground, and so in proportion for a greater or less quantity than an acre thereof, as a modus, and in lieu and full satisfaction of and for all tithes yearly arising upon every such respective acre, or greater or less quantity than an acre thereof; and that the several rectors so entitled for the time being, save as hereinafter mentioned, have always accepted and received the same accordingly. And these defendants further say that the boundaries of the said two several parishes united in the said parish of Mablethorpe St. Mary cum Staine are and have always **[469]** been well known and clearly ascertained; that the lands situate therein, which are ancient pasture lands, are and have always been well known to and easily distinguished by all persons acquainted with the said parish; and that the several pieces or parcels of land comprised in the first schedule to their answer, and in the occupation of these defendants respectively, as hereinbefore mentioned, are all and have at all times been reputed to be ancient pasture land, and recognised and admitted to be entitled to such privilege of exemption from tithe when held under such circumstances as aforesaid.

The defendants further alleged that it had always been customary, when any part of the lands, being ancient pasture lands, had been ploughed up or meadowed, that they should pay full tithes or a composition while so used; but that, on such lands being laid down again and used as pasture, the lands were again exempted from the tithes, and the modus revived.

In the first of the schedules annexed to their answers the defendants set forth a list of the several closes held by them in the parish of Mablethorpe St. Mary cum Staine, with the quantity of land contained in each for which they claimed exemption from tithes as being ancient pasture lands.

The plaintiff in support of his case relied on the depositions for the plaintiff and other proceedings in various former suits brought by successive rectors of the parish against the occupiers. The nature and effect of the proceedings in those suits is stated in the judgment. The proofs entered into by the plaintiff as to this part of the case were as follow:—The depositions for the plaintiff in *Ashfordby* v. *Purley*, filed M. T. 15 Car. 2; the like depositions and the decree (dated H. T. 28, 29, Car. 2) in *Ashfordby* v. *Christopher Newcomen;* the like depositions and the decree (dated 32, 33, Car. 2) in *Ashfordby* v. *Nicholas and Thomas Newcomen;* all **[470]** the proceedings in *Claxton* v. *Langton*, *Elliot* v. *Holden*, and *Elliott* v. *Holland*, which were modern suits.

Except the proceedings in these suits there was little documentary evidence on either side. Two terriers of 1674 and 1697 were proved on the part of the plaintiff, and two more modern ones on the part of the defendants. The defendants gave parol evidence, to a very considerable extent, of payments of 4d. per acre by outners for ancient pasture lands, and likewise evidence by reputation that the lands occupied by the defendants were part of the ancient pasture lands: but it likewise appeared that some of the ancient pasture lands had been ploughed up, and that the quantity of pasture had greatly varied at different times.

Mr. Simpkinson,(*a*) Mr. Swanston, and Mr. O. Anderdon, for the plaintiff, contended that it was clear upon the evidence that a certain defined district of pasture must have existed in the parish, and therefore that, as the defendants had not defined their lands, the modus was not properly laid. That it was impossible upon the evidence to arrive at any other than a conjectural conclusion as to the origin of the payment. That it had been proved that part of the lands had been ploughed, and that other pasture lands had paid tithes. That newly converted lands were not within the modus. That the uncertainty of the evidence arising from the newly converted lands had been the foundation of the last decree against the Newcomens. That it was impossible to trace the identity of the lands. That in this case reputation was the only thing to characterize the land as ancient pasture land, and that it appeared that the quantity of pasture land had greatly varied at different times. In the course of the **[471]** argument *Scott* v. *Allgood* (4 Gwill. 1369; 3 E. & Y. 1372), *Lake* v. *Skinner* (1 J. & W. 9; 3 E. & Y. 976), and *Croft* v. *Ayer* (4 Gwill. 1325; 3 E. & Y. 1361), were cited.

Mr. Boteler, Mr. Bethell, and Mr. Sutton Sharpe, for the defendants. Ancient

(*a*) The undue length to which this case would extend if more fully reported precludes the reporters from giving more than a mere sketch of the arguments.

pasture means that which was pasture in the time of Richard the First, and newly converted means land which was laid down to pasture afterwards. This modus is totally independent of the newly converted land. In one sense it is a parochial modus, and in another sense it is like a modus for particular lands. It is admitted that outners may claim a general modus. Here the contract no doubt was that the modus should revive if the ancient pasture broken up was again laid down, and such a contract is good in point of law: *Pidsley* v. *Carew* (1 Wood, 410; 1 E. & Y. 649). We are therefore not bound to make out any modus for the newly converted lands; we admit those lands pay tithes in kind, and we restrict the modus to the ancient pasture land. The modus, therefore, is in substance a modus that all lands which were pasture lands before the time of legal memory, pay 4d. an acre for tithe when used as pasture by outners. Now continuity of pasture is not necessary to support such a modus. It was held in *Brown's case* (Godb. 194; 1 E. & Y. 203) that if a modus be payable to a vicar for the tithe hay of a close which is sown with corn, and tithes in kind during that time are paid to the parson, the modus shall revive when the land is again in hay. *Wilson* v. *Mason* (3 Gwill. 974; 2 E. & Y. 240), *Hooper* v. *Andrews* (1 Roll. Abr. 120), *Simpson* v. *Hill* (1 Wood, 255; 1 E. & Y. 555), *Scott* v. *Fenwick* (3 Gwill. 1250; 3 E. & Y. 1318).

It is said that in this case the lands have not been sufficiently defined or identified. They are, however, stated **[472]** in the schedules with the greatest particularity and their identity is proved. The modus here is individual, and applies separately to the lands occupied by the defendants.

It is submitted that the suits which have been put in evidence by the plaintiff, so far from giving him assistance, materially weaken his case. In the second suit of *Ashfordby* v. *Newcomen* the defendants no doubt fell into the error of pleading the 12d. payment as a modus as well as the 4d. payment. The reasonableness of such a modus was referred to the other side of the Court, and it was adjudged to be bad. It was in consequence of that suit that the rector disputed the 4d. modus. Up to that period no rector had thought of disturbing it, but in *Claxton* v. *Langton* the 4d. modus was for the first time distinctly questioned. The bill, however, in that case was dismissed.

Lastly, supposing the Court should be of opinion that this modus is not sustainable to the extent contended for; yet, as there is evidence to shew that it may be supported in a more limited form; namely, as a modus for land continuing in ancient pasture, the Court will direct an issue as to the existence of such modus, with a view, in case a verdict shall be found for the defendants, of the modus being taken into consideration by the Tithe Commissioners under the stat. 6 & 7 Will. 4, c. 71, sect. 44.

Mr. Simpkinson, in reply. In order to get rid of the fact of the modus not having by the mode of pleading been precisely attached to the land, but having been pleaded as a modus for pasture, the counsel for the defendants are driven to contend that in point of fact, taking the whole answer together, and the evidence and the justice of the case, this modus is substantially a modus for a particular portion of land. By this line of argument they endeavour to bring this case within *Brown's case* **[473]** and that class of authorities. They contend that this is a modus for specific parcels of pasture land, not in a known district in the parish, nor throughout the parish, but for that pasture land within the parish which in the time of legal memory existed in a state of pasture. Assuming, for the purposes of argument, that the lands have been sufficiently identified, there is no evidence in this case which proves such a modus. But the lands have not been identified, though according to all the authorities they must be in such a case. They say that this must be considered as a modus covering not mere produce but specific land, and every titheable matter in a certain given case. If so, it is not enough for the defendants to say that the land in their occupation is part of the specific land covered by the modus, but they must shew distinctly and unequivocally the whole of the specific land covered by the modus: *Scott* v. *Allgood*, *Croft* v. *Ayer*, *Wood* v. *Ray* (4 Gwill. 1457; 2 E. & Y. 436), *Markham* v. *Smyth* (11 Price, 126; 3 E. & Y. 1071), *Gillibrand* v. *Scotson* (4 Price, 267; 3 E. & Y. 839), *Rudd* v. *Champion* (1 Younge, 173). Now, in this case it is imperatively necessary that the lands covered by the payment should be described, because they do not consist (according to the defendants' argument) of that kind of known division of a parish which speaks for itself, but of a portion of the parish which has acquired the name of

ancient pasture, but which cannot possibly be distinguished from the other pasture, and of which it is in evidence that the aggregate quantity has been greatly increased, and the component parts continually blended with other lands.

July 4th.—THE LORD CHIEF BARON. This was a bill filed by the Rector of Mablethorpe St. Mary cum Staine, against certain occupiers within that parish, for the tithes of pasture **[474]** land in their occupation. The defendants by their answers have pleaded a modus which is in substance this: That there is and from time immemorial has been within that part of the parish called Mablethorpe St. Mary's a laudable custom that, if any outdweller take ancient pasture ground, he shall pay a modus of 4d. an acre, and so in proportion, on the 1st of August, in lieu of all manner of tithe; and that if any of the ancient pasture be once ploughed up or meadowed, it shall, when restored to pasture again, pay 4d. the acre in the hands of such outdweller. They say further that the ancient pasture land in the parish is well known and easily distinguishable from other lands.

This is substantially the modus under which the defendants seek to cover a portion of the lands occupied by each of them, some of which are ancient pasture without interruption, others ancient pasture broken up formerly, but restored to the state of pasture, and so again covered by the modus.

The first thing to be considered is the meaning of the words ancient pasture.

The first and popular sense is that of ancient pasture as contrasted with modern. This sense does not necessarily include a state of pasture beyond legal memory. Pasture may well be called ancient which has been so for a hundred years, in comparison of that which has been made so within recent memory.

This cannot be the sense of the words ancient pasture as used in pleading their modus. If it be the sense, the modus is clearly bad, not merely for the uncertainty of the language and of the time when the modus attached upon them, but from the evident absurdity of a contract intended to apply to lands that might in future times become ancient pasture, according to no definite rule for measuring its antiquity, but to the fluctuating judgment of men in different ages to come.

[475] There is another sense of the words which seems to me the true sense, and the most consistent with the legal use and understanding of them, and that is, that the antiquity of the pasture is carried up to the time of legal memory—that is, to the time of Richard the First.

This interpretation of the words appears to me to dispose of the modus as it is pleaded. It is a contradiction in terms to call that ancient pasture which has been 100 years arable and in the last year converted to pasture, merely because it was originally ancient pasture. The quality and epithet of "ancient" cannot be applied to a substance of recent origin. The land is not now ancient pasture, because it was anciently in pasture. It must continue from all antiquity, and now remain in pasture, to support a modus for ancient pasture. Besides the finding of the jury in the case of *Ashfordby* v. *Newcomen*, that the customary payment of 4d. an acre for pasture was for ancient pasture still remaining so, disposes, in point of fact, of the modus as here pleaded, if it is to turn upon the evidence; as it surely cannot be expected that a modus should be established upon modern evidence directly opposite to the modus found by a jury in the time of Charles the Second, upon the trial of an issue involving the same question.

The counsel for the defendants, aware of these objections, have endeavoured to support the modus by an interpretation that, when duly considered, makes the definition of the word ancient, as well as the antiquity of the pasture, altogether immaterial. They have severally, and very ingeniously, argued that the modus is not for pasture, but for the land when in pasture—that the lands which are covered by it are well known, and go by the appellation of ancient pasture, but are not necessarily of that character—that these words mean no more than to indicate a portion of the lands in the parish, the quantity, position, and boundaries of which lands are well known, and which lands, from time immemorial, have **[476]** been covered by a modus of 4d. an acre when in pasture, and in the occupation of an outdweller. This mode of interpreting the modus as pleaded calls upon me to treat it as if it had been pleaded in this manner—that each of the defendants is an outdweller, and occupies certain lands, specific in quantity and description, which lands have, from time immemorial, when in pasture and occupied by an outdweller, been liable to pay 4d. an acre as a modus for all manner of tithe.

I am not prepared to say that a modus so pleaded would not be good in law. Nothing is more common than a modus for land in a certain cultivation, which pays tithe in kind when otherwise cultivated. There may be a modus for hay when tithes in kind are paid for grain, and so of other matters. And it is too late, after the case of *Chapman* v. *Bishop of Lincoln* (Moseley, 266, 279; 2 E. & Y. 11), for me to deny that a modus may be good for lands occupied by an outdweller which nevertheless pays tithes in the hands of an inhabitant, whatever I may think of the reasoning upon which that case was supported.

But would a modus so pleaded have been sustained by the evidence? I think not. Through the whole mass of evidence, ancient and modern, the idea of ancient pasture is connected with the modus set up. Whereas, upon this mode of pleading the modus, it would be no answer to it to shew that the lands to which it is applied, in fact were not pasture lands till after the time of Richard the First. Neither would it be any answer to a modus so pleaded to shew that it did not apply to many portions of land in the parish that were undoubtedly ancient pasture in the legal sense of the word; whereas the modus actually pleaded necessarily involves a custom extending over all the ancient pasture lands in the parish, and the rector, upon the actual state of the pleadings, has a right to establish his claim upon the negative of that general custom. The verdict of the jury in the case of *Ashfordby* **[477]** v. *Newcomen* is inconsistent also with this mode of interpreting the modus. For that verdict confines the modus to pasture lands remaining in pasture, which implies that when once the pasture is broken up the modus is gone. And I must say, once for all, that upon the question of fact I consider that verdict of more weight than any or all of the few modern instances in which it appears that 4d. an acre has been paid for pasture recently formed, when the land has been before broken up from what has been deemed ancient pasture. Indeed, these instances, to all of which Mr. Boteler referred me, putting the verdict out of the question, would not, I think, be sufficient to warrant me in finding any such custom. They are not brought distinctly home to the knowledge of the rector; there are instances clearly the other way; and the usage is not supported by the evidence of the witnesses in the time of Charles the Second.

Upon these several grounds I cannot think that I can establish the modus, either as it is pleaded in words, or as it has been ingeniously rendered by the defendants' counsel.

But it has been earnestly pressed upon me that there is evidence to support a modus in a more limited form; namely, a modus of 4d. an acre for ancient pasture, properly so called; that is, continuing so from the beginning to the present time when in the hands of an outdweller. It has been argued that the pleadings are adapted to support that branch of the modus, and that, with reference to the Tithe Commutation Act, which will prevent the further agitation of the question, I ought to direct an issue to be tried by a jury whether there be any such modus as is pleaded, with liberty to endorse on the postea any other modus they may find, which it is said will not prevent the defendants from setting up that branch of the modus before the Tithe Commissioners, though there should be a decree against them in this suit.

[478] Now such an issue could not, I think, be directed with such an object, except at the exclusive expense of the defendants, and that expense would probably be equal to the fee-simple value of the tithes in kind. But, however that may be, I am of opinion that I ought not, in any case, to direct an issue for the purpose of giving the party an opportunity of throwing the whole of this mass of evidence at the heads of a jury, in order to take the chance of the jury finding a modus which either has not been pleaded or not been proved; and, if the evidence now before me would justify a decree establishing partially the modus they have pleaded, it appears to me that it is a duty incumbent on me in the present case to determine that question myself, and not to leave it to a jury. Far be it from me to undervalue the assistance of a jury in determining questions of fact. Even in cases where they may not be the most competent tribunal to form a conclusion of fact, they are of singular use in the administration of justice; they must come to a speedy decision, and they often cut the Gordian knot which the Judge finds it difficult to untie. But a Judge in equity is a Judge of fact as well as of law: and, in my opinion, he can, with propriety, call in the aid of a jury in those cases only, when he finds the testimony of living witnesses contradictory—when, from circumstances before him, it appears that

the investigation in equity has been partial, or when some important fact arises upon the discussion which has not been duly sifted. In these and the like cases he may very properly and usefully direct an issue. But when the whole evidence is on paper, when there is no contradiction to be reconciled, no new fact to be brought to light, and, above all, when the case is one complicated of law and fact, I am of opinion that a Judge in equity is bound to decide it himself; that he ought to be at least as competent to decide it as a jury; and that he ought not to put the parties to the expense and hazard of an issue merely to save his own time and labour.

[479] Under this impression I have made it my business since the argument, to read over the whole of the evidence with the bills and answers from the first case of *Ashfordby* v. *Purley* down to the present cause, inclusive, in order to satisfy myself whether there was sufficient evidence to maintain a modus of 4d. an acre for ancient pasture land in the hands of an outdweller, the land continuing in pasture; for that is the modus which the evidence, taken together, seems to approach the nearest.

Upon entering into this inquiry one thing is to be premised—which is that the onus probandi is cast on the party seeking to establish the modus; that it is not enough for him to raise a doubt—he must give reasonable satisfaction to the understanding and conscience of the Judge of the existence of the modus he seeks to establish.

In a case which presents such a mass of evidence from the time of Charles the Second, it would be absurd to limit inquiry to the modern evidence.

Previously to the year 1817, there have been five suits touching the tithes of the parish; and it is remarkable that in each of those five suits except the first, *Ashfordby* v. *Purley*, and the fourth, *Claxton* v. *Langton*, the modus is differently pleaded. In *Ashfordby* v. *Purley* it is pleaded as a modus of 4d. for each acre of ancient pasture occupied by foreigners. In *Ashfordby* v. *Newcomen* it is pleaded as a modus payable by foreigners for all pasture land occupied by them. In *Ashfordby* v. *The Two Newcomens* the modus is alleged to be that foreigners pay 12d. an acre for all called new-converted ground, and 4d. an acre for ancient pasture. This was, no doubt, adopted from the finding of the jury in the last preceding suit. But it was, upon a case stated, very properly decreed to be bad.

In *Claxton* v. *Langton* the first form of pleading was adopted of a modus of 4d. for ancient pasture. In *Elliot* v. *Holden* it was pleaded as a modus to cover **[480]** agistment tithe. In that case all the evidence and proceedings in the former suits were read, but the decree was against the modus.

I advert to the fourth and last suit of *Elliott* v. *Holland and Others*, that I may dismiss it once for all. The modus was pleaded as in the case of *Ashfordby* v. *Purley*. The Court made no decree for or against the modus, but directed an issue to be tried, which the then rector declined. From the evidence, it is probable that this determination was governed by his poverty, and not by his will. And with respect to the doubt entertained by the Court, I would only observe that, as it was then constituted, the evidence against a modus must have been almost conclusive to prevail upon all the members of the Court to decree against it. The conclusion to be drawn from this case is much too uncertain to have any influence upon my judgment.

To return to the other five cases, I must observe that the variety in the forms of stating the modus is at least some proof that the counsel who prepared the answers from time to time found some difficulty in reducing the conclusions to be drawn from the evidence laid before them to a certain definite form. But let us examine each of those cases separately.

In *Ashfordby* v. *Purley and Barwell* it is remarkable that the defendants, in their answers, do each deny any tithe in kind was ever paid by any occupier of lands in the parish, and when they come to give an account of the use they made of their ancient pasture, Purley says that he always used it to depasture wether sheep; excepting one year, during which his servant, contrary to his orders, and without his knowledge, turned two or three ewes upon it which had lambs. And Barwell says that he never turned anything on his ancient pasture but wether sheep and beasts. In the evidence for the plaintiff there is no suggestion that the defendants did either of them do more **[481]** than stock their pasture with barren cattle. Nothing is said of lambs or shearing of sheep.

In the evidence for the defendant most, if not all, of the witnesses swear to a modus of 4d. an acre from foreigners for all their lands, without confining it to pasture.

I think it cannot be said that the evidence on their part was adequate proof of the modus they pleaded. But it is observed that Purley, in a subsequent suit, being examined as a witness, says that the rector abandoned his claim against him, and paid him 10l. for his costs. This may be so, but on looking at the evidence, and the answers of both those defendants, it is by no means clear that the rector could claim from them any other title than that of agistment which is properly the tithe of pasture for which 4d. an acre might be a very sufficient composition. How can it be supposed that the rector meant to acquiesce in the modus insisted upon, when we find the same rector very soon afterwards attacking the same modus?

In *Ashfordby* v. *Christopher Newcomen* the modus appears to have been pleaded for all pasture lands, according to the evidence in the former case. The Court, after some difficulty apparently in dealing with the modus set up by the evidence, referred the question to a jury, who found that, by ancient and immemorial custom, foreigners paid 4d. an acre for ancient pasture remaining so, and 12d. for new-converted land, and they also found how much of each the defendants occupied. The rector having had enough of that suit, consented to a decree upon that footing. The Court was not called upon to pronounce on the legality of such a modus: but there can be no doubt that such a modus is illegal. For how can that branch of it be immemorial which applies to new-converted ground? This would be to suppose a compact in the time of Richard the First, to enable a foreigner to apply a modus to lands that were not covered by it at that time, whenever he should afterwards convert them from arable to pasture. In **[482]** such a case, as the compact is only to be proved by the usage, it would seem that the novelty, and not the antiquity of the payment, is to be the foundation of the modus. Accordingly, in the next suit by the same rector against Thomas and Richard Newcomen, the modus, as found by the jury, was pleaded as the standing modus for foreigners, and is adjudged by the Court upon solemn argument to be void. It has been very ingeniously argued at the bar that though this modern branch of the modus may be bad, it may still leave untouched that branch of it which relates to ancient pasture; and the next case of *Claxton* v. *Langton* is argued as a proof of this, in which case the modus of 4d. an acre for ancient pasture in the occupation of foreigners was adjudged to be good. As a mere matter of law, that case may be taken like that of *Chapman* v. *Bishop of Lincoln*, to have established that such a modus, well proved in fact, may be sustained in law. But the impression of that case of *Claxton* v. *Langton* is very different, when it is considered as a branch of the evidence to maintain the fact of such a modus. In that view we must look at all the circumstances, and it cannot be overlooked that the counsel in that cause, from, perhaps, too great a confidence in their law, thought proper to admit that the modus was proved as pleaded. Whereas, upon looking at the evidence it appears that it was no otherwise proved than by the same evidence which had been supposed to establish the modus adjudged to be bad. In other words, the evidence was of a custom to pay 4d. for an ancient pasture, and 12d. for new-converted land; and, what is very singular there is in the evidence in that cause a direct contradiction to the modus alleged, which seems not to have been adverted to by the counsel who made the admission. It is to be found in the evidence of James Whiting, who says that all the inhabitants dwelling in Mablethorpe St. Peter's (a distinct parish) pay sixpence an acre for all pasture occupied by them in the **[483]** parish of Mablethorpe St. Mary's. This he combines with the fact that all foreigners pay 4d. for ancient pasture, as if he considered the inhabitants of St. Peter's were not foreigners. I must say, therefore, that I by no means agree with the counsel who admitted the modus to be proved in order to raise his question of law. I do not dispute the law of the court, but I must think that, notwithstanding the admission of the counsel, the question of fact is still left an open question by the case of *Claxton* v. *Langton*.

Finally, the case of *Elliot* v. *Holden*, in which the modus was pleaded for agistment only, and was even in that limited form repudiated by the Court, cannot in any sense be relied upon in support of any branch of the modus now pleaded.

Considering these several cases, therefore, as a series of judicial decisions, they do not appear to me of sufficient force to establish the case of the defendants. But then the defendants' counsel insist that the evidence in all those cases is uniform to establish that branch of the modus that respects the ancient pasture; and I must own that I was very much struck by the forcible way in which it was urged by Mr. Bethel that, upon this particular point there was no variation in the evidence, and, moreover,

that it does not distinctly appear that the rector has ever been successful in overturning that modus of 4d. an acre for ancient pasture by foreigners, when it was singly relied upon. But after giving due weight to that observation, it appears to me that it does not justify a conclusion in favour of the modus when put in opposition to various other considerations which arise upon a review of the whole case.

In the first place, I have observed that, wherever the manner of receiving tithes has for a series of years been by compositions of money, nothing is more natural than the existence of a persuasion in the parish that these [484] payments are moduses, and this persuasion, carried through two or three generations, when all memory of payment of tithe in kind is lost, makes it extremely difficult for the rector to repel the claim. I have known several instances in which the usage was so inveterate that nothing but the clearest evidence of a state of facts, at a time anterior to all living memory, could overturn it. One remarkable instance of this sort was the case of the rector of Halsal, a parish on the sea shore, in the county of Lancaster. I believe that case is not to be found reported; but I was counsel in the cause, and can state the facts. In that case a Mr. Hollingsworth brought an action, under the statute of Edward the Sixth, for not setting out the tithe, and it was set up against him that there was a modus which covered the whole parish of so much an acre for upland, and so much for downland. This was proved for many generations; there was no living memory to the contrary; the proof of it was about the strongest I ever remember. The rector sought to overturn it. It was found that the acreage, received by the rector, amounted to 1300l. a-year. Upon searching the earliest records it was found this was not of sufficient importance to come under Pope Nicholas's taxation; neither was it found by the investigation, which took place in the time of Henry the Eighth; it was not in the Valor Ecclesiasticus, or the King's Book, but it was found in the Parliamentary Survey in the time of Cromwell, a survey which was conducted with the greatest exactitude, and furnishes the most full information of that period; and it appeared, from the returns upon that investigation in the clearest manner, that the living was far below 1300l.; that it did not come to much more than a tenth part of the same. The real increase to the value had been by the cultivation of potatoes in Lancashire. This went to the jury, and the jury found in favour of the rector. The Court of Queen's Bench in which the action was brought, [485] on a motion for a new trial, confirmed that finding. Two other causes were tried afterwards, and had the same result, and the rector finally established his right. I mention that case to shew that, had it not been for the remarkable circumstance of this living, being mentioned in the Parliamentary Survey of Cromwell, he would have had no evidence at all, and the modus must have been established.

The experience of this and other cases of the like nature induces me to look with the greatest attention at all the circumstances attending a modus, consisting of a money payment, where all the tithes of the parish have for many years been paid by money.

Now, the very oldest piece of documentary evidence in this case is the Terrier of 1674, signed by the two churchwardens and the curate. After stating on what land the parsonage formerly stood, it continues thus: "The rest of the benefit belonging to the said parish is constantly paid in money, and hath been so, time out of mind, at 1s. per acre." Again, in the suit of *Elliot* v. *Holden*, almost every witness states the payments made by inhabitants as well as outners to moduses. For example, William Goodwin states that he being an inhabitant of the parish paid 1s. an acre as a modus for forty acres of pasture, that his father died at sixty-two years of age in 1771, and he heard from him as well as from Edward White, deceased, formerly a receiver for the rector that, in their time, the inhabitants paid 1s. the acre, for those pasture lands, and the outners 4d., and that they never heard or knew of any tithe in kind being paid in the parish, but, on the contrary, they always understood the moduses to be paid in lieu of all manner of tithe of pasture, meadow and arable; and, though the witness has known several instances of pasture converted into arable, he never heard of any tithe in kind taken for the same, nor does he believe that any tithe in kind was [486] ever paid within the said parish, within the memory of man.

Surely this evidence, when compared with that which is intermediate, and the facts admitted in the cause, tends greatly to weaken the effect which might otherwise attach to any particular species of money payment, however uniform.

Again, it is to be observed that the jury in the case of *Ashfordby* v. *Newcomen*, found upon the evidence adduced before them the modus of 12d. an acre for newly converted ground, as well as 4d. for ancient pasture. It must be presumed, therefore, that the evidence for each was equally cogent, which, indeed, appears from the depositions in that cause. Now the modus of 12d. an acre for new converted ground is given up and is clearly untenable. If, therefore, we should consider these two branches of the modus as distinct moduses, the evidence which supports the one which is insisted upon, being of the same description, of the same force, and the same antiquity as that which supports the other which is given up, it cannot be relied upon with the same confidence, nor lead with some certainty to the one conclusion as if it had not proved a fallacious guide to the other. It is open to the common remark that the evidence which proves too much proves nothing. How can I tell that both these alleged moduses, depending upon the same testimony, had not the same origin?

Again, upon looking carefully through all the evidence, it is by no means made certain that the same lands have always been subject to the modus alleged. In the case of *Claxton* v. *Langton* there are several instances proved of ancient pasture paying 1d. the acre; one in particular, where the landlord, on being applied to, refused to indemnify the tenant, who accordingly paid the sum demanded. It is admitted on all hands that the greatest part of the land now alleged to be ancient pasture has been at one **[487]** time under the plough, and that for the greater part there is no apparent distinction between that which the defendants admit not to be ancient pasture, and that which they claim to be such; so that they are driven to argue that the payment of the modus becomes itself the criterion of ancient pasture.

Again, it appears so probable upon the evidence as almost to amount to a certainty that the quantity of land called ancient pasture has increased in modern times; and though I do not much rely upon the exactitude of measurement of land at different times, yet, in that species of land where the tithe is paid by a modus by the acre, I cannot think it reasonable to ascribe to the vagueness of ancient measurement alone a difference of 200 acres in the course of a century and a half.

Upon the whole, therefore, as the utmost degree of certainty to which I can arrive from the whole of this evidence must borrow some light from probable conjecture, I own that I think it much the most probable conjecture that this payment of 4d. an acre by outners for ancient pasture was nothing more in its origin than a reasonable composition made long since the time of legal memory for the tithe of agistment. This is properly the tithe of pasture—for wool, lambs, calves and milk have nothing to do with the tithe of pasture, and if 4d. were the tithe of agistment upon old pasture, it would be very reasonable that 1s. should be the tithe upon lands converted into pasture from arable; not because the tithe of pasture was worth more upon the one than upon the other, but because the rector would lose the greater tithe upon the arable land so converted, and, therefore, exact a larger composition for the new pasture.

The farmers dwelling and having their homesteads out of the parish would very probably have driven their sheep home to be sheared and to lamb, and stocked their pasture in this parish with nothing but barren cattle, unless they **[488]** could make a composition with the rector for tithe, and thus leave him nothing to claim but an agistment tithe, for which 4d. might, for aught I know, be something more than a reasonable sum in the time of Charles the Second.

There is another topic which, although not urged at the bar, I will venture to mention, because it has had some weight with me in coming to the conclusion which I have stated.

I have said before that I do not propose to question the law as laid down in the case of *Chapman* v. *The Bishop of Lincoln*, in *Claxton* v. *Langton*, and some other cases, that a modus for foreigners may be good where there is none for residents. I am very far from quarrelling with the Judge who taxes his ingenuity to find reasons for supporting long existing usages. On the contrary, I think it is his duty, whenever he can conscientiously do so, to support the existing state of the property founded upon long usage. I will not say, therefore, that such a modus in favour of foreigners may not rest upon such a ground of usage, and strong unvarying testimony as may justify a Judge in establishing it, without any reason to be given for it than the mere fact of the usage; and if in such a case he is led by his anxiety to support the usage, to offer a reason for it that will not bear examination, it does not follow that his judgment is to be thereby impeached. But when it becomes a question of fact, whether such a

modus exists or not, I must be allowed to say that, upon the probability of the fact, and the application of the evidence, I am to be bound by my own judgment, and am not at liberty to adopt a reason which is clearly bad, merely because I find it in some reported case. Now, it appears to me that the reason given for such a modus in favour of a foreigner as it is stated in *Chapman* v. *The Bishop of Lincoln*, is a fortiori, a reason for a modus in favour of a resident. The number of actual residents in his parish must, in the fees for churchings, marriages, burials, and **[489]** other matters of a personal kind, be of some importance to the rector, and in a thinly peopled parish, where there was a difficulty of letting land, the object which might induce him to tempt a non-resident to take it must be equally, if not more efficacious with him, to prefer a resident. Every argument in favour of a foreigner must prevail with more force in favour of the resident. There may be a good reason why the rector should take a small composition to encourage the tilling of the lands, but none at all why he should give more encouragement to a non-resident than to a resident. I say, therefore, that I expect the proof in support of such a partial modus to be more strong and more cogent than that of a modus to cover the lands in the possession of any person whatever.

But let us see what favour is shewn to the foreigner by the alleged modus of 4d. an acre. What if it should appear that, in the time of Richard the First, that sum was much nearer the entire rent of the land than any reasonable composition for the tithe? It is well known that the pound troy of silver in weight was, in the time of King Edward the Third, coined into twenty shillings. In the time of Henry the Third there is reason to believe that it was no more than twelve shillings. But the standard pound is now in the Tower of London. There is a statute of Henry the Sixth, which shews that in his time the value of the pound troy in shillings did not, at all events, exceed thirty shillings; for that statute prohibits the sale of the pound troy in silver for more than thirty shillings over the fashion. This shews that in the intermediate time the pound had been coined into a greater number of shillings than twenty. The Sovereigns of England, in whom the prerogative of coining existed, continued to multiply the number of shillings into which the pound was coined till the reign of George the Third, when we find it in Acts of Parliament first brought up to 60s. and a fraction, and by the last act since the Peace, to 63s. But **[490]** I believe there was no increase beyond 59s. and a fraction, from the reign of Elizabeth down to that of George the Third. The number of 20s. going to the pound is some evidence of the pound originally consisting of that number; though, at present, it is somewhat less than the third of the pound. To find, then, the value of the shilling of Edward the Third in our present money, we must divide 63 by 20, which gives $3\frac{3}{20}$; but for the ease of computation let us suppose it to be 3 only, as it probably was, in the reign of William the Third. Now, 4d. being the third part of the shilling, it will be found by the same process that 4d. in the time of Edward the Third is equal to a shilling. But then comes another process, resulting from the vast decrease in the value of money since the discovery of the mines in America in the time of Henry the Seventh. This is most ready to be found by comparing the average prices of corn at different periods. Adam Smith, Dr. Henry in his History of England, and indeed all writers upon this subject, agree that the diminution at least was as 5 to 1 at the beginning of the last century. It is, undoubtedly, much greater now. Taking the proportions of 5 to 1 to be just, to find the value of 4d. in the reign of Edward the Third in the money of King William the Third, you must first multiply by 3, which makes it a shilling, and then by 5 which makes it 5s. Now the rent of the old pasture is said by some of the witnesses to be 8s. an acre in the time of William the Third. Reduce that into the money of Edward the Third, by dividing it first by 5, which makes $1\frac{3}{5}$ or 1s. 7d. and then by 3 which reduces it to 6 $\frac{1}{3}$rd of a penny, or rather more than $6\frac{1}{2}$d. the acre. So that this great favour to encourage foreigners made them pay a modus equal to the whole rent of the land within 2d. $\frac{1}{2}$ a farthing. This mode of reasoning was allowed by the Court of Exchequer, in a case in which I was counsel, heard at Carlisle, **[491]** and in *Askew* v. *Greenhow*, mentioned in Chief Baron Thomson's judgment in a case in 2 Price, 314.

It may be said that this argument would make many established moduses rank; and so it would if the modus depended merely on the payment within the memory of man. But a modus which would, standing alone, be rank, may be supported by shewing some other reasonable ground for it, especially as the piety of our ancestors

about the time of the Holy Wars induced them often to make great sacrifices to the Church, and often to obtain money for their expenses in the Holy Crusades.

The plaintiff, therefore, is entitled to have an account of his tithes from the period of his induction only. As he has waived any antecedent claim, I need not say anything on that subject, nor in the subordinate question raised in the argument upon the abandonment, and then the re-assertion of part of the modus in the second and third answers of the defendants to the amended bills.

Decree accordingly.

PALMER *v.* FRASER. June 1st, 1839.—A., by a deed of separation, covenanted with a trustee that he would pay to his wife, or to the trustee, for her separate use, an annuity during the separation; and, by the same deed, A. assigned leaseholds to the trustee, to secure payment of the annuity. A. regularly paid the annuity to his wife, without the intervention of the trustee. Afterwards the wife, on the faith of this separate property, borrowed money of B., who filed his bill against the husband and wife (without making the trustee a party) for payment of his debt out of the annuity. The husband then filed his bill against the trustee and B.; and the wife, stating that B. had filed his bill against him, and also that the trustee threatened to distrain for the arrears of the annuity, and praying to be at liberty to pay the arrears into Court, and to be indemnified against the costs of B.'s suit: Held, upon demurrer, that this bill was not sustainable, either as a bill quia timet in regard to the costs of B.'s suit, or as a bill of interpleader; inasmuch as B.'s suit, in its then existing frame, was not sustainable against A.

[S. C. 3 Jur. 890. See p. 279, ante.]

The bill stated that prior to November, 1826, the plaintiff married Mary Gearing; that after the marriage differences arose between them, and they agreed to separate; and that the plaintiff agreed to allow his wife as a separate maintenance an annuity of 150l. a-year.

The bill then stated that an indenture, as appeared by **[492]** a copy in the plaintiff's possession, was in November, 1826, executed between the plaintiff of the first part, his wife of the second part, and Alderman Harmer of the third part, whereby, after reciting the intended separation, the plaintiff covenanted with Alderman Harmer, that the plaintiff, his heirs, executors, and administrators, would yearly, during his life, pay or cause to be paid, to his wife or to Harmer for her use, an annuity of 150l., free and clear from all charges and deductions, on the 1st days of January, April, July and October in each year respectively. And, for more effectually securing payment of the annuity, the plaintiff thereby assigned to Alderman Harmer, his executors, &c., certain leasehold premises at Walton-upon-Thames, in trust, to permit the plaintiff to receive the rents so long as he should punctually pay the annuity, and in case the annuity should fall in arrear for thirty days, then upon trust to levy the same out of the rents, and to pay, apply, and dispose of the same to and for such person or persons, and for such ends, intents, and purposes, as the wife, notwithstanding her coverture, should by any writing under her hand order, direct, and appoint in that behalf; and for want of such appointment, into her own proper hands for maintenance, and not to be subject to the control, debts or engagements of her husband. The deed contained a proviso that notwithstanding anything thereinbefore contained to the contrary, if the plaintiff should at any time, during the joint lives of himself and Mary Palmer, be sued by Mary Palmer, or any other person on her behalf, in order to compel him to allow her, while living separate from him, any further or other sum of money by way of alimony than that which was thereby provided for her; or if the plaintiff should be legally or rightfully sued or prosecuted, for or in respect of any debt, goods, or wearing-apparel, incurred, bought, or taken up or redeemed by or for the use of the said Mary Palmer, or for or in respect of any bargain or contract **[493]** whatsoever, entered into by or on behalf of the said Mary Palmer, then and in any of such cases it should be lawful for the plaintiff, his heirs, executors, administrators and assigns, to retain out of the next and every or any succeeding quarterly payment of the said annuity, as far as the same would extend, and that Alderman Harmer, his executors and administrators, should retain out of the money which should be received by him or them, or come to him or them by virtue of the trust, all and every sums and sum

of money with which the plaintiff should be lawfully or rightfully charged as aforesaid, with all costs which he should be compelled to pay, by reason of any such action, suit, or prosecution as aforesaid.

The bill then stated that since the execution of this indenture the plaintiff and his wife had continued to live separate, and that he had regularly paid the annuity by quarterly payments, through the bank of Messrs. Drummond & Co., up to July, 1838, when the last quarterly payment was made; and that Drummond & Co. would have continued the payments, but for a letter which had been sent to the plaintiff by Mr. Poole, the solicitor of Fraser, which was in these terms: "Sir, I have been instructed by J. J. Fraser to apply to you for payment of 471l., for money advanced to your wife and interest thereon, and unless the same is immediately paid, I have instructions to bring an action for the amount without further notice."

The bill further stated that in answer to this letter, Messrs. Ostler, the plaintiff's solicitors, wrote a letter, dated the 27th June, 1838, to Mr. Poole, to the effect that if Mrs. Palmer had borrowed any money it was without the plaintiff's authority, and that under the deed of separation, an ample provision was made for her separate maintenance. To which Poole, on the 13th of September, replied that he had issued a subpœna out of the Exchequer, and was preparing a deed, creating a lien on **[494]** the separate property, and the bill would be framed so as to give effect to the lien: "After this intimation, it is hoped that Mr. Palmer will withhold all future payments under the deed, in default of which he will be held liable."

The bill then stated that Messrs. Ostler received a letter, dated the 30th of October, from the solicitors of Alderman Harmer, stating that, Alderman Harmer had been applied to by Poole on behalf of Fraser for payment to him of Mrs. Palmer's annuity in discharge of his debt. That Poole had informed Alderman Harmer that the annuity had been created under a deed of separation under which Harmer was the trustee; but that Harmer could not recollect the circumstances and had not the deed in his possession. That in answer to this letter Messrs. Ostler informed Harmer's solicitors of the state of the case; and that shortly afterwards the latter wrote to Messrs. Ostler, stating that Mrs. Palmer was very much in need, and requesting payment of 75l. the half-year's arrears of the annuity; to which application Messrs. Ostler replied that they could not advise Mr. Palmer to make the allowance. That, nevertheless, Messrs. Ostler subsequently sent to Harmer's solicitors a letter, containing this paragraph: "If you will produce the deed of separation to our agent Mr. M., we will advise our client to pay Alderman Harmer the 75l. upon his giving us a receipt." That Messrs. Ostler at the same time sent 75l. to their agent, who accordingly offered payment of that sum to Harmer's solicitors upon the terms above mentioned. That this request, however, was not complied with, but that, on the contrary, Harmer's solicitors gave notice to the plaintiff's tenants to pay the rents over to them.

The bill then charged that, before November 1838, the defendant Fraser or his solicitor well knew that Alderman Harmer was sole trustee of the deed of separation, and yet that in that month Fraser caused a bill to be filed in **[495]** this Court against the plaintiff and Mary Palmer alone, praying payment of his debt out of her annuity; and, on the other hand, that the defendant Harmer refused to accept payment of the annuity or to sign any receipts for the same, and yet threatened to distrain upon the tenants of the premises on which the annuity was secured.

The bill therefore prayed that the plaintiff might be at liberty to pay into Court in this cause and also in the cause of *Fraser* v. *Palmer* the arrears of the annuity mentioned in the bill and the growing payments, deducting the costs incurred by the plaintiff in both suits; and that the arrears so paid in might be paid over to such of the said parties as might be justly entitled to receive them, the plaintiff being ready and willing to pay such arrears so that he might be protected and indemnified by the Court; and that the defendant Harmer might be restrained from distraining on the plaintiff's tenants for the annuity, and that both Harmer and Fraser might be restrained from proceeding at law against the plaintiff to recover the arrears, &c.

No affidavit was annexed to this bill, as a bill of interpleader, denying collusion between the plaintiff and the parties to the suit.

To the bill so framed the defendant Harmer demurred generally for want of equity.

Mr. Simpkinson and Mr. G. L. Russell, for the demurrer. If this bill is sustainable at all, it can only be supported as a bill of interpleader; but a bill of interpleader must be filed by a mere stake-holder upon whom different demands are made for the same

sum, calling upon the Court to say to whom the money is to be paid; the party himself being indifferent as to the issue: and it is the essence of a bill of interpleader, that an affidavit should be annexed denying collusion. Now do these circumstances concur in this case? First, the plaintiff is not **[496]** an indifferent party to the question in issue; for it is clear that this money is not separate property till it is paid to the trustee. If the money had been in Alderman Harmer's hands he might have filed a bill of interpleader, but not the plaintiff: *Mitchell* v. *Haine* (2 S. & S. 63), *Statham* v. *Hall* (Turn. & Russ. 30). The plaintiff has nothing to do with the equities affecting Mrs. Palmer's estate: all he has to do is to pay the money to the trustee for her separate use, according to his own undertaking. Until the fund reaches Harmer's hands, there is nothing upon which a lien can be claimed. Secondly, no affidavit is annexed to the bill, denying collusion: and, in fact, the correspondence set forth in the bill pretty clearly shews that there was collusion, and that the plaintiff could not conscientiously make the affidavit. Want of an affidavit in these cases is a ground of demurrer. Admitting, however, that there was no collusion, it is not a mere vexatious claim made against him that will authorize a party to file a bill of interpleader.

Mr. Temple and Mr. Koe, for the bill. This is not a mere bill of interpleader, but a bill claiming a specific right under the terms of a covenant to retain the costs and charges which the plaintiff has sustained by the suit which has been brought against him. [The Lord Chief Baron. The plaintiff has paid nothing.] We have a right to the security of a Court of Equity for the costs and expenses which he may be put to, in consequence of Fraser's suit. To hold otherwise would be in direct contravention of the terms of the deed.

The plaintiff, however, has this further ground of equity against Harmer, that Harmer being a trustee under the deed (which he admits by his acts and correspondence, though the deed is not in his possession) refuses to give the plaintiff a receipt for the annuity, the **[497]** plaintiff tendering payment. Under such circumstances, has not the plaintiff a right to enjoin him from distraining on the tenants? It may be said that the tender was conditional; but were not the conditions justifiable? All the payments had been made to the cestui que trust, and it was therefore clearly justifiable after so long an interval to call upon him to produce the deed, for it was possible he might have assigned his right. Notwithstanding, however, that tender, he refuses to sign a receipt, and gives notice to the tenants. These circumstances alone are sufficient to justify the interference of this Court, unless it can be shewn that the plaintiff can have protection in the other suit. But he cannot; because Harmer is not a party to it, and Palmer only a defendant.

Again, though the bill is not strictly a bill of interpleader, it calls for relief against the party to whom the plaintiff has covenanted to pay the annuity. Harmer is only interested in distraining in default of payment to Mary Palmer. The plaintiff covenants with Harmer to pay to Mary Palmer or unto Harmer for her use. On payment to her Harmer could have no right to distrain. His right under the conveyance arises only in default of payment to Mary Palmer. Now she has created a lien on the property. [The Lord Chief Baron. Does the bill state an assignment?] At law the promise of a feme covert will not raise an assumpsit, but a Court of Equity will give effect to the implied promise of a feme covert and will order payment of the debt out of her separate property: *Murray* v. *Barlee* (3 Myl. & K. 209). Fraser says he has a demand upon her separate property, and has caused a deed to be executed to enforce that lien, and she neither demurs to this bill nor denies the debt, but, on the contrary, submits the question to the Court. Has she no in-**[498]**-terest in the annuity till it is paid to her trustee? The trustee has no paramount claim to her, and the bill states that the annuity would have been paid to her but for Fraser's claim.

Lastly, though this bill is not strictly a bill of interpleader, still it is submitted that the plaintiff may refuse to pay till the question of lien is decided. In the suit brought by Fraser, is he to pay Harmer by distress and then be compelled in Fraser's suit to pay over again to Fraser? With respect to the affidavit, there is no evidence that it does not exist, and no authority for saying that it is ground for general demurrer. The objection must be raised either by special demurrer, stating that there is no affidavit (Mitf. Pl. 143), or by moving to take the bill off the file.

Mr. Simpkinson, in reply. The whole equity claimed, except as to interpleader, is the retaining the costs of the suit, instituted by Fraser, out of the arrears of the

annuity; and that depends on the proviso in the deed. But that proviso is simply an indemnity against actions at law, brought for demands on the wife. It only provides for the case of the plaintiff, being "legally or rightfully" sued in respect of debts, goods, or wearing-apparel. Can it be extended to the case of a bill in equity, brought merely for the purpose of impounding the annuity till doubtful claim is settled, the costs of which suit are not yet paid? If it cannot, then the bill is one of interpleader, and cannot be supported without the usual affidavit.

THE LORD CHIEF BARON. If the case made by the bill had been, that Alderman Harmer was in possession of the trust-deed, and had refused to exhibit it, or to account for the money in his hands, or give a receipt, I would not have dismissed the bill, because these facts would have raised a sufficient equity for the plaintiff, [499] without any other equity. But, from the singular circumstance of the bill omitting to state the fact that Harmer has the trust-deed, I am induced to think that he has it not, as he says, and that probably the plaintiff himself has it at his banker's. As that ground of equity, therefore, fails, the question is, what other equities the plaintiff can rely upon?

Undoubtedly, courts of equity have established a right in the creditors of married women to pursue their separate estates, and for that purpose have given effect to deeds of separation. And courts of law have so far followed the footsteps of courts of equity as to allow actions to be brought on covenants contained in such deeds. They have done so with great reluctance; but, certainly, to that extent they have recognised the existence of separate estates, created after marriage, by deeds of separation. If this were res integra I should say that, unless separate estate arose from circumstances in which separation was not contemplated, it ought not to be made the subject of charge by the wife, and for this reason—that a settlement of property to her separate use before marriage, and a settlement for her separate maintenance after marriage, under a deed of separation, are made with altogether different objects. At law, where the wife has separate property settled upon her before marriage, the maintenance not being the immediate or exclusive object of this provision, he is equally bound to maintain her, as if she had no such property. All the obligations to which the wife may expose the husband are as strong in that case as in any other, and proof that she had separate estate would be no answer to an action brought against him on her account. But where, after the marriage, a fund is created, and a covenant entered into for the separate maintenance of the wife, it is nothing more than a declaration by the husband that, though he is bound to maintain her, he means to do so sepa-[500]-rately. Instead of receiving her in his own house, he says he will maintain her in another, and that he expects her friends will see that he is not burdened with any other debts on her account. Now, the object of such a provision is, in my opinion, simply that of the wife's maintenance, and not that she may be able to raise money upon it. I fear, however, that I cannot act upon this distinction, however just I may deem it, after the cases have gone so great a length in giving effect to deeds of separation.

But although I do not mean to proceed upon this distinction, it so far influences me as to make me look narrowly at the acts of the parties. Now, the bill filed by Fraser was brought against the husband and wife only. The trustee was not joined in the suit. What right, it may be asked, had she to any property at all till it was paid to the trustee? Till the money got into the trustee's hands it may fairly be contended that there was no fund, at law or in equity, for her separate creditor to reach. But at all events it seems to me that the trustee was a necessary party to the suit, and that it could not in any shape be enforced against the husband and wife alone, and, consequently, that that suit, as it regards the plaintiff, is nugatory. If the trustee had been a party to it, the case would have taken a different turn.

In that state of things, the present bill is filed by the husband in order to enable him to pay himself the costs in the original suit. But, as I have already intimated, it is obvious that, unless something further is done in that suit, the bill will be dismissed. What there is in it to affect the husband without joining the trustee I do not know. The mere circumstance of such a bill being filed is not a ground for the husband to file a bill quia timet. He can at present sustain no costs, and the apprehension of costs is no ground for filing a bill; besides, his own bill does not pray that the other may be dismissed.

[501] I agree that the only way in which this bill can be sustained is, as a bill of

interpleader: but the plaintiff is not bound at law, nor at present in equity, to pay the money to Fraser; and, therefore, he cannot sustain this bill as a bill of interpleader.

Demurrer allowed.

SMALL *v.* ATWOOD. June 4th, 1839.—An order of the House of Lords, reversing a decree in this Court, and dismissing the plaintiff's bill with costs, held only to embrace the costs of the suit up to and including the costs of the decree in this Court.

[S. C. 8 L. J. Ex. Eq. 67.]

An order had been obtained in this suit by the defendants dated the 19th April, 1838, whereby the order and judgment of the House of Lords, dismissing the plaintiffs' bill with costs,(*a*) was made an order of this Court, and it was referred to the Master to tax the defendants their costs of this suit, and it was ordered that the costs when taxed should be paid by the surviving plaintiffs to the defendants' clerk in Court, to abide the further order of the Court.

Mr. Knight Bruce and Mr. Sutton Sharpe, for the plaintiffs, now moved that this order might be discharged for irregularity, or that it might be varied by ordering taxation of the costs up to the hearing of the cause in this Court only. They contended that the effect of the judgment of the House of Lords, was only to put the cause in the same position as if the bill had been dismissed with costs at the hearing by Lord Lyndhurst; that this construction had already been acted upon by this Court (see ante, p. 105); that the defendants, therefore, had no right to costs, beyond the original hearing of the proceedings, either in this Court or the House of Lords; and that to hold otherwise would, in effect, be making the plaintiffs answerable for the error of the Court in pronouncing a wrong decree.

[502] Mr. Wakefield and Mr. Lovat, contrà. There is no regular order in a case of this nature, and, therefore, there can be no irregularity. It is very rare for the House of Lords to give costs to the defendant upon the reversal of a decree, and here they were given in order to shew the failure of the charge of fraud against Mr. Atwood. It was obviously, therefore, the intention of the House of Lords to include in their order the costs of all the proceedings in this Court. Where a bill is dismissed with costs upon an interlocutory application, costs are taxed up to the day of the order. It is the same when the bill is dismissed at the hearing or on further directions. The House of Lords did not declare that the bill ought to have been dismissed, but that it be dismissed with costs. It was not an order nunc pro tunc. If a party obtains a decree, and prosecutes it after an appeal has been lodged, he does so at his peril. No doubt the general rule is, that a party will not be made to pay costs by reason of an erroneous decree, but here, after notice of the appeal, the plaintiffs went on and made use of the decree, by taking various proceedings under it. [The Lord Chief Baron. By claiming costs up to the reversal, you include all the costs in the House of Lords.] That does not necessarily follow, nor do we claim those costs. *Hall* v. *Lamb* (not reported), *Howard* v. *Lord Digby* (2 Cl. & Finn. 634), Seton on Decrees (p. 380).

Mr. Knight Bruce, in reply. *Hall* v. *Lamb* is an authority for this motion. There the Master of the Rolls had made a decree directing certain inquiries against the defendants in that suit. The defendants appealed to Lord Brougham, C., who reversed the decree of the Court below, and dismissed the bill with costs. It cannot be contended that the decree of dismissal included any costs subsequent to the decree of the Court below, even **[503]** although the proceedings before Lord Brougham were in strictness merely a re-hearing, and not an appeal. That case, therefore, is an authority to shew that the defendant is not entitled to the costs of the proceedings in this Court (to say nothing of those in the House of Lords) subsequent to Lord Lyndhurst's decree.

THE LORD CHIEF BARON. When this case was before me on a former occasion it was much discussed upon what principle I should carry into execution the further proceedings in this suit, consequent upon the decree of the House of Lords: and I then thought that the House of Lords must be considered as having given the same

(*a*) For the form of the order of the House of Lords, see ante, p. 108.

judgment as the Court below ought to have given. I am still of opinion that that is the correct principle to be acted upon, and that the order of the House of Lords ought to be executed, so as to give costs to the defendants only up to the time of Lord Lyndhurst's decree, and not subsequent costs for proceedings arising out of the error of the Judge. And, if I am called upon to interpret this order, I understand it to include the costs of the suit up to the time of the decree of the Court below, and not costs which have arisen since, as the consequence of that erroneous decree. Therefore, let the order be varied, by confining it to costs up to, and including the settling of the decree.

Order accordingly.

BRUNT *v.* WARDLE. June 4th, 1839.—Order to enlarge publication, founded on a false allegation that the party had many material witnesses to examine, discharged.

[S. C. 8 L. J. Ex. Eq. 64; 3 Jur. 975.]

The original bill was filed by the plaintiff as one of the legatees, under the will of James Wardle, for payment of his legacy. To this bill Elizabeth Wardle, the testator's widow, was made a defendant in respect of an annuity of 30l. bequeathed to her by the testator. She died without putting in her answer, and the suit was revived against **[504]** the defendant John Ainsworth, her personal representative, who, by his answer, admitted the will and codicil of the testator, and claimed such interest in the suit as he should be declared entitled to.

The plaintiff having no witnesses to examine obtained the usual rule to pass publication on the 16th of April. Some days afterwards the defendant Ainsworth obtained an ex parte order to enlarge publication till Michaelmas Term, on the motion of counsel, "informing the Court that the defendant John Ainsworth had several material witnesses to examine."

A motion was now made on the part of the plaintiff that the order so obtained might be discharged for irregularity. In support of the motion the affidavit of the plaintiff's solicitor was read, to the effect that the defendant had not examined witnesses, and that from the nature of the suit and of the defendant's answer it was impossible, as the deponent believed, that he could have witnesses to examine. That the order had been obtained, as the deponent believed, for the sole purpose of delay.

Mr. Simpkinson and Mr. Bacon, for the motion, contended that the order must be discharged as having been obtained on a false allegation: *Harding* v. *Cox* (3 Atk. 583), *Anon.* (18 Ves. 517). They admitted that it was usual to allow publication to be enlarged without opposition, but that was on the assumption that there were real grounds for it. Publication could not be enlarged as of course.

It was contended on the other side that the order had been obtained regularly, and that the defendant was entitled to enlarge publication once as of course. The words contained in the order were merely a common form. In the case in Atkins the objection was made at the hearing.

[505] THE LORD CHIEF BARON. It is unfortunate for the credit of this Court that such an order should be founded on a fiction. The delays in Courts of Equity are quite enough already without adding to them. I shall comply with this motion as an example for the future; that in future delays may not take place as matters of course. The order must be discharged, as having been founded on a false allegation.

Motion granted.

TOWNSEND *v.* CHAMPERNOWNE. June 17th, 18th, July 1st, 1839.—Upon a bill filed by a vendor for the specific performance of the contract, it appeared that he could make a good title before the commencement of the suit, but did not shew a good title to the purchaser until afterwards: Held, that though specific performance must be decreed, the purchaser was entitled to the costs of the suit generally.—By an agreement between vendor and purchaser, it was agreed that the purchaser should be entitled to the rents on the 1st May, 1813, or from such time as the purchase should be completed. An abstract of title was afterwards furnished to the purchaser, and the title appeared to be satisfactory to the purchaser; and in May, 1806, he sent the vendor a draft conveyance for his approval, which was

returned approved in July, 1816. Afterwards, the purchaser, on the suggestion of counsel, made several objections to the title, and delayed completing the purchase. In November, 1817, the vendor filed his bill for specific performance, and in that suit the Master found that the vendor could make a good title before the bill was filed, but did not shew a good title to the purchaser till the 20th January, 1825: Held, upon a decree for the specific performance of the contract, that the proper date of the conveyance was the 20th January, 1825.—Quære, upon what principle the increased value of an estate, arising from the dropping of lives, between the commencement and completion of the contract, is to be calculated?

[See *Sidebotham* v. *Babington*, 1842, 5 Beav. 261.]

By articles of agreement in writing, bearing date the 11th of December, 1812, and executed by the plaintiffs, the defendants, and others, reciting a former agreement dated the 27th of May, 1811, by which the borough and manor of Honiton were, in consideration of 70,000l., agreed to be conveyed by the plaintiffs to Charles Scott in fee, and reciting that 10,000l., part of the said sum of 70,000l., had in part performance of that contract been paid to Messrs. Hammersleys (for whose benefit the sale was to be effected, but who were to hold the said sum of 10,000l. in trust till the contract was completed), and reciting that Scott had relinquished the contract in favour of Arthur Champernowne: it was witnessed that in consideration of 60,000l. thereinafter agreed to be paid by the said Arthur Champernowne to the said Messrs. Hammersleys, **[506]** the plaintiffs, by their trustee Richard Nowell, thereby agreed to make out a good title to the premises by the 1st of May then next ensuing, and to convey the premises to him in fee, free from incumbrances, except the land-tax, and except leases for lives and years existing on the said premises; and it was further agreed that the defendant, his heirs and assigns, should be entitled to the rents and profits of the premises from the said 1st day of May, or from such time as the said purchase should be completed; and that he should, on or before the said 1st of May, pay to the said Messrs. Hammersleys the sum of 60,000l., residue of the said purchase-money; and, further, that he should pay to them, or to the said Richard Nowell, upon the trusts of a certain indenture therein referred to, dated the 29th December, 1810, all and every such sums and sum of money for the increased value of the said borough, manor, messuages, hereditaments, and premises, or any part thereof, by or in consequence of the death or deaths of any person or persons since the 29th day of September, 1811, for whose life or lives any of the said messuages, lands, tenements, and hereditaments were theretofore granted. Provided always, and it was thereby agreed and declared, that the said vendors should receive from or be allowed interest by the said Messrs. Hammersleys, upon the sum of 7000l., part of the said sum of 10,000l., at the rate of 5l. per cent. per annum, from the 13th day of February last to the time of the completion of the said purchase, and the said Arthur Champernowne should, in like manner, receive from or be allowed interest by the said Messrs. Hammersleys upon 3000l. remaining part of the said sum of 10,000l. at the same rate, and for the same period; but in case a good title could not be made to the premises, then they, the said Messrs. Hammersleys, should and would pay, or cause to be paid, unto the said Arthur Champernowne, his executors, administrators, or assigns, the said sum of 10,000l., with lawful interest for **[507]** the same from the said 13th day of February last, until it should be ascertained and settled that a good title could not be made out to the said borough, manors, lands, and hereditaments.

On the 15th of March, 1813, Champernowne paid into the banking-house of Messrs. Hammersleys the sum of 15,000l., in further payment of the purchase-money.

About the 25th of May, 1816, Richard Nowell received a draft purporting to be a draft conveyance of the premises from him to Champernowne, wherein it was recited (amongst other things) that the increased value arising from the deaths of lives, had been fixed and ascertained at the sum of 1454l. 7s. to the mutual satisfaction of all persons interested in the amount of such value, and the decreased value, owing to the inaccurate statement of the ages in a particular of sale therein referred to, had been estimated at the sum of 961l. 8s. 11d., to the mutual satisfaction of all persons interested in the account of such value, which latter sum being deducted from the sum of 1454l. 7s. left, as an increased value upon the whole, the sum of 492l. 18s. 1d.; and that this sum, when added to the sums of 10,000l. and 15,000l. already paid, and

the sum of 45,000l. which remained to be paid, gave the full sum of 70,492l. 18s. 1d. It was also recited that certain mortgage sums of 11,000l. and 2000l. which had been secured on the estate were to be retained by Champernowne out of the purchase-money which so remained to be paid, and that, after such deductions, there remained to be paid by the said Champernowne, for the remainder of the purchase-money, the sum of 32,492l. 18s. 1d.

This draft was returned by Nowell to the defendants' solicitor, approved of, on the 4th July, 1816, with some alterations which the plaintiffs alleged to be trifling. Mr. Champernowne, however, after this period, delayed completing the purchase, alleging various objections to the **[508]** title, and to the form of the proposed conveyance, and likewise on the score of various outstanding judgments; and he ultimately gave notice of his intention to file a bill to rescind the contract. This led to the institution of the present suit in November, 1817, in which the bill was filed by the vendors against Champernowne, and afterwards revived against the defendants as his personal representatives, praying that Champernowne might be decreed specifically to perform the agreement of the 11th of December, 1812, and to accept a conveyance of the premises according to the draft so prepared and approved of, and might pay to Richard Nowell the said sum of 32,498l. 18s. 1d., together with interest thereon from the 4th July, 1816, the plaintiff being ready and willing to allow interest upon the said sums of 3000l. and 15,000l., up to the time of payment of the residue of the purchase-money, and also to execute a proper conveyance.

The cause came on to be heard in February, 1821, when the Court decreed that it should be referred to the Master to inquire and report to the Court whether the plaintiffs could make a good title to the estates and premises comprised in the contract of the 11th of December, 1812, according to the terms of such contract; and if the Master should find that the plaintiffs could make a good title, then he was to inquire and state at what time they were able to make such title, and at what time they first shewed to Champernowne, or to his solicitor, that they were able to make such title; and the Master was also to inquire and report to the Court whether the value of the estate and premises had been diminished by any dilapidations which had taken place since the 11th day of December, 1812, and to what amount such value had been thereby diminished, and in what manner and through whose default the same had happened; and the Master was also to inquire and report to the Court whether any arrangement, binding upon the representatives of **[509]** Champernowne, was come to in his lifetime, with respect to the deductions to be made from the purchase-money on account of the ages of some of the persons for whose lives part of the estates and premises comprised in the said contract had been let, having been inaccurately represented; and if the Master should find that any such binding arrangement took place, then he was to state the particulars thereof; and if he should find that no such binding arrangement did take place, then that he should also inquire and state to the Court what deductions ought to be made from the purchase-money on account of such inaccuracy in the description of the ages of any of the persons for whose lives any part of such estate and premises were let; and the Master was also to inquire and report to the Court whether any of the persons for whose lives any part of the estates and premises comprised in the said contract were held on the 29th day of September, 1811, had died since that time, and whether any arrangement binding upon the representatives of Champernowne, deceased, was come to in his lifetime with respect to the payments to be made by Champernowne on account of the lives which had so dropped, or any of them; and it was further ordered that the Master should inquire and report how much the value of the said estate and premises had been increased by the deaths of such persons, or of such of them as to which no such binding arrangement should be found to have been made.

In pursuance of this decree, the Master made two reports, one dated the 26th of August, 1824, in respect of the title of the premises, and the other dated the 7th of April, 1831, as to the increased value by the droppings and wearings of lives.

By the former of these reports, the Master reported against the plaintiff's title; but, upon being directed to review his report, he made another, dated the 29th day of March, 1827, which was in favour of the title, with the exception **[510]** of a small portion of the estate. By this report he further certified that the plaintiffs were able to make and first shewed a good title on the 20th of January, 1825, on which day certain additional abstracts had been left at his office on which he had

proceeded. Exceptions were then taken to this latter report by the plaintiffs, the first of which was that the Master ought to have found that the plaintiffs were able to make a good title previously to the commencement of the suit; and that exception was allowed.

By the report dated the 7th of April, 1831, the Master reported what he conceived to be the increased value of different parts of the premises by the dropping in of lives, and also by the wearing of lives since the 29th of September, 1811; and he further certified the principle upon which he calculated such increased value. To this report exceptions were taken by the defendant, on the ground that the Master was not at liberty, under the decree, to calculate the wearing of lives. These exceptions were ordered to stand over, with liberty to the plaintiffs to present a petition of re-hearing; the Court being generally favourable to the Master's report, but being of opinion that it could not be sustained consistently with the wording of the decree. The petition of re-hearing was accordingly presented, but failed by reason of having been presented too late. The plaintiffs then presented a petition to vary the decree, whereupon the Court, by an order dated the 9th of July, 1831, directed the Master to prosecute further inquiries as to the wearing of the lives, in addition to directions contained in the decree as to the dropping of lives. The defendants then appealed from that order to the House of Lords, and the order was reversed.(*a*) The plaintiffs appealed to the House of Lords from the decree generally, stating as their reasons that, according to the true construction of the agreement, they were **[511]** entitled to interest on the remainder of the purchase-money from the 1st day of May, 1813, and that the respondents on the other hand were entitled to the rents and profits of the said estates and premises, including the increased value from the dropping and wearing of lives from that period; and, therefore, that the inquiry as to the dropping of lives from the 1st day of May, 1813, was erroneous, and ought not to have been extended beyond the period that elapsed from the 29th day of September, 1811, down to the 1st of May, 1813. That appeal was argued before the House of Lords in March, 1837, and dismissed in July of the same year.

The cause now came on for further directions, the plaintiffs claiming payment of the sum of 32,000*l*., being the remainder of the purchase-money, as ascertained by the concluded arrangement of July, 1816, with interest from that time, and not from the 1st of May, 1813, together with the costs of the suit; the plaintiffs admitting the defendants to be entitled to the rents and profits from that time, and to compensation as to any part of the premises to which the plaintiffs could not make a good title. The more minute facts of the case will appear from the arguments.

Mr. Swanston and Mr. Calvert, for the plaintiffs. This is the sale of a reversionary interest, and it is the practice of the Court to carry contracts for the sale of reversionary interests into execution, by compelling the defendant to pay interest upon the purchase-money from the time when the contract ought to have been completed. It is, in fact, the only way in which justice can be done in these cases. Here, for the lapse of now more than twenty years, the reversion has been from day to day becoming more valuable. In the meantime, the plaintiffs have been in receipt only of that small portion of the rents and profits which arise from the estates in possession, so that if the defendant **[512]** is not to pay for the increased value of the inheritance, the effect will be that he will be a gainer by his own delay. We cannot, however, anticipate that this part of our claim will be objected to, or that the general practice of the Court upon this point will be disputed. The purchaser is, in truth, in one sense, in possession. For, in accounting to him for the rents and profits which we have received, he has all the possession which the nature of the case will admit of; and he is within the rule that the purchaser is not to retain possession of the estate, and also of the purchase-money, without paying interest on the purchase-money: *Ex parte Manning* (2 P. W. 410), *Trefusis* v. *Lord Clinton* (2 Sim. 359).

This part of the case, in effect, resolves itself into the question, what is the date from which the conveyance ought to run? As a general rule, where there are no laches on either side, interest will run as against a purchaser, from the time fixed in the contract for its execution. But if the rule is ever varied in point of strictness, it seems clear, both upon principle and authority, that it would be more rigidly enforced with respect to estates in reversion than those in possession, and more especially if it

(*a*) See *Champernowne* v. *Brooke*, 3 Cl. & Finn. 4.

can be shewn that the purchaser has been guilty of laches. That may be gathered to have been Lord Cottenham's opinion, from what he said during the proceedings in the House of Lords in March, 1837: "If," said his Lordship, "the construction the respondent contends for be true, that the possession is not the possession of the purchaser until the contract is completed; yet if it shall appear that the purchaser has been the cause of the delay, then the vendor had a right, at a prior period, to call upon the purchaser to complete his contract; and it is quite open upon these proceedings for the Court to say at what time, as between the parties, the contract ought to be completed; not giving the purchaser a benefit that he **[513]** is not entitled to." That is the principle upon which the plaintiffs act. They ask that the contract may be carried into execution from the year 1816, with interest from that time; any subsequent delay in the completion of the contract arising, as we contend, from the purchaser's laches.

Now, upon the point last-mentioned we say that if we can shew—what we do shew from the opinions of counsel—that in 1814 the plaintiff had satisfied all the defendant's inquiries as to title, and that it was not till long afterwards that any notice was given to the vendor, so as to put him upon the proper inquiry; then it follows that it was by the purchaser's laches that the defect of title was not shewn at an earlier period. The opinions of counsel in 1814 all refer to matters of conveyance rather than of title, they therefore shew that all objections of title had been satisfied or waived. The preparation of the conveyance in 1816 is likewise an important fact to shew that the parties had arrived at a stage of proceedings subsequent to the question of title, and must therefore be supposed to have removed or abandoned all objections. Again, the letters of 1817 are strong to shew that, at the time the defendants threatened to file a bill, it was not upon the ground of objection to title but upon some other ground. [Alderson, B. If you mean to argue that they had at that time precluded themselves from taking any objection to the title, your argument is at variance with the decree, which directs inquiries as to title. I take it the Court directs inquiries as to title, on the ground that there is no acceptance of title.] Unless there is a clear acceptance of title admitted by the answer, the Court, it is conceived, will direct such inquiries. It is one thing to accept a title and another thing to have ceased to put inquiries as to title, thereby leaving the vendor to the supposition that you mean to inquire no farther. Even in cases where strong expressions, amount-**[514]**-ing almost to an acceptance, have been used, the Court will direct an inquiry, upon the ground that it is harder upon the purchaser to take a doubtful title than for the vendor to submit to the inconvenience of an inquiry. [Alderson, B. After an inquiry directed, and the Master's report to those inquiries, it cannot be competent to the parties to contradict the Master's report. Here, the Master has said that you first shewed a good title in January, 1825. You propose to say that you are entitled to treat it as a good title in 1814.] Assuming that we did not shew a good title till 1825, we say that we have a right before it is determined from what date and upon what terms the conveyance is to be made, to have it considered why the good title was not shewn till 1825; and the answer which we expect to be able to give is this—that there were certain requisitions as to title, which the defendant might have made in 1814, but which he did not make till 1825; we say, further, that he had sufficient notice of circumstances in 1814 to put him to make those requisitions; that if he had made them at that time they would have been answered; that the delay has therefore arisen from his fault, and that this circumstance will have weight with the Court upon giving further directions, notwithstanding the Master's report. Upon this part of the case there are two authorities which are strongly in point, and which were decided upon the question of costs: *Long* v. *Collier* (4 Russ. 269), *Holwood* v. *Bailey* (id. 271). In both those cases the Court, on further directions, took into its consideration the grounds on which the Master had come to the conclusion that a good title was not shewn till a certain day.

It may possibly be objected to the plaintiffs' claim of interest that it was at their instance that a considerable time was spent in determining the question, whether they **[515]** were entitled to any benefit from the wearing of lives. The answer to that is that the terms of the decree were peculiar, comprising, not only the ordinary reference as to title but references as to many other points. Under that decree the plaintiffs had at least a right to have the question of the wearing of lives determined. They were greatly interested in that question, in the event of the Court determining that

the conveyance should be dated at a late period. It is to be remembered too that their view of the case was favoured by Lord Lyndhurst, and when their petition of re-hearing, which was directed to this particular point was dismissed, a second petition, with the same view, in the shape of an appeal from the decree, was encouraged by the House of Lords. There are many authorities to shew that even though a vendor may have an inquiry made, which turns out against him, still the interest will be suffered to run. In *Dyer* v. *Hargrave* (10 Ves. 505) the question was whether the vendor had or had not correctly represented the nature of the estate in his particulars of sale, and an inquiry took place which lasted for three years. The result of the inquiry was against the vendor, yet the Court decreed that the contract should be executed from the commencement of the three years, and that for those years the purchaser should pay interest and the vendor an occupation rent. The case of *Paton* v. *Rogers* (6 Madd. 256) supports the same principle. Here it is impossible to say that the proceedings by the plaintiff in the House of Lords occasioned an improper delay, more especially when it is considered that his appeal was dismissed without costs. The only other remark to be made on the question of interest is that it ought to be at the rate of 5l. per cent. both on the ground of this being a reversion, in which case the purchaser has not only the profit but the enjoyment of possession, as far as the sub-**[516]**-ject will admit of it, and also because that rate of interest appears to have been intended to have been allowed between the parties.

Upon the point as to whether the defendant had sufficient notice before the suit to put him upon inquiry as to the defects in the title, it may be remarked, notwithstanding the affidavit of his solicitor that he had what in equity is deemed sufficient notice. The solicitor's affidavit is that he had no knowledge previous to the suit that any part of the hereditaments contracted to be sold had been purchased from Sir Henry Northcote, or Mr. Courtenay, or any of the other parties whose titles are now exhibited, but he thought the whole of the title had been included in the abstracts furnished to the defendant. Yet it appears, by other affidavits that certain leases were produced to the defendant's solicitors, in which the titles of Sir Henry Northcote and Lord Courtenay, as lessors of the property, are distinctly referred to. It is sworn, indeed, by the solicitor's clerk, that he examined these leases only for the purpose of ascertaining the dates thereof, and the rents and heriots thereby reserved, and the ages of the cestui que vies, in order that he might compare them with the printed particulars of contract; but, in point of law, it is matter of total indifference with what reference these documents were examined. If a purchaser, or his solicitor, has inspection of the deeds at all, he has notice of the entire contents: *Mertins* v. *Jolliffe* (Ambl. 314), *Moore* v. *Bennett* (2 Ca. Ch. 246), *Allen* v. *Anthony* (1 Mer. 182), *Hamilton* v. *Royse* (2 Sch. & L. 327). This doctrine as applied to leases which appear to have been granted in consideration of the surrender of a former lease, is more especially apparent from the case of *Coppin* v. *Fernyhough* (2 Bro. C. C. 294).

With respect to the small parcels of land to which the **[517]** plaintiffs, according to the Master's report, cannot make a good title, it is submitted that they are the proper subject for compensation: *Macqueen* v. *Farquhar* (11 Ves. 417). These parcels cannot be considered as the valuable part of the contract, and, indeed, it is not pretended that any one part of the estate is considered as valuable, with respect to the other part. On the contrary, it was the object of the bargain to re-sell the estate in lots.

With respect to costs, there is a general principle which applies to this case; namely, where one party who is about to litigate with another does not give notice of the nature of the point on which the litigation is to turn, and therefore does not enable the other party, if he pleases, to resist that point, the party guilty of such omission must pay the costs, although he may have a decree upon another point. [Alderson, B. He loses his costs; he does not pay them.] In *Winch* v. *Winchester* (1 Ves. & B. 375), where the purchaser omitted to take an objection before the suit commenced, which, when taken, was successful, the vendor's bill was dismissed without costs. In *Warren* v. *Richardson* (1 Younge, 1) the title was no ground of suit, but when the parties came to execute the conveyance, the state of the title was disclosed accidentally, very much as the defect of title has come out in this case, and the decree was refused, but the purchaser lost his costs. There are other cases of the same nature. *Oxendon* v. *Lord Exmouth* (Sugd. V. & P., vol. 2, p. 27), *Thorpe* v. *Freer* (id. p. 23, 25), *Schools* v. *Morell* (Rolls, 11th March, 1839).

Mr. Bethell and Mr. Coleridge, for the defendants. The argument on the other side is a deliberate attempt, on the part of the plaintiffs, to set aside on further directions the original decree in this cause. They say that the decree ought to have declared an acceptance of title [518] by the purchaser, although the decree expressly directs an inquiry as to title, and although the Master has, in point of fact, reported that there is no title. It is true that the Master has reported that the plaintiffs can shew a good title, with certain excepted particulars, and, upon that, a right may arise in the vendor to shew that those particulars are not essential to the possession and enjoyment of the entirety. Still, the report of the Master is in strictness a report against the title, and the only order to which the plaintiffs are entitled on the present occasion is for a reference back to the Master to ascertain whether the particulars are or are not material to the possession of the whole; and if not material, then what deduction should be made from the purchase-money in respect of those particulars. The defendants, therefore, rest their case upon this basis; namely, that the vendors have not shewn a title; admitting, however, that they will be entitled to a specific performance if the excepted particulars are not essential to the possession of the whole.

If such be the ground taken by the defendants, the first question to be considered is how it will affect the costs of this suit. The bill sets forth that the plaintiffs had a good title to the entirety of the estate, that they had investigated that title and ascertained it to be good, and that they had shewn that title to Mr. Champernowne. The litigation, however, has proved that these statements are unfounded. Even giving them credit for what they allege at the bar, namely, that they had made their title the subject of investigation and were aware of its particulars, then it follows that in the investigation with Mr. Champernowne, before the institution of this suit, they deliberately suppressed a material part of their title: for the question in all these cases is not what the purchaser might have required, but what it was the duty of the vendors to communicate. It is sufficient, however, to say that the result of the litigation has disproved the [519] main proposition on which their bill proceeds; namely, that they had made a good title to the whole property. At law that would have been conclusive against them; and but for the indulgence of this Court, which gives specific performance with compensation, they would have no right to the performance of the contract at all. The question then arises whether if a man files a bill, alleging that he has a good title, and it turns out that he is only entitled to a qualified performance of the contract, by virtue of a particular rule in equity—whether he must not pay for the benefit of that jurisdiction to which he appeals? The rule to be deduced from the cases is that unless the conduct of the purchaser has been a personal bar to him, the vendor who gets the benefit of that peculiar doctrine of equity must pay the costs of the suit. A fortiori ought he to pay them where he has provoked and commenced the litigation by alleging that he had a title to the whole, and yet was unable to make such a title, and where, therefore, the foundation of his record is altogether taken away.

But the vendors go still further; for they say that they found their right to this relief, not upon the fact of their having a good title merely, but upon having done every thing which it was incumbent on them to do antecedently to the institution of this suit. They say that they satisfied all the requisitions of Mr. Champernowne before that time. Without adverting to the entire negative given to all this by the decree, the proceedings in the Master's office shew that the vendors had particulars within their own knowledge which must or ought to have satisfied them of the falsehood of these allegations. How then, under such circumstances, can they sustain their claim to costs? or, rather, how can they avoid the necessity of paying the costs? The abstracts and leases produced in the Master's office disclosed nine several titles which had not been disclosed before. Of these nine titles two only could have been shewn to the purchaser before the insti-[520]-tution of the suit; and that merely by means of leases, reciting others that appear to have been derived originally from Mr. Courtenay's trustees. So that, in point of fact, the vendors could not have made a good title before the institution of the suit. Then was the title accepted by the purchaser? The vendors cannot say that; and therefore are driven to make a refined distinction which it is scarcely possible to understand, that though the title was not accepted, yet, from the capabilities which the vendors had of making a good title, they ought to be placed in the same situation with regard to interest and costs, as if the

title had been accepted. We contend, however, that it would be most prejudicial to the practice of the Court to introduce such refined distinctions as these. The Courts have always acted upon this plain and simple rule, that if it appears upon the Master's report that the vendor has done his duty in shewing a good title before the institution of the suit, then primâ facie he is entitled to his costs; but that if the title is only shewn pending the suit, then as a matter of course the vendor is bound to pay all the costs of the suit up to and including the particular inquiry as to when a good title was first shewn. But it is argued on the other side that the vendors in this case have done all that is ordinarily required of a vendor, and, in fact, that it is the duty of the purchaser to call for the evidence of title, and not the duty of the vendor to produce it; and *Long* v. *Collier* (4 Russ. 269) was referred to as in some degree sanctioning that proposition; but, in that case, the Master only required that which the vendor had before the suit specifically offered to give, but which was refused by the purchaser who insisted on other objections which were found against him. Sir John Leach therefore acted strictly in accordance with the general rule in holding that the vendor must be considered in the same situation as if he **[521]** had done that which he had offered to do. But it is clear from all the authorities that the obligation lies upon the vendor to produce a good title, and not upon the purchaser to call for it.

With reference to the subject of costs in suits for specific performance, the cases seem to establish these propositions. First, that the party who fails is not necessarily but only primâ facie liable to the costs of the suit: *Dyer* v. *Hargrave* (10 Ves. 505), *Macqueen* v. *Farquhar* (11 Ves. 467). Secondly, that if the vendor makes out the title contained in the abstract delivered, and no other title, then if that is made out through the medium of the suit only, the vendor is certainly not entitled to costs, and primâ facie the purchaser has them: *Vancouver* v. *Bliss* (id. 458), *Wilson* v. *Allen* (1 J. & W. 623). And, thirdly, that if the vendor makes out his title by means of other things than those contained in the abstract, the vendor indisputably pays the costs: *Fielder* v. *Higginson* (3 Ves. & B. 142), *Collinge* v. *Collinge* (ibid.), *Harrison* v. *Coppard* (2 Cox, 320). Here we say that the plaintiffs failed in making out their title before the suit commenced, and that they have established their title only by means of the suit, and by documents which they had in their possession and ought to have produced, but did not produce before the suit commenced. We contend, therefore, that they, as the parties failing, must indemnify the purchaser from the consequences.

Proceeding now to the question of interest, we have first to ascertain who was treated as the owner of the estate up to the time when the contract was to be completed; and, secondly, at what time the contract ought to be considered as completed. Now, it is clear from the words of the contract, and from the decree that the parties **[522]** did not consider that the estate belonged to the purchaser (as it does according to the ordinary rule) from the time fixed by the contract for the completion of it, that is to say, from the 1st May, 1813, but only from the time of the actual completion. According to the ordinary rule in equity, which makes the estate the purchaser's, and the money the vendor's, at the time fixed by the contract for the completion of the purchase, any contingent advantages accruing subsequent to that period of time would belong to the purchaser. But here, by the terms of the contract, the increased value arising from the dropping of lives since the 29th of September, 1811, belonged to the vendor; and by the decree the Master was directed to inquire whether any lives had dropped since that time, not during any limited period, as, for instance, up to the 1st of May, 1813, but at any time. The inquiry so framed contains within it the strongest evidence that the vendors treated the estate as theirs up to the time when the contract should be completed. Again, the very charges in their bill corroborate this fact; for the bill charges that the rents now actually receivable are not nearly equal to the amount of the purchase-money, which makes it greatly to the advantage of the defendant to protract the completion of the contract, and the bill then charges the defendant with purposely and designedly delaying the completion. That is a clear admission that the defendant was not bound to pay interest till the contract was completed; and this was the view taken by the plaintiffs till the defendant interfered to prevent the Master deviating from the terms of the decree in calculating of the wearing as well as of the dropping of the lives. The plaintiffs then presented their appeal to the House of Lords with the view of having the decree altered, so as either to give them the benefit of the wearing of

lives or to render the decree consistent with their claim to interest upon the purchase-money from the 13th of May, 1811. That appeal, under the direction **[523]** of the Lord Chancellor, whose opinion upon this part of the case was strongly in favour of the defendant, has been dismissed by the House of Lords. Therefore, that House has, in fact, decided the question of interest, and this Court must be guided by its decision.

Then the question remains, at what time the contract must be considered as completed, and the interest to commence running. The plaintiffs now admit that they have no claim for interest from the 1st of May, 1813, but they attempt to substitute by this bill a different date, at which they allege that the contract was de facto concluded. But that depends entirely on allegation. They say that a conveyance was finally settled between the parties on the 4th July, 1816, but, on the present occasion, there is no evidence of such arrangement, and it is completely negatived by the decree. [Alderson, B. The question is whether the conveyance can be dated earlier than the year 1825, when they first shewed the title.] We contend that it cannot be dated till they bring the suit to a conclusion. When they found the Master's report established against them as to title, they ought then to have immediately offered the defendants a conveyance, and to have given up possession. Instead of that, finding that they could not get interest from the 1st of May, 1813, they took up the further inquiry upon the subject of the increased value, by which means the suit has been protracted to the present time. The other cases cited in the course of the argument for the defendants were *Osbaldiston* v. *Askew* (Sugd. V. & P. vol. 2, p. 28) and *Harford* v. *Purrier* (1 Madd. 532).

Mr. Swanston, in reply.

July 1st.—ALDERSON, B. This case, which came on for further directions, now stands for the judgment of the Court. It **[524]** was a bill filed in Michaelmas Term, 1817, in order to enforce an agreement, dated 11th of December, 1812, for the purchase of the borough, manor, and lordship of Honiton, and all the messuages, farms, lands, and other hereditaments therein: and it prayed that the defendants might be decreed specifically to perform that agreement, and to accept a conveyance of the premises, according to a draft theretofore prepared and approved of; and to pay the residue of the purchase-money, together with interest from July, 1816, the plaintiffs being willing to allow interest upon certain sums paid in advance, and to execute a proper conveyance. The cause having come on to be heard, a decree was pronounced on the 24th of February, 1821, when it was referred to the Master to inquire and report to the Court whether the plaintiffs could make a good title to the estates and premises comprised in the contract, and to state at what time they were able to make such title, and at what time they first shewed it to the defendants that they were able to make such title. And the Master was also required to make inquiries, and report as to other special matters.

It would appear from this decree that the question, whether the title had been agreed to, and all objections to it finally waived by the defendant, was not made out by the plaintiffs, and that the Court, after hearing argument, or, which would be the same thing, by the mutual agreement of the learned counsel, who appeared on the occasion for the parties, determined that the issue of the cause was to depend on the result of this inquiry as to title, to take place before the Master.

Upon this reference, various objections to title seem to have been taken—all of which, it is said, were answered finally by the plaintiffs—except one, and upon that objection, the Master having reported against the title, exceptions were taken and allowed to his report, apparently, on the ground that he had not come to a correct **[525]** conclusion in reporting against the title, without taking into his consideration certain additional abstracts, which, though not contained in the original abstract of title shewn to the defendants, had been subsequently found, and which were brought into the Master's office before this his report. The Master, having proceeded therefore with this inquiry, made his final report on the 29th of March, 1827, and then reported that the plaintiffs had made a good title; and the report, as finally settled, after discussion by the Court, stands thus: that the plaintiffs were able to make a good title to the whole premises, with certain small exceptions, before the commencement of the suit; and that they first shewed that title to the defendants on the 20th of January, 1825, when the whole of the abstracts were first brought into his office.

It is in truth from this stage of the cause that the Court ought now to proceed to give its further directions—for the rest of the cause, intermediately, has consisted of a series of most unfortunate and unprofitable litigation to both parties—the only result of which has been, at an enormous expense and after great delay, to settle one out of the several additional points referred to the Master, namely, that as to the binding arrangement respecting the mutual compensations up to 1816. It has been determined by the Master, and after argument confirmed by the Court that there was such a binding arrangement between them.

What then are the further directions which the Court must now give? It is conceded by the defendants, and properly, that the Court must decree that the agreement should be specifically performed, and that the failure of the title, as to the small portion of the premises mentioned in the Master's report, is only the proper subject of compensation to the defendants. There must, therefore, be a reference to the Master to settle the conveyance and to estimate that compensation.

[526] The next point to be considered is from what period of time is the conveyance to bear date? On the part of the plaintiff it is contended that it ought to bear date from 1816; on the part of the defendant, from the day of its execution. I do not think that either party is right in their claim. It appears to me that the case does not fall within the case of *Long* v. *Collier* (4 Russ. 269). For there the plaintiff had offered, prior to the suit, to remove the very objection which ultimately was the ground for the Master's report that he had not shewn his title till after the bill filed. But here the ground upon which the Court have already acted as to the title was the production of the several abstracts in January, 1825, and if I were to decide, as the plaintiffs contend I ought to do, I should virtually overrule the previous judgment of the Court, which by the present further directions I ought only to carry into effect. Nor do I think it is made out that these objections were waived by the defendant in point of fact. And if I did think so I much doubt whether I ought to act upon such opinion, for the same reason that it would virtually be acting contrary to the original decree of the Court.

On the other hand the nature of the property which is the subject of this agreement, and which by the conveyance will in truth be placed in the defendant's possession ab antecedenti, by the intermediate wearing of the lives seems to me to require, in order to do equity between these parties, that the conveyance should be dated from the earliest period when a good title was shewn by the plaintiffs, and that the plaintiffs should be entitled to the principal money with interest, and the defendants to the rents and profits of the estate from that earliest date. I have come, therefore, to the conclusion that the conveyance should bear date from the 20th of January, 1825. **[527]** The Master will, therefore, have to compute interest upon the 3000l. and 10,000l. from the dates of their respective payments up to the 20th of January, 1825, and to allow that to the defendants. He will also have to take an account of the rents and profits from the 20th of January, 1825, to the present time, and to allow that also to the defendants. On the other hand he must take into his consideration the increased value arising from the dropping of lives between 1816 and the 20th of January, 1825, and add that to the compensation definitively arranged up to the former period. This will be a sum to be allowed in favour of the plaintiff, and should be added to the remaining balance of the purchase-money upon which the plaintiff is entitled to interest since the 20th of January, 1825.

The defendant on receiving a proper conveyance will have to pay the ultimate balance of the accounts thus taken.

I wish the parties would have consented to argue the principle on which the increased value arising from the lives which have dropped between 1816 and 1825 is to be calculated by the Master, because I foresee more delay, inconvenience, and expense from their not doing so. As I have not heard it argued, I shall intimate no opinion upon this point. And it is proper to say that the more I consider it the more I am satisfied that it is a very difficult question.

The remaining question is the costs. I think the true rule is this—primâ facie, he who succeeds ought to have the costs. But there may be, and often are, equitable circumstances which ought to exempt a failing party from that penalty.

Here the plaintiff's case on his bill is that at the time he filed it he was entitled to require of the defendant a specific performance. I am of opinion that he has failed in that respect. The defendant, therefore, ought to have **[528]** the general costs of

the suit. But there are stages in the suit where he has been in the wrong, as in that part of the case respecting the Master's reports on the final arrangement as to the mutual compensation in 1816. There the plaintiff has succeeded and ought to receive the costs. In the contests also in the Master's office as to title, though the defendant has succeeded in obtaining a report favourable as to the ultimate result of the suit respecting the period when the title was first shewn, yet he seems to me to have taken many and insufficient objections, and to have thereby caused much unnecessary expense and delay; I think neither party should receive, but that each should bear his own, costs of those discussions before the Master as to the title.

In like manner, I think that each party should bear his own costs of the arguments and contentions in this Court respecting the mode of calculating the wearing of the lives, and the alteration of the decree of 1821, which were ultimately decided before the House of Lords. But with these exceptions the defendant should have the general costs of the cause.

Decree accordingly.

HALL *v.* CONNELL. June 21st, 1839.—Commission to take the answer of two defendants, provided notice of the execution of the commission be given to J. S., who was the plaintiff's attorney. The commissioners gave notice to J. S. of their intention to execute a commission to examine witnesses, and thereupon executed the commission as to one defendant: Held, that the execution was good inasmuch as J. S. could not be deceived by the notice.—Under a commission to take the answer of two defendants, the commissioners may take the answer of one defendant only.

In this case a writ of commission or dedimus, dated the 9th of May last, had issued to take the answer of the two defendants, Edward Connell and Henry Moult. The writ was directed to commissioners named for the defendants and also for the plaintiff, requiring them, or any two of them, to examine and take the answer of the two de-[529]-fendants, on such day and at such place as the commissioners should appoint, and to engross the answer when so taken, and take the same before the Barons of the Exchequer, provided that J. S. had six days' notice of the time and place of the execution of the commission. J. S. was the country solicitor of the plaintiff, and one of the commissioners to take the answer.

Mr. Geldart, for the plaintiff, now moved that the answer which had been taken under this commission might be taken off the file for irregularity; first, on the ground that the commissioners had given an insufficient notice to J. S., the notice being that the commissioners were about to execute a commission for the examination of witnesses in this cause; and, secondly, that they had taken the answer of one defendant only, namely, Edward Connell. Upon the first point he cited *Pound* v. *Wildgoose* (8 Price, 102) and *Pilkington* v. *Himsworth* (1 Y. & C. 612), and contended that a proper notice to J. S. was the condition upon which alone the commissioners had power to examine, and that they had no right to administer an oath without the strict fulfilment of that condition. Upon the second point he urged that the commissioners had no right to execute the commission partially.

Per Curiam. In *Pound* v. *Wildgoose* the party had not notice of the proper time of executing the commission; here the time was right enough, though a mistake was made in stating the nature of the commission. If the plaintiff could have been misled by what has occurred, there would have been grounds for granting the motion, but it is impossible he could have been misled by this mistake.

Motion dismissed.

[530] COSTEKER *v.* HORROX. June 15th, 1839.—A., B., and C., being in partnership, A., who had nearly the whole of the capital, retired, taking a warrant of attorney from B. and C. to secure to him 12,500l., but leaving his whole capital in the firm. The accounts of the partnership were not then made up. Soon afterwards A., who still interfered in the business, mortgaged certain leaseholds, his private property, and certain policies of assurance on his life, for the purpose of paying off a partnership debt. A month or two afterwards A. died, having made B. and C. his executors, and having by his will directed that they might apply

the monies to be received from the policies in carrying on the trade, provided they gave such security to his residuary legatees as W. might approve. W. refused to act, and B. and C., without giving any security pursuant to the will, applied the money arising from the policies in discharge of the mortgage. Upon a bill filed against them by one of A.'s residuary legatees, they alleged by their answer that A.'s share in the capital at the time of his retirement was far below 12,500l., and that the warrant of attorney was given merely to secure what upon an account taken might be found to be his share. They admitted, however, that they had in their hands a balance of 989l. belonging to A.'s estate: Held, that as between B., C., and A., the amount of the policies must, primâ facie, be taken to be a debt due from the continuing partnership to A.'s estate, and that they could only employ that money in the trade upon the terms of the will; and that, not having so done, they must pay the amount of that debt, namely, 7000l., as well as the 989l., into Court.

[S. C. 3 Jur. 996.]

In June, 1832, Squire Horrox, of Pilkington, in the county of Lancaster, calico printer, took into partnership with him his sons and son-in-law, James Horrox, Richard Horrox, and John Anderton. The value of the assets in Squire Horrox's business then amounted to about 14,000l., of which he gave up 2000l. to James Horrox, as his share of the partnership capital. No partnership articles were executed, but it was agreed that the partnership should be carried on as from the 1st of June, 1832; and that the parties should be interested in the profit and loss in the following shares; namely, Squire Horrox in three-sixths, and the other three in one-sixth each.

In the early part of 1832, Squire Horrox, being advanced in years, gave notice of his intention to retire from the partnership; and on the 20th of March in that year the partnership was dissolved as to him, and due notice of such dissolution was given in the *Gazette*. His capital, however, remained, and was employed in the partnership concern.

In September, 1832, Squire Horrox, being about to make his will, applied to his sons and Anderton to give him some security for the amount of his capital. Accordingly, they executed to Squire Horrox, and to the defendant Samuel Woodcock, as his trustee, a warrant of attorney, dated the 7th of September, 1832, authorizing the attornies therein named to confess judgment against them for 12,500l.

[531] Squire Horrox, by his will, dated the 20th of May, 1833, after giving an annuity of 300l. to his wife, and after ratifying the gift of the 2000l. to James Horrox, and after bequeathing to James Horrox his one-fourth part or share of the lease of the printing establishment and premises at Mount Sion, ordered and directed that within three calendar months after his decease, his sons and John Anderton should take a full, true, and perfect account of all and singular his personal estate and effects, and that a valuation should be put upon such chattels and effects by themselves; and also that they should take an account of all sums of money that might be then due and owing to him the said testator, whether on security or securities, or book or other debts, and that they should bring the whole of such his personal estate and effects into a stock balance-sheet. And the testator directed and declared that in such account should be included the money which he had laid out and expended in and about the erections, buildings, and improvements at or connected with the establishment at Mount Sion, not including his beneficial interest in the lease of the same premises which was thereinbefore bequeathed to his son James Horrox; and the testator authorized his said sons and John Anderton to employ the same in carrying on the calico-printing and bleaching business, which the said testator thereby empowered them to continue, and to occupy such works on the terms and conditions on which the said testator held the same, on giving a warrant of attorney to confess judgment, or such other security as would be satisfactory to his wife and Samuel Woodcock for the whole amount of such stock and balance-sheet, payable in ten years, by equal half-yearly instalments in each year, the first instalment to become due and be paid in six months after the testator's decease, with lawful interest thereon, after the rate of 5l. per cent. per annum until the whole thereof should be paid, such interest to be paid with every half-yearly instalment. And the testator directed that such **[532]** security should be given by his said sons and son-in-law to the testator's said wife and Samuel Woodcock jointly, or to Samuel Woodcock solely, if his said wife

should then be dead. And the testator thereby nominated and appointed the said Samuel Woodcock a trustee specially for that purpose. The testator then, after reciting that he had lately put his said sons and son-in-law in the possession of goods, chattels, and effects to the amount of 12,500l., being part of the effects which would have been computed in the before-mentioned stock or balance-sheet, for which they had given security to him and to Samuel Woodcock as his trustee, thereby further willed, ordered, and directed that the said Samuel Woodcock should specially stand possessed of such security, and the money thereby secured, together with interest thereon, after the rate of 5l. per cent., upon the trusts and purposes mentioned in his said will concerning the same. And the testator further directed that when and as such instalments should be received by his said wife, and the said Samuel Woodcock, or his executors or administrators, the same should be placed out at interest on good Government or mortgage security or securities, in the names of the said James Horrox, Richard Horrox, and Samuel Woodcock. And the testator thereby also gave and bequeathed unto the said James Horrox, Richard Horrox, and Samuel Woodcock two policies of insurance, which he had effected upon his own life, to the amount of 7000l., upon trust to receive and place the same out at interest, upon such security or securities as in the will mentioned, and to stand possessed thereof upon the trusts thereinafter mentioned. And the testator thereby gave, devised, and bequeathed all and singular his freehold and leasehold estate, and all the rest, residue, and remainder of his real and personal estate and effects, unto the said James Horrox, Richard Horrox, and Samuel Woodcock, their heirs, executors, administrators, and assigns, according to the several natures and qualities thereof respectively, upon certain trusts for the benefit of his children, James Hor-**[533]**-rox, Richard Horrox, Elizabeth the wife of John Anderton, and Sarah Horrox, and their issue, in four parts; the life-interests of Elizabeth Anderton and Sarah Horrox being settled to their separate use, and the reversionary interest in Sarah Horrox's share being subject to her separate power of appointment. And the testator further declared that in case the said James Horrox, Richard Horrox, and John Anderton, or such other person or persons as might at the time be engaged in partnership with them, should have occasion for the said sum of 7000l. for which the said insurances had been effected, or any part thereof; and if they should be of opinion that they could employ the same beneficially in extending their business, or carrying on the same to advantage, then the said testator thereby authorized and empowered them, with the concurrence of his said wife, if she should be then living, and his widow, and if she should be then dead, then of their own proper authority, to use and employ the same, or so much thereof as they should require for that purpose, upon their giving such security for the same, by warrant of attorney, to the said testator's said wife and to the said Samuel Woodcock jointly, or, if she should be dead, then to the said Samuel Woodcock alone, payable by such instalments, with such rate of interest, and in such way and manner, and to be applied for the same purposes as were thereinbefore expressed respecting the bulk of his real and personal estates. And the testator appointed James Horrox and Richard Horrox the executors of his will.

The testator died on the 11th, and his wife on the 22nd of August, 1833. James Horrox proved the will and paid the testator's debts and funeral expenses.

In February, 1836, the testator's daughter, Sarah Horrox, married John Costeker, upon which occasion part only of Mrs. Costeker's separate property under the will of her father was settled upon her husband.

The bill was filed in February, 1838, by Mrs. Costeker, **[534]** against James and Richard Horrox, John Anderton and his wife, Samuel Woodcock, John Costeker, and other parties, charging that the sum of 12,500l. secured by the warrant of attorney was the ascertained balance due from the partnership to Squire Horrox at the time of his retirement, but that the defendants, James and Richard Horrox, and Woodcock, though they had entered into possession of the trust property under the will, had not paid or secured that sum to the parties entitled to it; that Woodcock had declined to sue on the warrant of attorney, and had otherwise refused to act in the trusts; that the defendants, James and Richard Horrox, and Anderton, had neglected to take the accounts and valuation of the testator's estate directed by the will, and that they had applied the produce of the policies of insurance, partly in discharge of a mortgage due from the partnership, and partly in carrying on the trade, without giving any security for the same to the testator's wife or Woodcock, as directed by the will.

The bill prayed that the will might be established; that the usual accounts might be taken of the testator's debts and assets; that the sum of 12,500l. secured by the warrant of attorney might be paid into Court; and for a receiver, and an injunction to restrain the collecting of the outstanding personal estate of the testator.

The defendants, James and Richard Horrox, by their answer, stated that although Squire Horrox retired from the partnership in March, 1832, no statement or settlement of accounts then took place; and that he continued to be interested and was always consulted as to the business of the firm. That, upon the occasion of his making his will in September, 1832, he applied to the continuing partners for some security for his interest in the concern, and that, the amount of such share not being ascertained, they agreed to give him a warrant of attorney for 12,500l. That this was accordingly done on the express understanding that it was thereby only intended to facilitate the **[535]** making of the will, and that the warrant of attorney, though it mentioned the sum of 12,500l., was only intended to secure what should ultimately be found due to Squire Horrox; and that in fact his share, so far from amounting to that sum, was, as the defendants believed, of a much less amount by several thousands of pounds.

With respect to the application of the 7000l. secured by the policies of assurance, the defendants made this statement: that previous to the retirement of Squire Horrox, and for some time afterwards, Messrs. Jones, Lloyd, & Co. were the bankers of the firm, and that it being necessary to close the account with that bank, and pay the balance, amounting to 9000l., due to the bankers, that sum was discharged by monies borrowed by Squire Horrox in the following manner—namely, 4000l. of William Kay, and the remainder of the Birmingham and Liverpool District Bank. That the money advanced by Kay was in June, 1832, secured by a mortgage made by Squire Horrox of a leasehold estate, his separate property, the policies of assurance for 7000l., and certain other life policies—the money advanced by the Birmingham and Liverpool Bank being secured by a second mortgage of the same date of all the before-mentioned securities. That shortly after the death of Squire Horrox, the amount due on the policies was, by an arrangement between the mortgagees and the defendants, received by the defendants as the executors of Squire Horrox, by means of a bill of exchange drawn by the agent of the insurance company in favour of the defendants, which bill was indorsed by the defendants to the firm of Horrox & Anderton, and by them indorsed to the Birmingham and Liverpool District Bank. That thereupon the bank advanced the sum of 4118l. to William Kay, in discharge of the principal and interest due on his mortgage, and retained the residue in satisfaction, as far as it would extend, of the mortgage so made to them. And the defend-**[536]**-ants stated that in this manner and no otherwise, the produce of the policies was employed in carrying on the trade pursuant to the clause contained in the testator's will.

The defendants further stated that they had set forth in the schedule of their answer the sums belonging to the testator which they had withdrawn from the trade, and the sums which they had expended in the trade; which latter, considering that the warrant of attorney was to a far larger amount than the money actually due to Squire Horrox's estate, they submitted they had a right to expend under the provisions of the will without giving further security. They likewise made a statement of the monies paid on account of the testator's debts, and they admitted the balance of these sums in favour of the testator's estate to amount to 989l. They alleged it to be impracticable, there having been no account then taken of the partnership effects, to take the account and valuation of the testator's estate within three calendar months, as directed by the will.

A motion was now made that the defendants might pay the sum of 989l., and likewise the sum of 7000l. secured by the policies, into Court; and for a receiver.

Mr. G. Richards, for the motion. The money received by the defendants, and which the plaintiff asks to have paid into Court, is part of the separate estate of Squire Horrox, for which the trade is liable to account. The defendants say that they have applied that money, first, in paying off the mortgage, and next in carrying on their trade; but it is an universal rule that executors have no right to embark their testator's property in their trade, or that of others, except under the terms of the will: *Johnson* v. *Aston* (1 Sim. & Stu. 73), *Farquharson* v. *Balfour* (Turn. & Russ. 184). **[537]** They had, it is true, authority to use the testator's money in their trade, provided they conformed to the conditions and provisions of his will: but it is not pretended that they executed the security they were desired to do. The interest of Squire Horrox

in the partnership was well settled at the period of dissolution. On his retirement, a calculation was made of what was coming to him, and upon that the sum of 12,500l. was ascertained to be due to him. That account must have embraced all the liabilities of the partnership. The answer admits that he had credit for that sum, but says that his share did not amount to so much. It is clear, however, that a large balance was due to him, and they at all events gave him security for that sum. After this, it appears that, amongst other liabilities, there was a debt due from the partnership to Jones, Lloyd, & Co., which debt was undertaken by the continuing partners. Now, as between Jones, Lloyd, & Co., and Horrox & Sons, Squire Horrox was liable for this debt; but he was not liable as between himself and his former partners. To pay that debt, money was borrowed, partly of Kay and partly of the Birmingham Bank. Now, the mortgage to Kay was a collateral or additional security to the security of the continuing partners. As between Squire Horrox and the continuing partners, they had no right to apply his money in discharge of the mortgage. Their debt was the first, and the mortgage and policies were only collateral. It is clear that Squire Horrox so considered it; for the mortgage was made in July, and yet in September he bequeaths the money due under the policies, in the same way as his other partnership effects. The money was received by the executors, and they, upon receiving the money, in the first instance indorsed the bill of exchange to the continuing firm, and then the continuing firm pay it as stated. The continuing firm, therefore, are primarily liable. As between the separate estate of Horrox and the continuing **[538]** partners, the executors had no right to pay any part in discharge of the partnership debts. It is a receipt by the executors of 7000l., and a loan of that sum to the continuing partners, or a misapplication of the money so received. The question therefore is whether they are not bound to pay that money into Court: *Vigrass* v. *Binfield* (3 Mad. 62), *Rothwell* v. *Rothwell* (2 S. & S. 217), *Collis* v. *Collis* (2 Sim. 365).

Mr. Girdlestone (with whom was Mr. Bacon), contrà. No doubt the general rule is that, where an executor admits assets of the testator in his hands, after payment of all claims upon the testator's estate, he will be ordered to pay the balance into Court. But these are not assets of the testator in the hands of the executors. It is true that the partnership gave security to Squire Horrox to the amount of 12,500l., but the parties differ in their statement of the circumstances under which that security was given. The plaintiff says it was given to secure the ascertained balance due to Squire Horrox. But according to the statement in the answer, there was no account or stock-taking at that time, and it was only given to cover what was actually due. There is a positive statement by the defendant that the amount mentioned in the warrant of attorney exceeded, by many thousands, what was actually due to Squire Horrox. Then, upon the express terms of the will, the partners were clearly justified in doing what they have done. With respect to the 7000l., the testator authorized them to employ that sum in the trade, upon giving a warrant of attorney, or such security as would satisfy his wife and Woodcock. The wife died a few days after the testator, and Woodcock declined to act: they had already given security for 12,500l., and they swear that neither the wife nor Woodcock called for **[539]** any further security. Upon what principle, then, can the Court call upon them to do more than give security now? With respect to the account and valuation directed by the will to be taken of the testator's estate, they swear that it was impracticable to do so within three months, as directed by the will. Lastly, the notice of motion is nugatory as applies to the sum of 989l., inasmuch as the plaintiff, by the motion, adopts that balance as a balance of receipts and payments, and yet disputes single items of it.

THE LORD CHIEF BARON.(*a*) On the death of the testator, it became the duty of the executors to take an account of all his personal estate and to get it in; and when it was ascertained that Woodcock and the wife were authorized to allow the defendants to take the money on the policies, on the same terms and security as in the former instance, that is, by giving a security and re-paying the money by instalments—when one of them died, and the other refused to act, some special provision, in conformity with the will, ought to have been made by the defendants themselves in respect of the re-payment of this money. It is true that they might turn round, as they have done here, and say that Mr. Woodcock, having refused to act in the

(*a*) Ex relatione Mr. Burgess.

trusts, and the wife having died, they were not to be deprived of the use of this money, as given them by the will; but it does not appear that they have given any security beyond that given to the testator at the dissolution of the partnership, to the amount of 12,500l., which they contend was sufficient to cover both. But I am of opinion that some further security ought to have been given; for, although they had a right, under the will, to use the 7000l. in the policy by giving security, yet that security ought to have been given in 1833, and in [540] the terms of the will. It is argued for the defendants that, though the plaintiffs state by their bill that the value of the personal estate, due to the testator on the dissolution of the partnership, amounted to 12,500l., yet, because the defendant, by his answer, states it to have been very considerably less, the security given for 12,500l. was a security sufficient for both purposes. I am, however, of opinion that they have applied money in a manner not sanctioned by authority under the will; and that being the case, I do not see how I can refuse the present application. The money must, therefore, be paid into Court; but I think, under the circumstances, it must be by instalments—one-half to be paid by the first day of Michaelmas Term, and the other half by Hilary Term; and a receiver must be appointed, subject to an arrangement between the parties.

Order accordingly.

LISTER *v.* LISTER. June 24th, 1839.—Commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition.—Commissioners of partition, in dividing tenements between brothers and sisters, exercise a sound discretion in awarding the mansion-house and pleasure-grounds to the eldest brother, though he also has awarded to him other lands at a distance from the mansion-house.—The Court will not suppress or vary the certificate of Commissioners of partition, by reason of alleged irregularity in the allotments, except on the ground of fraud, or of negligence amounting to fraud.—Commissioners of partition may direct new fences to be made to divide the lands which are the subject of partition.

In this case a commission of partition had issued for the purpose of dividing amongst the plaintiff and defendants, according to their respective shares as found by the Master's report, certain lands comprised in the marriage settlement and will of Edward Lister, Esq., deceased.

The Commissioners made their return, whereby they certified that they had allotted to the plaintiff, Charles Lister (among other property), all that water-corn-mill commonly called Coverham Low Mill, together with the messuage, buildings, garden, &c. belonging thereto; and they thereby directed and declared that the said Charles [541] Lister, and the owner or owners for the time being of the Coverham Low Mill, should have full and free liberty of ingress, egress, and regress, at all times for ever thereafter, for him and them, and his and their tenants, agents, workmen, and servants, &c., in, over, through, and upon the part of the close called the House Pasture, numbered 22 e, and thereinbefore allotted to Thomas Lister, and the part of the close called the Farm House Pasture, marked 22 f, and thereinbefore allotted to Christopher Other, to repair, cleanse, and scour the mill-dam, mill-race, or water-course, leading from the river Cover to the said Low Mill; the said Charles Lister, and such owner or owners, paying to the owners of the said closes a reasonable compensation for any damage or loss which they or their tenants might sustain or be put to in consequence of such liberty of ingress, &c.; and further, that the said Charles Lister and the owner or owners for the time being of the said mill should have such right and privilege of way to and from the said mill, and the lands adjoining thereto, as had been usually had and enjoyed, &c. And the Commissioners further certified that they had allotted to Edward Atkinson Lister (who was the testator's eldest son and heir-at-law), amongst other property, the capital mansion house, messuage or tenement, called Coverham Abbey, with the buildings, garden, pleasure grounds, and other lands adjoining thereto, and also certain lands not adjoining thereto, and they directed he and the owner and owners for the time being of Coverham Abbey should have a riding and drawing way from the public high way, over lands allotted to some of the other parties, in as full and ample a manner as the occupier of the said mansion house had theretofore used and enjoyed the same. The Commissioners further directed that parts of certain specified closes, as the same were then marked out and staked

from the remaining parts thereof, should be sepa-**[542]**-rated and divided therefrom by fences, to be made at the expense of the several parties. This direction was successively applied to each party.

A motion was now made on behalf of some of the parties interested, namely, Robert Lister, Thomas Lister, Charlotte Lister, and Anne Lister, that the return of the Commissioners might be suppressed, and that a new Commission might be issued, or that the return might be varied. The principal grounds of the motion appeared to be—the award of the right of way to Charles Lister; the award of the mansion house and surrounding land to Edward Atkinson Lister, at a distance from other lands awarded to him; inequality in the value of the respective lands allotted; and the direction to the parties to make fences at their own expense.

Mr. Richards and Mr. Torriano, in support of the motion, cited *The Dean of Hereford* v. *Hullet* (6 Price, 333), *Jones* v. *Totty* (1 Sim. 136), *Manners* v. *Charlesworth* (1 M. & K. 330), *Corbet* v. *Davenant* (2 Bro. C. C. 252), *Story* v. *Johnson* (1 Y. & C. 546), *Agar* v. *Fairfax* (17 Ves. 546), *Turner* v. *Morgan* (8 Ves. 143), Seton on Decrees (p. 197); and they contended that the direction of the Commissioners to the parties to make new hedges was alone such an excess of their authority as would induce the Court to suppress the return; but that, in addition to that, it did not appear that the lands had been duly and equally valued, or fairly awarded; and that the distribution should have been made by drawing lots.

Mr. Spence and Mr. Bayley, for the plaintiff, supported the Commissioners' certificate, and in reference to the award of the mansion house cited *Lord Clarendon* v. **[543]** *Hornby* (1 P. W. 446). They said that no case had determined that the distribution should take place by lots, and the Court would not interfere with the valuation of Commissioners except in the case of fraud.

Mr. Simpkinson and Mr. Campbell, for defendants, in the same interest with the plaintiffs, contended that a partition of open lands could not be effectually carried into execution without directions as to what parties should be at the expense of separation.

Mr. Wilbraham appeared for another defendant.

Mr. Richards, in reply. The Commissioners had no more right to direct fences to be made than walls to be built, or other expensive buildings to be erected on the premises. [Alderson, B. There is certainly a difficulty in saying that the Commissioners have a right to order money to be laid out upon the property by ordering hedges to be erected de novo, though they may order hedges to be maintained. But the partition may take place without inclosing.] The Commissioners have ordered a new road to be made, and there is an equally strong objection to that as to the making of new fences. [Alderson, B. This is not a road, it is a right of way. A road is a passage for the ordinary use of persons: this is extraordinary, for the purpose of repairing premises. Making such an easement is a part of the partition. It is not like laying out money on the property.]

In consequence of the doubt expressed by the Court as to the power of the Commissioners to direct new fences to be made, that point was reserved for discussion on a subsequent day. Upon the other points judgment was now given.

[544] ALDERSON, B. Several objections have been made to the return of the Commissioners. One is, that the abbey has been awarded to Edward Atkinson Lister. I see no objection in that. It must be assigned to some one. It would be difficult to assign it to the several other parties on the mere ground that they have lived there a long time. I am not prepared to say, therefore, that the Commissioners have done wrong in assigning it to the testator's heir-at-law.

As to the valuation, I shall not go into that question. The cases have decided that it is improper for the Court to interfere with the valuation of Commissioners, unless there be any mistake in it so gross as to induce the Court to think that the Commissioners have acted from unjust, corrupt, or fraudulent motives. The decision in the case of *Story* v. *Johnson*, with which I fully agree, proceeded entirely on that principle.

The next objection, as to the fences, is reserved for future consideration.

With respect to the roads and easements I see no cause to quarrel with the award of the Commissioners. The principal parts of the roads were used with the premises assigned, and it would be perfectly just and proper, in estimating the value of the premises, to take into consideration the roads which the parties had previously

enjoyed. And with regard to the easements, though it is not usual to create an easement over another person's land, yet it is otherwise when a separation of property takes place, and it is necessary that a certain part of it should be assigned to a person who cannot have the use of it without a right of way.

July 1st.—On a subsequent day the counsel for the parties interested in supporting the Commissioners' return addressed themselves to the question reserved; contending that in **[545]** directing new hedges to be made the Commissioners had not exceeded their authority, and that such a direction was allowable on the same principle as a direction for payment of money for owelty of partition; which was constantly allowed: *Bailey* v. *Moore*,(*a*) Litt. sect. 251. They likewise relied on the case of *Parker* v. *Gerrard*,(*b*) as an express authority in point; observing that the Commissioners in that case ordered stone walls of a certain thickness to be erected, with good gates, for the purpose of the partition. They also referred to *Cartwright* v. *Davenport*.(*c*)

Mr. Richards, in reply, contended that an order to make new fences could not be supported consistently with what was said in *Turner* v. *Morgan* (8 Ves. 143), and *Agar* v. *Fairfax* (17 Ves. 533). [Alderson, B. In *Turner* v. *Morgan* Sir Samuel Romilly mentions a case where a partition of a house was made by building a wall in the middle of it.]

ALDERSON, B. I think the objection which has been made is not sufficient to invalidate the return of the Commissioners. The object of a bill of partition is equitably to adjust the rights of all parties interested in it; and if that can be done, the Court goes considerable lengths, by ordering money to be paid for owelty of partition, and by other means, to carry that object into execution. It is suggested that if this return be allowed, there will be no limits to be placed on the authority of the Court in ordering partition. If this were so, I should be very reluctant to exercise the authority; but it seems to me that though **[546]** the Court may uphold the return, it will not be necessary, on all occasions, to go the length which has been apprehended.

Therefore, though I am not prepared to say to what extent the Court, upon a commission of partition, will authorize the erection of walls, I nevertheless think that the Commissioners have the power of doing what is reasonable to be done in these cases; and that the Court, having the power to see whether the Commissioners have or have not exceeded the reasonable limits of their authority, ought to take care that, with the least possible expense, justice is done. Now, it may be that, in order to do justice, fences must be erected. If so, though no doubt it should be at the least possible expense, I think that such a direction may be made, and the Court will see that the Commissioners keep within their limits.

It appears to me that this may be done under the express direction given by Courts of Equity. In these cases, the general rule upon which the Commissioners are to act is to decide equitably between each of the conflicting parties. The object of the partition is that each may enjoy in severalty; and it seems to me that a direction to each to erect a fence, to prevent the intrusion of his neighbour's cattle, is quite reasonable, and is in truth necessary, to enable each to enjoy the land in severalty. There will be no practical difficulty in this direction; for the deeds of partition may contain proper covenants to erect and keep in repair the fences.

Motion dismissed.

[547] HUTCHINSON *v.* MORRITT. June 19th, 21st, July 1st, 1839.—Under a deed of 1658, a manor, with its rights, members, liberties, and appurtenances, saving and reserving certain lands therein mentioned, was conveyed to trustees upon trust, to permit the persons named in the schedule to the deed, their heirs and assigns, being tenants of the several messuages and tenements mentioned in the schedule, to have and convert to their own use a rateable proportion of the rents and profits of the manor, according to the yearly rents and purchase-monies paid by them respectively for the purchase of their messuages and tenements. A

(*a*) Not reported.

(*b*) Ambl. 236: see Blunt's ed. Return confirmed in October, 1755.

(*c*) Allnatt on Partition, 209. Return in this case confirmed Feb. 1819. Lib, Reg. A, 1819, fol. 3846. Plaintiff an infant.

schedule was added to the deed, containing the names of certain persons and their tenements. Upon a bill filed by a person claiming to be a tenant of the manor under the deed, and who proved that his estate was part of one of the tenements mentioned in the schedule, praying to be declared entitled to the benefits of the deed of trust, and particularly to the right of sporting over the manor: Held, 1st, that the plaintiff could not sustain the bill simply as a tenant of the manor, inasmuch as certain of the lands being reserved under the deed, it did not appear that all the tenants were entitled to the benefits of the deed; and, 2ndly, that he could not sustain it as a tenant under the deed, because it did not appear that any of the assurances, by which the property was conveyed to him, expressly mentioned the right of sporting; and such an interest in the profits of the manor could not be annexed to the various tenements mentioned in the schedule, without appropriate words of conveyance for that purpose.—Where a manor is conveyed to trustees, upon trust to divide the profits of it amongst the tenants of the manor, it is the duty of trustees not to let the right of sporting to any of the tenants upon terms advantageous to them as tenants, but to make the best profit they can, by letting the right of sporting to all eligible persons, whether tenants or otherwise, and to divide the profit so made rateably amongst the cestui que trusts.

The bill was filed by the plaintiff on behalf of himself and all other the tenants of the manor of Bowes, in the North Riding of the County of York, entitled to the benefit of the trusts of an indenture bearing date the 29th of November, 1682, against the trustees under that deed, and it prayed a declaration that the plaintiff was entitled to the benefits of the trusts of the said indenture, and that the plaintiff, and all other the tenants of the said manor, entitled to the benefit of the said trusts, and being duly qualified by the usual game certificate, were entitled to beat and search for game on the moor and wastes of the said manor, and that the defendants might be restrained by injunction from prosecuting an action of trespass commenced by them against the plaintiff, and from bringing any actions against any of the tenants of the manor entitled to the benefit of the trust aforesaid, for any act lawfully done by virtue of the trusts, and that the defendants might be decreed to account for the profits of the manor come to their hands, &c., and might be removed from being trustees, and for the appointment of new trustees, &c.

It appeared that the manor of Bowes originally belonged to the city of London, but was sold many years ago by certain persons, acting on behalf of the corporation, to **[548]** certain persons acting on behalf of the tenants of the manor. On that occasion a deed of feoffment, bearing date the 4th of August, 1657, was executed between John Stone and others on the part of the city of London, of the one part, and Christopher Hanby of the other part, whereby the parties of the first part conveyed to Christopher Hanby and his heirs all that the lordship or manor of Bowes, with the rights, members, and appurtenances thereof, and all that tollage and custom within the said manor of Bowes, and all the rights, members, liberties, and appurtenances thereunto belonging, and all that common furnace with the appurtenances situate and being in Bowes aforesaid, and all that close of ground or pasture, together with the cottage thereupon built, and all other the appurtenances thereunto belonging, situate, lying, and being below the Castle in Bowes aforesaid, &c., which said tollage, custom, common furnace, close of ground and cottage thereupon, with the appurtenances, &c., were charged with a fee-farm rent of 20*l.*; and also all wastes, waste ground, commons, heaths, furzes, moors, marshes, void grounds, underwoods, streams, banks, rivers, waters, watercourses, fishings, fowlings, hawkings, huntings, mines of coal and lead opened or not opened, prairies, rents, reversions, services, heriots, fines, amerciaments, Courts Leet and Courts Baron, &c., and all waifs, estrays, estovers, &c., and all duties, customs, pickage, emoluments, freedoms, and hereditaments whatsoever, within the townships, parishes, hamlets, precincts, and territories of Bowes, Bolron, Sleightholme, Stoney Keld, and the Spittle or elsewhere, within the said county of York, to the said manor or lordship, or reputed manor or lordship, belonging or appertaining, or accepted, reputed, taken, known, or enjoyed as part, parcel, or member thereof: except, and always reserved out of the said grant, bargain, and sale, the aforesaid fee-farm rent of 20*l.* &c.; and also all and singular the fee-farm rents, **[549]** and other annual rents whatsoever, charged upon or growing due and payable

for or out of all, every, or any of the lands, tenements, or hereditaments of all and every the freeholder and freeholders of or within the said lordship or manor, or reputed lordship or manor, of Bowes, or within the townships, parishes, hamlets, precincts, and territories of Bowes, Bolron, Sleightholme, Stoney Keld, and the Spittle; except also, and in the like manner reserved, all and singular the messuages, lands, tenements, cottages, cattle-gates, woods, underwoods, and trees, commons, common of pasture, moor, and turbary privileges of slate and stone, rights, easements, profits, commodities, and other hereditaments, with the appurtenances, situate, lying, and being within the townships, precincts, parishes, hamlets, and territories of Bowes, Bolron, Sleightholme, Stoney Keld, and the Spittle, or any of them, which, before the date of the said indenture, had been sold or contracted for, or by any person or persons authorized by or on behalf of the said mayor, commonalty, and citizens of the city of London, unto or with any person or persons whatsoever, and except also and reserved out of the said grant, bargain, and sale all and every the fee-farm rents, and other yearly rents and profits whatsoever, which were charged upon or issuing out of the before excepted messuages, lands, tenements, and hereditaments, and all powers for the recovery of the same: To have and to hold, &c., unto and to the use of the said Christopher Hanby, his heirs and assigns, upon special trust and confidence, nevertheless, that he and they should, upon reasonable request, grant and convey the said manor and premises, except as therein before excepted, to such person or persons, and his or their heirs, as Leonard Laidman and other persons named in the indenture should, in that behalf, nominate and appoint.

By another indenture of feoffment, dated the 21st of [550] October, 1658, made between Christopher Hanby of the first part, Leonard Laidman and others of the second part, and Thomas Dale and others of the third part, Christopher Hanby, by the appointment of Leonard Laidman and the other parties of the second part, conveyed to the parties of the third part and their heirs, all that the said lordship or manor of Bowes, with the rights, members, and appurtenances thereof, and all other the premises granted and conveyed to the said Christopher Hanby, his heirs and assigns, by the indenture of the 4th of August, 1657 (except as therein excepted), and also except and reserved out of the present indenture to the said Christopher Hanby, his heirs and assigns for ever, all the said tolls, tollage, and customs, with the rights, members, and appurtenances thereof, the said common furnace, with the rights, liberties, and customs thereunto belonging, the Castle, the Castle Garth, the close or parcel of ground called the Bailey, with the cottages thereupon built, two cattle-gates or pasture gates, for two beasts or cattle in the town pasture of Bowes aforesaid, called the Ox Pasture, &c.; and all mines and quarries of lead and coals, as well opened as not opened, within the moors, wastes, and commons of or within the said manor or lordship of Bowes aforesaid, or within the limits or territories of Bolron, Stoney Keld, Sleightholme, and the Spittle, &c. &c.: To have and to hold the said manor or lordship of Bowes, &c., except as before excepted, unto and to the use of the said parties thereto of the third part and their heirs for ever, upon trust and confidence that they and their heirs should and would from time to time and from thenceforth for ever permit and suffer &c. [Here followed a declaration of trust in the same words as that of the subsequent indenture of the 29th November, 1682.]

By indentures of lease and release dated the 19th and 20th of October, 1682, Thomas Dale and Ralph Simpson, being the surviving trustees under the indenture of Octo-[551]-ber, 1658, conveyed all the premises comprised in that indenture to new trustees, namely, William Bowes and others; and by an indenture dated the 29th of November, 1682, which was the deed now sought to be carried into execution, those trustees declared that the premises were conveyed to them upon trust and confidence that they and their heirs should and would, from time to time and at all times thenceforth for ever, permit and suffer every of the persons mentioned in the schedule thereunto annexed, their heirs and assigns, being tenants of the several messuages, lands, and tenements in the said schedule contained, then in their several and respective tenures and occupations, to have and convert to their own use respectively, a rateable share and proportion of the rents, issues, and profits of the said manor and premises, and of every part and parcel thereof so granted as aforesaid, according to the proportion of the several ancient yearly rents of the said messuages, lands, and tenements, and of the monies by them respectively paid for the purchase of the premises which said rents and monies were set down, expressed, and declared

in the schedule thereunto annexed. The deed then contained a schedule in which entries of the following description appeared:—"Sir J. L., Bart., holdeth lands and tenements there of the yearly ancient rent of 2s., and paid for the purchase of the same 2l." "Richard Coates holdeth two messuages and lands of the yearly ancient rent, &c., and payeth 5l. 10s. 6d."

In the year 1809 the manor of Bowes, and the several premises of which the trusts were declared by the last-mentioned indenture, had become vested in Lord Rokeby and his brother, Mr. Montague, as trustees; and those persons having attempted to deprive the tenants of the manor of their rights under the ancient trust deed, a bill in Chancery was filed against them in that year to remove them from their office of trustees. After some length of litigation, the Court of Chancery made a decree under which **[552]** Lord Rokeby and his brother were removed from the trust, and new trustees were appointed in their room, the survivors of whom were the present defendants.

Pending these proceedings in Chancery, a meeting was held at Bowes on the 6th of March, 1818, for the purpose of appointing new trustees in the room of Lord Rokeby and Mr. Montague. Upon that occasion a considerable body of freeholders attended, and appointed the same trustees as were afterwards appointed by the Court of Chancery. The persons present at the meeting at the same time entered into a series of resolutions, of which the following related more particularly to the game:—"The principal advantage of the manor of Bowes being derived from the game with which it abounds, and it being desirable that such regulations shall be adopted as will make the property beneficial to those freeholders who exercise, and those who do not exercise, the right of killing game: resolved unanimously—That for the advantage of the former, the trustees are required to appoint a gamekeeper, and to use every exertion for the preservation of the game; and every freeholder who shall take out a game certificate, and subscribe annually one guinea towards the expense of preserving the game, shall be at liberty to sport upon the manor unmolested, whatever arrangements may be made for deriving a profit by letting the same liberty to strangers. That in order that those who do not shoot may not be deprived of their interest in the manorial rights, the trustees are required to let to strangers, subject to the foregoing resolutions, the right of shooting on such plan and on such terms as shall seem to them expedient for raising a revenue for the benefit of the freeholders at large." The subsequent resolutions provided that the monies to be produced by such subscriptions and lettings should be applied first, in preserving the game; next, in payment of the costs of the suit in Chancery; and next, for such general purposes as the majority in value of the free-**[553]**-holders present at the annual meeting, not being less than one-third in number, should approve.

These resolutions were uniformly acted upon by the trustees; each freeholder qualified by the terms of the resolutions being charged a guinea, and each stranger five guineas, and since the year 1830 ten guineas, for the privilege of shooting.

The plaintiff having refused to pay the guinea, and having been served with a writ, in an action of trespass, by the trustees, for shooting on the manor, now brought his bill praying the relief before mentioned. The bill alleged that, by divers mesne conveyances, assurances, and other acts in the law, and ultimately by indentures of lease and release, dated the 3rd and 4th of August, 1835, and made between Daniel White of the one part, and the plaintiff of the other part, all those two messuages, with a garth and garden &c., situate in the township of Bolron, were conveyed to the plaintiff and his heirs, and that such premises were comprised in the indenture of the 29th of November, 1682, and held by some of the persons named in the schedule to that deed, and in particular by one Richard Coates, and certain persons of the name of Kipling. The plaintiff then deduced his title to these lands by putting in evidence the successive conveyances from the grandson of Coates, to whom Coates's property was devised, and from the Kiplings, to the present time. He likewise proved the admissions of the several successive owners of the property, by entries in the Court books, and also that several of the persons through whom he claimed had exercised the right of shooting on the manor.

Mr. Simpkinson and Mr. Bichner, for the plaintiff. The plaintiff has a right, independently of the resolutions entered into at the meeting, to sport over the manor. The trust is not accompanied with a charge, and the freeholders are not compellable to pay a fine. Besides, the **[554]** other sources of profit are more than sufficient to

keep up the manor. This was a trust for all the freeholders, and not for specific persons. That the freeholders of Bowes have always been a recognised body is apparent from the entries in the books of the manor; and it is in proof that the persons from whom the plaintiff claims, exercised the rights of freeholders, and that the plaintiff was himself fined for an encroachment, and thus treated as a tenant. His title therefore is, upon the whole, very clear.

The question, however, is whether the trustees are entitled to put the cestui que trust to strict proof of his title. A trustee cannot evict his cestui que trust. So far from throwing obstacles in his way, he is bound to assist him. [Alderson, B. I much doubt whether the trustees are bound to let any person, as tenant of the manor, search for game. They are to let the manor for what they can get, and divide the profits rateably.] Can they, when there has been a particular mode of enjoyment, in which they have acquiesced, tell the tenant that he has no right to sport? The Court cannot presume against the plaintiff's title, though the evidence of it may not be strong. Presumptions are made for the purpose of confirming titles, and not weakening them. The only exception to that is in regard to tithes. In *Hillary* v. *Waller* (12 Ves. 252) Sir William Grant refers to the observation of Lord Hardwicke, that the Court must govern itself by a moral certainty in these cases, for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title. [Alderson, B. That only means that you cannot prove a title by means of reasoning, but only with the help of evidence. Those sort of apothegms get a great deal more reputation than they deserve.] The question is whether the plaintiff's title may not fairly be presumed from the rights which he has exercised. [Alderson, B. **[555]** He may have legal rights, as, for instance, common of turbary, independently of the lands.] In order to let them in to make the plaintiff prove strict title, the defendants ought to shew amongst whom the profits should be divided, unless it can be ascertained that they themselves have a legal right to them. But they shew nothing of this sort, and the deed shews the contrary; for although it is not expressly stated that the land is purchased for the freeholders, the trust is that the freeholders may convert the profits of the manor to their own use. They are in fact to help themselves to the profits, and the trustees have no right to impose any fine upon them.

Mr. Cooper and Mr. Lovat, for the defendants. The whole gist of the bill is, that in one small particular the defendants have refused the plaintiff the benefit of the trust. There is no ground whatever for an account, nor has any application for an account ever been made. With respect to the plaintiff's title, as this is not a bill to establish a manorial or other custom, it is not necessary that he should have the legal estate; but he must prove, by all the evidence that a cautious conveyancer requires, that he is entitled to the benefit of the ancient deed—no matter how ancient. He must also, coming here for an account of profits, state what proportion of profits he claims. Therefore a special case must be made by the bill, and consequential relief demanded. The result of the authorities is that whenever a plaintiff comes to the Court and says he is not able to state exactly the amount of his interest, he must shew that his ignorance is occasioned by conduct on the other side.

But assuming that the plaintiff has succeeded in making out his title, under the deed of November, 1682, and that he is entitled to a portion of the trust-fund, the question is whether the bill can be sustained in its present frame. **[556]** The plaintiff, being one of about a hundred cestui que trusts, files his bill to have the trustees removed. Can he file such a bill alone? No doubt where the parties who ought to be plaintiffs or defendants are extremely numerous this Court, in order to do justice, will permit one plaintiff to sue on behalf of himself and all others in the same situation. The same principle is applicable to defendants. But there are certain qualifications to this rule. First, the plaintiff filing his bill on behalf of himself and others, must have the same common interest with the other parties, not only in the property but in the object of the suit. The Court must see that there are no other parties who are not desirous to have the prayer of the bill carried into execution. Secondly, the Court must be convinced that the object of the suit is beneficial to all parties. It must have no lurking suspicion that the result of the decree may be to destroy the property which is the object of the trust. Thirdly, the Court must be able to do justice to the defendants, by making a perfect decree, so as not to leave them open to responsibilities in which the decree will not protect them. Of these three qualifications, the first will occasionally be disregarded in favour of the second. Probably,

in some cases, a plaintiff would be allowed to sustain a bill on behalf of himself and others, though the others were adverse to it, if the Court were convinced that the suit was beneficial to all parties. If, for instance, the majority of the parties interested were to agree to enjoy the trust-property in a manner contrary to the terms of a statute, the Court might entertain a suit against the majority: *Bromley* v. *Smith* (1 Sim. 8). But in this case is the suit so clearly beneficial as to induce the Court to make a decree for the plaintiff, where so many of the freeholders are adverse to his claim? His proposition is to get rid of the guinea subscription, the consequence of **[557]** which must be the loss of the gamekeeper and the destruction of the game. It is in evidence that before the resolution of 1818, there was hardly a head of game on the manor, but that since that time it has been abundant. What right has a party who purchases the property eighteen years after these resolutions were passed, and with full notice of their nature, to quarrel with them? He must, at all events, convince the Court that they are illegal and detrimental to the enjoyment of the property. If this were a mining concern instead of a manor, would the assignee of a share under one of the ancient deeds be permitted to dig the mines, and convert them to his own use and benefit? If he had the legal estate, he might do what he could; but what Court would permit him if he had only an equitable interest? The Court would not let him take even his hundredth part. Or suppose this was a right of fishing. No person entitled to a tenement to which that right was appendant could take fish except for the benefit of himself and his family. If he took more than his right, the others might sustain an action upon the case for damages.

If it be said that under the deed of 1682 the plaintiff is entitled to such a proportion of the game as his tenement bears to the other tenements in the schedule, and that it is not in the power of the cestui que trusts to prevent him from taking it, the plaintiff must state some mode of adjusting the right of the parties in this respect, otherwise he can have no relief. But it is submitted that, on the face of it, this proposition is so unreasonable and unjust that a Court of Equity will not assist him.

The question whether a perfect decree could be made in this case need hardly be argued, because it is submitted that the bill should be dismissed with costs. Supposing, however, a decree to be made against the defendants, and they to bear their own costs, what authority can your **[558]** Lordship give them to retain their costs as against the cestui que trusts, who signed the resolutions?

Reverting to the question of title, it is worthy of consideration whether the plaintiff, even admitting that he proves his title to these lands, has shewn any right to share the profits of the manor. What is there in the law of this country to prevent any one entitled to share the profits of the deed of 1682 from separating the profits from his tenement? No doubt the parties who framed the deed thought they could connect the profits of the manor with the tenement. But it is clear, both at law and in equity, that a manor may be separated from the land. So a franchise of free warren may be separated from the manor; and it must be expressly mentioned, or will not pass by conveyance. Now here Richard Coates, or any other proprietor, might have conveyed away the profits and retained the tenement. In *Edwards* v. *Lord Rokeby* Mr. Bell, who drew the bill, set out every link in the chain of the plaintiff's title. That suit was brought, not to establish the customs of the manor, but by persons claiming as cestui que trusts under the deed of 1658; and claiming, like the present plaintiff, not simply as tenants of the manor, but as tenants entitled to the benefits of the indenture. Now, for any thing that appears in the present bill, the whole of the right of sporting may have been aliened. Neither do the rolls of the manor nor any of the documents assist the plaintiff in his evidence in this respect. For though they make mention of the tenement in respect of which he claims the profits, they take no notice whatever of the profits themselves.

But, further, we submit that the plaintiff has not succeeded in proving that these lands are a portion of those contained in the schedule, he himself admitting he can only identify a part of them. It is clearly necessary that he should prove himself a tenant under the deed, and not merely a tenant of the manor. His case is, that the **[559]** persons named in the schedule, their heirs and assigns, are entitled in respect of the premises therein contained to divide among them the profits. There is no suggestion, nor can it be supposed, that these were the whole of the freeholders. Some sixty are named in the schedule; but considerable as that number is, it cannot

be supposed that the whole of them should have concurred in becoming the purchasers. Besides, the reservations in the deeds, both of August, 1657, and October, 1658, are very considerable; and the person who owns the castle garth is not a party to this suit.

Upon the whole, even admitting that the plaintiff has a right to some part of the relief which he prays, he can have no right to an account, or to the removal of the trustees. It is difficult to see how else the trustees could have acted differently in respect to the game. In *Webb* v. *Lord Shaftesbury* (7 Ves. 488), which was the case of a devise of a manor, the parties could not agree as to what should be done with the game; and Lord Eldon directed an inquiry whether the liberty of sporting could be let for the benefit of the cestui que trusts. Here the charge of a guinea was, in fact, a sort of letting which the Court would authorize: it was a check on indiscriminate shooting. [Alderson, B. The difficulty is in the trustees not having treated all the persons alike. They should have been all considered as strangers.] As to the account, no bill was ever filed for an account stating merely that the plaintiff is entitled to some share of the profits, but not saying what.

Mr. Wilcock appeared for Sarah Bailey, a party in whom the right of nominating new trustees had vested by descent.

Mr. Simpkinson, in reply. If the resolutions of 1818 were valid, and the plaintiff came into Court upon certain **[560]** equitable grounds to set them aside, it might be a good objection that the freeholders who signed them were not parties, defendants, to this suit. But, as it appears distinctly that these resolutions were a dead letter, and not binding either at law or equity, it would be idle to bring the parties who signed them before the Court. The parties to this suit are quite competent to represent the freeholders at large, who are about a hundred in number.

With respect to another objection, upon which much stress has been laid, it is clear that all the freeholders of the manor have enjoyed the rights of cestui que trusts under the deed. The form of the schedule and the deed together make it impossible to come to any other conclusion than that it applies to all the freeholders. It is said that some of the property is reserved; but the very exception shews that the deed was meant to include all the freeholders, for the thing excepted is part of the demesnes of the manor. The purchase was only by the tenants, not by the lord; and therefore it was that the reservation of Bowes Castle and other parts of the property was made in the deed. Besides, the assessment on all the tenants for the costs of the Chancery suit is further evidence that the trusts of this deed, be they what they may, are for the benefit of all.

Again, though the title of the plaintiff is not set out in the bill as it was in *Edwards* v. *Lord Rokeby*, the proof is the same. In that case, Henry Wrightson, through whom the plaintiff claimed, was named in the schedule. The statement in the schedule was that "Henry Wrightson holdeth lands, &c.," precisely as was the case here in regard to Richard Coates. There it was necessary to state the plaintiff's title in the bill, because the defendant, Lord Rokeby, repudiated the trust. Here the trust is admitted.

With respect to the acts of the trustees, it cannot be **[561]** said that they have let the manor; what they have done is, to let the right of shooting in an arbitrary and capricious manner. Even supposing the deed fails to shew that the right of shooting is in all the freeholders, without restriction, usage will shew it; and can it be said that the deed is not perfectly consistent with such usage? And can it be contended that, before 1818, there was not free liberty to all the freeholders to take the game of the manor?

July 1st.—ALDERSON, B. This was a bill filed against the defendants, who are the trustees for the manor of Bowes, in the North Riding of the county of York, praying that this Court may declare that the plaintiff, as a tenant of the said manor of Bowes, is entitled to the benefit of the trusts of a certain indenture dated 29th November, 1682, and that he, and all other the tenants of the said manor entitled to the benefit of such trusts, being duly qualified by the usual game certificate, is and are entitled to beat and search for game on a certain moor within the said manor, and on the wastes of the said manor.

The bill then prays an injunction against the defendants to restrain them from further prosecuting an action of trespass against the plaintiff, and from bringing any actions against any of the tenants entitled as aforesaid, for any acts lawfully done

by virtue of the said trusts; and that they may be decreed to account for the profits of the said manor, and may be removed from being trustees, and that new trustees may be appointed under the directions of the Court.

It appears from the facts laid before the Court that in 1657, by deed of feoffment, this manor of Bowes was conveyed by the corporation of London to Christopher Hanby and his heirs, together with certain other premises therein mentioned; but with the exception of all messuages, lands, tenements, cottages, cattlegates, woods, **[562]** underwoods, and trees, commons, common of pasture, moor and turbary, privileges of slate and stone, rights, easements, profits, commodities, and other hereditaments, with the appurtenances, situate within Bowes, Bolron, Sleightholme, Stony Keld, and the Spittle, which had been before sold or contracted to be sold by the Corporation of London to any person or persons.

It appears that Christopher Hanby, in making this purchase, was not making it on his own behalf; but was, in truth, a principal for the benefit of others, and was under an engagement to convey certain portions of the same to such persons as should be nominated by five individuals therein mentioned. Accordingly a conveyance was executed on the 21st October, 1658, of the premises, with certain further exceptions, which Christopher Hanby reserved to himself; and the trusts of this conveyance were declared to be, to permit and suffer every of the persons named in the schedule to that deed, their heirs and assigns, being tenants of the messuages, lands, &c., mentioned in such schedule, to have and convert to their own uses respectively a rateable proportion of the rents, issues, and profits of the said manor and premises, and every part and parcel thereof, according to the proportions of the several ancient yearly rents of the said messuages, lands, and tenements, and of the monies by them respectively paid for the purchase of the premises, which said rents and monies were set down and expressed in the said schedule to the said last recited indenture annexed.

These conveyances were recited in the trust deeds executed in 1682, and the above trusts were again expressed in the indenture of the 29th of November, 1682, which it is the object of the present suit to enforce.

It further appears that in 1809, Lord Rokeby and Mr. Matthew Montague, who were then acting as trustees, claimed to hold the manor for their own benefit, whereupon a suit in the Court of Chancery was instituted by **[563]** certain persons, the progress of which it is not very material to trace; but the result of which was, that by indentures of lease and release, dated 24th and 25th of July, 1828, the present defendants, together with Sir Henry Lawson, Bart., since deceased, were appointed trustees under the trusts of the deed of 29th November, 1682.

The present suit is instituted by the plaintiff claiming to be one of the cestui que trusts of the last deed.

It seems to me clear that, in order to establish this, he must shew himself to be entitled under one of these persons enumerated in the schedule annexed to the deed of October, 1658, for these were the persons who really purchased the manor of Bowes, and who were entitled to a rateable proportion of its profits. Looking at the recitals in those deeds, and the exceptions therein mentioned, and comparing them with the evidence in this cause, it does appear to me by no means clear that all the tenants of the manor of Bowes are entitled to participate in those advantages. I find, in the original conveyance to Hanby, mention made of lands within the various townships sold to other persons and excepted out of his conveyance; and in the conveyance from Hanby to the first trustees further exceptions are to be found. Again, supposing this not to be so, I am by no means prepared to assent to the proposition that this interest in the profits of the manor can be annexed to the various tenements mentioned in the schedule, so as to be assigned therewith, without appropriate words of conveyance for that purpose. And unless this be so, the title of the plaintiff to this undivided share of the profits of this manor, as one of the cestui que trusts, is not satisfactorily made out. It is, I think, reasonably enough made out that the plaintiff holds an estate which formed part of an estate of one of the tenants enumerated in the schedule. But that is all. I am of opinion, therefore, that in the tracing of his title as one of the cestui **[564]** que trusts he has failed. But, secondly, if he had succeeded, it appears to me quite clear that he cannot succeed upon the second and third declarations which he seeks from the Court. All that the cestui que trusts are entitled to, is to have a rateable proportion of the rents and profits, and this is, as it seems to me, impossible, upon the claim made by the plaintiff. Many of the cestui que trusts may be females,

many infants, and many, from age or other circumstances, wholly unable to enjoy these profits in the way proposed: and even if all could do so, it is clear that it would not be done rateably unless we could suppose that all had proportionate skill and proportionate diligence. The only way, therefore, in which justice can be done to all, is to make a pecuniary profit of the whole right of sporting, and to divide that profit rateably amongst those entitled to it. So far as the resolutions of 1818 go to give liberty to freeholders of the manor to shoot on more favourable terms than others, I think them illegal, and would advise the trustees to reconsider them. In other respects they appear to me to be just and right.

I cannot, therefore, make the second declaration prayed by the plaintiff, nor restrain the action of trespass by the injunction of the Court.

As to the account, there are two objections to granting it. First, the failure of the plaintiff in establishing his right as cestui que trust; and, 2ndly, the obvious non-necessity for any account, none having been even asked from or refused by the trustees. As to the removal of the trustees, that is out of the question, for, with the exception to which I before adverted in the resolutions of 1818, there is no pretence for any fault to be found with their conduct, and I do not think them to blame as to that part of the resolutions. It is a mere mistake, and not a mistake of the trustees, but of the body who intrusted them.

The bill must be dismissed with costs.

[565] CROMEK *v.* LUMB. June 25th, 27th, 1839.—Testator devised his real and personal estate to trustees upon trust to sell and lay out so much as should be sufficient to raise three annuities of 100l. each; and he directed that they should apply one of such annuities towards the maintenance and education of his grandchildren, the children of his late daughter H., until the youngest of such children who should live to attain twenty-three should attain that age; and from and immediately after such youngest child should have attained that age, then he directed the capital, from which such annuity was derived, to be paid and divided unto and equally amongst his last-mentioned grandchildren, share and share alike, as tenants in common. He then directed the two other annuities to be paid to his daughters C. and W. for their lives, and as to the respective capitals from which such annuities were derived, he directed his trustees to pay and divide each of them from and immediately after the decease of his daughters C. and W. unto and equally amongst all and every his grandchildren then living (children of H.), and all the children of C. and W., as well those then living as those which might thereafter be born, share and share alike, &c. And as to the residue of the monies to arise from the sale of his real and personal estate, he directed his trustees to pay and divide the same unto and equally amongst the children of H. then living, and the children of C. and W. then living or to be born during his lifetime, share and share alike, as tenants in common. The will then contained a proviso that the legacies or shares should vest in the grandchildren at twenty-three, and that if any should die under twenty-three without issue, then the legacies or shares of them so dying should go and accrue to the survivors and survivor of them, to be equally divided between them, share and share alike. At the testator's death there were twelve children of H., C., and W. Of these, four died under twenty-three: then six attained that age; then two died under twenty-three; and of H.'s children, who were five in number, three attained the age of twenty-three, of whom one, namely J. H., died, after surviving M. H., who died under twenty-three, and predeceasing D. H., who died under that age: Held—1st. That J. H. took an original one-fifth share of the annuity-fund provided for the children of H., and one-third of M.'s share, but no part of D.'s share.—2ndly. That the limitations over of the annuity-fund from which C. and W. took their life annuities were void for remoteness.—3rdly. That J. H. took an original share in the residue, and an aliquot part of the shares of the four who died before him, but no part of the shares of those who died after him.—4thly. That for the purpose of the above construction, the words "survivors and survivor" were to be taken in their usual sense, and to be considered as referring to survivors in each class of grandchildren.—If the interest and dividends of a legacy are alone the subject of the bequest until a particular time, and the principal is not sooner

taken out of the residue, but is directed for the first time to be taken out of it and paid to the legatee at the end of that period, the intermediate gift of the interest or dividends will not vest the capital: 1 Rop. Leg. p. 500.

Samuel Hartley by his will devised all his real estates, which consisted principally of houses and warehouses at Wakefield, in the county of York, and all his shares in the Barnsley canal, and all other his canal shares, and all his stock in trade, money, goods, and personal estate, to certain persons, their heirs, executors, administrators, and assigns, in trust, for the purposes following, upon trust to stand possessed of eleven of his shares in the Barnsley canal until his grandchildren then living, the children of his late daughter, Martha Hill, and of his daughters, Elizabeth Cromek, widow, and Sarah the wife of William Henry Worthington, being sons, should attain **[566]** the age of twenty-three years, or, being daughters, should attain that age or marry with consent as therein mentioned, and then upon trust to transfer or assign to each of them respectively one of such shares; and he directed the annual profits of such shares to be applied for their maintenance till they should be entitled to such shares. And upon further trust that his said trustees and the survivors of them, &c., should, as soon as conveniently might be after his decease, sell all his real estates and all his personalty of a saleable nature, and out of the monies to be produced by such sale or sales lay out and invest upon real security or in the public funds such sum or sums of money as should be fully sufficient to raise three several annuities or clear yearly sums of 100l., "and by and out of the interest, dividends, or annual proceeds thereof, and the rents and profits of my said real estate, until such sale and investment as aforesaid, do and shall pay and apply one of such annuities or annual sums of 100l. in or towards the maintenance, education, and support of my said grandchildren (the children of my said late daughter Martha Hill, deceased), until the youngest of such children who shall live to attain the age of twenty-three years shall attain that age; and from and immediately after such youngest child shall have attained that age, then I direct that the principal sum or sums of money which shall have been laid out or invested as aforesaid, for the purpose of raising the said annuity or annual sum of 100l., shall be paid and divided unto and equally amongst my said last-mentioned grandchildren, share and share alike, as tenants in common. And upon further trust that my said trustees do and shall by and out of the said interest, dividends, and annual proceeds, rents, and profits, pay unto each of my said daughters, Elizabeth Cromek and Sarah Worthington, for and during their respective natural lives the like annuity or clear yearly sum of 100l." [Here followed a clause enabling the trustees to pay the annuities to **[567]** Mrs. Cromek and Mrs. Worthington in such manner, form, and proportions as they might think proper, so that such annuities might be placed out of the control of the respective husbands of the annuitants.] "And as to each of such principal sums of money respectively as shall have been laid out and invested as aforesaid for the purpose of raising the said last-mentioned annuities or yearly sums of 100l. each, I direct that my said trustees shall pay, apply, and divide each of the same principal sums of money, from and immediately after the decease of my said daughters Elizabeth Cromek and Sarah Worthington respectively, unto and equally amongst all and every my grandchildren now living, children of my said late daughter Martha Hill, and unto and amongst all the children of my said daughters Elizabeth Cromek and Sarah Worthington, as well those now living as those which may hereafter be born, share and share alike, as equal tenants in common. And as to all the rest, residue, and clear remainder of all the monies to arise by sale or otherwise from my said real and personal estates and not herein otherwise disposed of (subject to the payment of an annuity of 15l., and legacy to my sister Martha Firth, and to the legacies to my trustees hereinafter mentioned), I will and direct that my said trustees shall and do pay and divide the same unto and equally amongst all my grandchildren now living, the sons and daughters of my said late daughter Martha Hill, and my grandchildren, the sons and daughters of my said daughters Elizabeth Cromek and Sarah Worthington now living, and which may hereafter during my lifetime be born, share and share alike, as equal tenants in common; * and I will that the respective shares (subject and without prejudice to the life interests of my said daughters) of all my said grandchildren hereinafter mentioned shall be paid to each of such grandchildren being a son on his attaining the age of twenty-three years, and each of them being a daughter upon **[568]** their attaining that age or being married

with such consent as aforesaid, whichever event shall first happen (except as to such shares as are hereinbefore otherwise directed to be paid). Provided always, and I do hereby expressly will and direct that the legacy, part, or share, legacies, parts, or shares, as well specific as otherwise, hereinbefore given to or intended for each and every of my grandchildren as well now living as which may hereafter be born, shall become a vested and transferable interest in each of my said grandchildren, being a son, upon and immediately after his attaining his age of twenty-three years or leaving lawful issue at his decease before that age, and on each of them my said grandchildren, being a daughter, on her attaining that age or marrying with the consent aforesaid, whichever shall first happen. Provided always that if any of my said grandchildren shall die during my lifetime or after my decease, being a son, under the age of twenty-three years without leaving lawful issue, or being a daughter, under that age and unmarried as aforesaid, then I will and direct that the legacy, part, or shares legacies, parts, or shares, as well specific as otherwise, of him, her, or them so dying, shall go and accrue to the survivor and survivors of all and every my said grandchildren and the lawful issue (if any) of such grandchildren as may be dead, to be equally divided between or amongst them if more than one, share and share alike, and if but one, then to such one or only surviving grandchild or issue (such issue taking only by representation the share which the parents or parent would have taken if living), and to be vested and transferable interests in him, her, and them at such ages and times respectively as the original share or shares is or are hereinbefore declared to be vested; which accruing or surviving legacy, part, or share, legacies, parts, or shares, shall from time to time upon any such death as aforesaid be subject to such new chance, contingencies or condition of accruer as is herein-**[569]**-before declared in respect of the said original legacies, parts, or shares." * The testator then declared that until the share or shares of his grandchildren respectively should become payable by virtue of his will, it should be lawful for his trustees to apply any part of the interest and dividends of their presumptive shares towards the maintenance of such grandchildren or the issue of any such grandchild or grandchildren who might be dead. There was likewise a clause for the advancement of the grandchildren, notwithstanding that the shares should not have become payable. And the testator further directed his trustees, if they should think proper, out of the interest, dividends, and annual proceeds of the legacies or shares of his grandchildren the Hills, to provide a suitable dwelling-house for their residence during their minority.

The testator died, leaving Mrs. Cromek and Mrs. Worthington surviving him. At the time of making his will he had eleven grandchildren, and, at the time of his death, twelve grandchildren of the three several families mentioned in the will.

At the time when the testator's will was made, and of his death, there were five children of Mrs. Hill; namely, Samuel Hartley, John, Mrs. Rowlandson, Martha, and Daniel. Of these the three first attained their ages of twenty-three. The other two died under that age. John Hill also died; his death taking place after that of Martha, but before that of Daniel, and before Mrs. Rowlandson attained her age of twenty-three.

Of Mrs. Cromek's children, two only, who were living in the testator's lifetime, attained the age of twenty-three.

Of Mrs. Worthington's children, one only, who was living in the testator's lifetime, attained that age. She had, however, a daughter Sarah born after the testator's decease, who was now living.

None of the grandchildren who died left any issue.

The question on further directions was what dis-**[570]**-tribution was to be made; first, of the capital fund out of which the annuity of 100*l.* was provided for the maintenance of the Hills; secondly, of the capital fund out of which the annuities to Mrs. Cromek and Mrs. Worthington were given; thirdly, of the residue.

Mr. J. Russell and Mr. O. Anderdon, for Samuel Hartley Hill and Mrs. Cromek. The first of these funds is only distributable amongst those of the children of Mrs. Hill who are in esse when the youngest of any of them, who lives to attain twenty-three, attains that age. John Hill, therefore, is altogether excluded from any participation in that fund, and the whole goes to Samuel Hartley Hill and Mrs. Rowlandson. There is no gift of this fund, except in the direction to divide; therefore, upon general principles, those only who are living at the period of distribution are entitled.

Secondly, the whole of the bequest of the capital out of which Mrs. Cromek's and

Mrs. Worthington's annuities arise is void, as being too remote. If the clause in which that bequest is made stood alone, it would be good ; but the subsequent direction, that the shares of grandchildren born or to be born should be a vested interest at twenty-three, destroys the prior gift : and if a bequest is made to a class of persons, some of whom are within the legal limits during which a bequest may take effect, and others not, the whole gift fails : *Leake* v. *Robinson* (2 Mer. 363, 390), *Bull* v. *Pritchard* (1 Russ. 213), *Vawdry* v. *Geddes* (1 Russ. & M. 203).

Mr. Simpkinson and Mr. James, for the representatives of John Hill. Upon the first point, there is a material distinction between this case and the common cases where the time of payment is annexed to the substance of the **[571]** gift. Here the testator has directed his trustees expressly to set apart a competent part of the estate to produce the annuity. The corpus of the fund, therefore, is severed from the testator's other property. It is given to the trustees immediately, though to be divided at a future time. For that purpose, it is immaterial whether the gift is to the trustees or the individuals. The trusts of that fund are solely and exclusively for the benefit of the children of Mrs. Hill, and it is impossible to read the will without coming to the conclusion that all her children who survived the testator were to receive an adequate proportion of the annuity for their maintenance, and, upon arriving at twenty-three, should share the principal as vested. Where maintenance is given, though the fund is not given till a future period, it is a proof of the intention of the testator to vest the interest, though the time of payment is postponed : *Booth* v. *Booth* (4 Ves. 399), *Jones* v. *Macilwain* (1 Russ. 220), *Bass* v *Russell* (1 Taml. 18) ; and that a gift to trustees is equivalent to an immediate gift to the individuals is settled by *Dodson* v. *Hay* (3 Bro. C. C. 404), *Murray* v. *Addenbrook* (4 Russ. 407), and *Rofe* v. *Sowerby* (1 Taml. 376). The children of Mrs. Hill were orphans, and it was a particular object that the fund should not be divided till they could go out into the world. There is an express direction that a house should be provided for them.

From all these considerations, it is clear that John Hill was entitled to one-fifth of the corpus of the first-mentioned fund, and also to one-third of Martha's share in that fund. There may be some doubt whether he was entitled to any part of the share of Daniel, who died after him under the age of twenty-three. Upon that, it is submitted that it was the clear intention of the testator that all those who attained twenty-three should take not only **[572]** their original shares, but a proportion of the shares of those who died under twenty-three. John Hill's representative is, therefore, entitled to such proportion of Daniel's share as John would have been entitled to if living.

Mr. Teed, for Mrs. Worthington and her son W. H. Worthington, who had attained twenty-three, contended that the words "survivors and survivor" could not mean "others and other," as had been argued for the Hills ; and that in strictness that expression had reference to the survivors amongst all the grandchildren, and not merely amongst each class of grandchildren.

Mr. Girdlestone, for Sarah Worthington. The Court will lean in favour of this party, towards whom, as well as the other grandchildren, the testator put himself in loco parentis. Her claim depends on the limitations over upon the residuary clause. First, she is entitled to a share in such part of the annuity-fund given to Mrs. Hill as survived to the other grandchildren, upon the death of any of Mrs. Hill's children under twenty-three. This is submitted on the ground that those shares went over to the grandchildren generally, and not to Mrs. Hill's children only.

Secondly, she is entitled to an original share in the capital set apart for the two annuities of Mrs. Cromek and Mrs. Worthington. It is said that the limitations as to this fund are too remote. We do not dispute that a bequest to unborn children, to vest at twenty-three, is too remote, or that the whole bequest will fail if part is too remote. But the question is whether, upon the true construction of the will, the vesting is postponed till the age of twenty-three. We say that these are immediate vested interests, subject to the event of the parties dying under twenty-three, without leaving lawful issue. Where there is a clear **[573]** immediate gift which would vest the whole at once, it will not be controlled except by very strong words of a contrary signification. Now, here the testator in the first instance makes a clear immediate bequest of the annuity-funds—"As to each of such principal sums of money," &c. Then he directs that each of the shares shall be paid at twenty-three. That does not divest the original gift. Then comes the disputed clause, which they say operates as a new disposition—"Provided always," &c. But neither of the antecedent clauses says

anything about issue; therefore the testator does not lay the foundation in those clauses for this. He does not intend to provide a different period for vesting, but only to state in what events the funds are to go over. Then, after the clause of survivorship, he declares that, till the shares shall become payable, the trustees may apply the interest of them for the maintenance of the grandchildren. This, as well as the advancement clause, shews that the testator intended an immediate gift. The question therefore is whether, solely upon the equivocal clause as to vesting at twenty-three, your Lordship is to hold the vesting is not immediate—all the other clauses in the will being strongly in favour of an immediate vesting?

Thirdly, upon the same grounds as we rest our first claim, we claim a share in those portions of the last-mentioned capital which would belong to such of the children of Mrs. Cromek and Mrs. Worthington as died under twenty-three without leaving issue.

Lastly, upon the same grounds, we claim to participate in such shares of the general residue as would belong to parties dying under twenty three without leaving issue.

Mr. Swanston, Mr. Cooper, Mr. Kenyon Parker, Mr. Sutton Sharpe, and Mr. Bacon appeared for other parties.

[574] Mr. Russell, in reply, referred to *Batsford* v. *Kebbell*,(*a*) as an authority to shew that John Hill had not a vested interest in the annuity-fund of the Hills. He also contended that the words "survivor and survivors" must be construed according to the usual meaning of the words, unless there is something to force a contrary construction: *Crowder* v. *Stone* (3 Russ. 217).

June 27th.—ALDERSON, B The questions which have been argued with great ability have turned on the construction of the will of Samuel Hartley, dated 12th of January, 1822. By his will, after leaving all his property, real and personal, to trustees, he directed them to stand possessed of eleven shares in the Barnsley Canal until his eleven grandchildren, then living, should, if sons, attain twenty-three; or, being daughters, should attain that age, or be married with consent. And upon those events happening, to transfer one share to each of such grandchildren, and in the meantime to apply the dividends to their maintenance respectively. And then he proceeds to direct sales of his real estates, and out of the monies so produced he directs his trustees to lay out a sum of money on real or Parliamentary security sufficient to raise three several annuities of 100l. each. He then proceeds to dispose of those annuities. First, he directs that the first shall be applied to the support, maintenance, and education of his grandchildren, the children of his daughter, Martha Hill deceased, until the youngest of such children shall attain twenty-three, and immediately after the youngest child shall have attained that age, in trust that the principal sum or sums **[575]** of money laid out in the purchase of such annuities "shall be paid and divided unto and equally amongst my said last-mentioned grandchildren, share and share alike, as tenants in common."

The next trust in the will relates to the other two annuities, which are directed to be paid to his daughters, Elizabeth Cromek and Sarah Worthington respectively, for life. And he then proceeds—"As to each of such principal sums of money laid out in the purchase of each annuity of 100l., I direct that my trustees shall pay, apply, and divide each of the sums from and immediately after the respective deaths of Mrs. Cromek and Mrs. Worthington, unto and equally amongst all and every my grandchildren now living (children of my late daughter Hill), and unto and amongst all the children of my said daughters, Cromek and Worthington, as well those now living as those who may hereafter be born, share and share alike, as equal tenants in common."

Then he proceeds "as to all the rest and residue" to bequeath that amongst all his grandchildren now living (children of his daughter Hill), and his grandchildren (children of his daughters Cromek and Worthington) now living, or who shall hereafter be born "during my lifetime," share and share alike, as tenants in common.

(*a*) 3 Ves. 363; and see *Livesey* v. *Livesey*, 3 Russ. 287. But it is difficult to reconcile the cases on this subject. It may be remarked that in *Batsford* v. *Kebbell* the party was not to receive the capital till he was thirty-two, which was apparently one ground for holding that there was not an immediate vesting. See the next case in the same volume of Reports.

"And I will that the respective shares" &c. [Here his Lordship read that part of the will which is comprehended between the asterisks. See ante, pp. 567, 569.]

Now, the first question is, what interest the Hills take in the principal sum producing the first annuity. It appears that at the time of the will, and of the testator's death, there were five children of this family. Of these, three only attained twenty-three; and one of these, John Hill, died after attaining twenty-three, but before the period when the principal became payable. It is contended, on behalf of the plaintiff, that he took nothing under this bequest: and that this case falls within the **[576]** principle of the case of *Batsford* v. *Kebbell* (3 Ves. jun. 363). But I do not agree to that argument. I think the principle of the cases is well stated by Mr. Roper, vol. 1, p. 500, and it is this—If the interest or dividends alone are the subject of the bequest until a particular time, and the principal is no sooner taken out of the residue, but is directed for the first time to be taken out of it, and paid or transferred to the legatee at the end of that period, the intermediate gift of the interest or dividends will not vest the capital. And this is on the ground of the apparent intention to constitute the time appointed for the payment to be of the essence of the gift.

Now, if this be so, it seems to me to make an end of this point. For here the testator takes the principal money out of the residue by the direction to the trustees to purchase an annuity therewith. He devotes the dividend to a specific object intermediately, and appoints the time of division of the principal, postponing it on account of the peculiar circumstances of the family. If, therefore, this bequest stood alone, I should be of opinion that it vested immediately; and that the declaration of the respective interests must be on that footing. But I think this construction is controlled by the subsequent parts of the will.

And this brings me to consider the general scope and plan of this will. The testator seems to me to have first distributed his property to different classes of grandchildren. First, the eleven alive when the will was made, to whom he gave the Barnsley shares. Those they were to take as each attained twenty-three, or if daughters, at the time of twenty-three, or marriage. The second class were the Hills, who were orphans. To their maintenance he devotes the annuity, which probably, if their mother had been alive, would have gone to her for life for the **[577]** same presumable purpose; and this fund for maintenance he, naturally enough, continues unbroken till the youngest is of age. Then the principal is distributed.

The next bequests are to his surviving daughters. And then he distributes the principal amongst a third class, consisting of all his grandchildren alive, or to be after born. And then comes the residuary clause, which he gives to a fourth class, namely, grandchildren alive or after born in his lifetime. Having done this, the residue of the will contains a variety of provisions applicable, as it seems to me, to all these four classes, and to be read as if repeated mutatis mutandis at the conclusion of each bequest.

The first of these directs that, with the special exception of the bequest of the principal money of the 100l. annuity to the Hills, each of his grandchildren should take the share due to him or her at twenty-three, if sons, or at twenty-three on marriage, if daughters.

The second of these general provisions is, that the share of each grandchild shall become a vested or transferable interest, if a son, at twenty-three years, or if he dies leaving lawful issue; and if a daughter, at twenty-three, or marriage with consent.

And the third provides for what is to be done in case any of the grandchildren die before their interests are vested, and provides in substance that in that event those who survive (by which I understand those of each class who survive) are to divide the share of the one who dies equally, share and share alike.

Now, in the events which have happened, applying the above reading of the will to the facts of this case, I have come to the conclusion that the interest of the Hills became vested at twenty-three, and that John is entitled to a portion of the share of the one whom he survived, but not to any part of Daniel's original share. I think, therefore, that he took one-fifth originally, and one-third of Martha's **[578]** fifth; and that the other two Hills took each one-fifth, and one-third of Martha's, and one-half of Daniel's original share.

The next question is, as to the devise of the principal of the two other annuities. I think it follows from the construction I put on this will, and the authorities cited in

argument that this is void, as being a bequest to a class, as to some of whom it is too remote. This must, therefore, fall into and be divided with the residue.

Then as to the residue. It appears that, at the death of the testator, there are twelve who might have become entitled. These were reduced to eight, of whom six attained to the proper age, and two have died subsequently to the death of one of the six, namely, John Hill. It results, therefore, that the representative of John Hill will be entitled to an original one-twelfth, and to one-sixth of four-twelfths of the residue, and the other five grandchildren will have each that share, and also one-fifth of the remaining two-twelfths.

Decree accordingly.

HUGHSON *v.* COOKSON. June 26th, 1839.—Where a legacy is given to A. and B. in equal moieties, a bill will lie by A. for his moiety, without making B. a party to the suit.—Bill against two executors, one of whom is attached for want of an answer, and discharged. The cause may be heard on supplemental bill, taken against him pro confesso.

[S. C. 8 L. J. Ex. Eq. 68.]

George Brooks, by his will, gave to his daughter Martha 150l., to be paid to her when his other daughter, Ellen, the wife of John Hughson, should attain twenty-one; but in case she should die before the other daughter attained twenty-one and without issue, then he gave the 150l. to Ellen Hughson and his son T. Brooks, in equal moieties, to be divided between them. Martha Brooks died without issue before Ellen Hughson attained twenty-one. The bill was filed by John Hughson and his wife against the executors and residuary legatee, for payment of their moiety of the 150l. T. Brooks was [579] not a party to the suit. The cause now came on for hearing.

Mr. Spence (with whom was Mr. Dixon), having opened the case for the plaintiff,

Mr. Simpkinson and Mr. Harwood, for the defendants, objected that the bill could not be filed for a moiety only of the legacy of 150l., and that T. Brooks ought to have been made a defendant to the suit. As the record now stood the executors might at some future time be sued by T. Brooks for the other moiety. When two persons are jointly interested in a particular fund, they ought both to be before the Court: *Munch* v. *Cockerell* (8 Sim. 219).

Mr. Spence, contrà. Every person is at liberty to file a bill for his own legacy. *Munch* v. *Cockerell* was the case of a breach of trust, and it was there sought to make the trustees personally answerable for their misconduct. Here the bill is filed against the residuary legatee and executors, to ascertain whether the funds in their hands are sufficient to pay the 150l. It is precisely the same as if they had sued for 75l. The parties who are to account for the assets are before the Court.

ALDERSON, B., overruled the objection.(*b*)

In this cause, Cookson, one of the executors, having failed to put in his answer to the original bill, was attached and sent to gaol, but was afterwards discharged, though not brought up under Sugden's Act, and no further proceedings were there had against him. Afterwards the plaintiffs filed their supplemental bill, to which the defendant appeared, but put in no answer, whereupon another [580] attachment issued against him, under which he was sent to prison, and afterwards removed to the Fleet by writ of habeas corpus. The bill was then taken pro confesso against him.

Mr. Simpkinson and Mr. Harwood, for the defendants, objected that the cause had not been properly brought to a hearing against Cookson—the plaintiffs proceeding against him on supplemental bill only. They urged that an account could not be taken against one of two executors.

Mr. Spence and Mr. Dixon, contrà. The decree in the supplemental suit recites that it became impossible to go on with the original decree. That will be sufficient as against this defendant: *Williams* v. *Townsend* (6 Sim. 296).

ALDERSON, B., overruled the objection.

(*b*) See *Hutchinson* v. *Townsend*, 2 Keen, 675.

WOOD *v.* WOOD. June 27th, 1839.—Where an official assignee was omitted to be made a defendant, liberty was given to the plaintiffs at the hearing to amend the bill by adding parties.—Quære, whether, under an order to amend, a plaintiff may file a supplemental bill? See *Greenwood* v. *Atkinson*, 5 Sim. 419.

[See further, 4 Y. & C. Ex. 135.]

The bill was filed by the creditors of John Worthington the elder, against the trustees and executors under his will for the administration of his estate. By the will the real estates of the testator were charged with the payment of his debts, and though the bill stated that fact, and also that the will was duly executed so as to pass real property, it did not pray relief against the real estate. It also appeared that one of the executors had become bankrupt, but that his official assignee was not made a party to the suit.

Evidence having been entered into, and the cause coming on for hearing,

[581] Mr. Simpkinson and Mr. G. L. Russell, for the defendants, the assignees of the bankrupt, objected that the official assignee ought to have been made a party to the suit. They insisted that it was competent for them to take the objection at the hearing: *Cocker* v. *Quaile* (1 R. & M. 539), *White* v. *Hall* (id. 332), and that it was in the discretion of the Court to give liberty to amend the bill: *Tyler* v. *Bell* (2 M. & C. 89).

Mr. Pigott, for a mortgagee of the estate, contended that the bill could only be amended, if at all, by adding parties.

Mr. Kenyon Parker and Mr. J. Russell, for the plaintiffs. The assignees shew by their answer that they knew the official assignee was not a party. They then enter into evidence notwithstanding this defect. That evidence could not be received against him if he were now made a party, and therefore it would be nugatory to do so. If, however, the objection is available, the Court will give liberty to the plaintiff to file a supplemental bill, both for the purpose of remedying the defect and charging the real estate. It is clear that relief was intended to be had against the real estate, otherwise the bill would not have contained the statements which it contains as to the will; nor would the plaintiffs have proved it as a will of real estate. As to the right to file a supplemental bill, *Greenwood* v. *Atkinson* (5 Sim. 419) is in point. [Alderson, B. That case seems to decide that you may file a supplemental bill, though you have only liberty to amend by adding parties.]

Mr. Simpkinson, in reply, contended that the decision in *Greenwood* v. *Atkinson* was erroneous.

ALDERSON, B. I shall make an order that the plaintiff be at liberty to amend by adding parties. If that order, **[582]** according to *Greenwood* v. *Atkinson*, gives them the liberty to file a supplemental bill, I do not mean to deprive them of that right. I do not intend expressly to allow them to file a supplemental bill so as to enable them to obtain a greater quantity of relief than they could obtain by the original bill, but I mean them to have the same order as in *Greenwood* v. *Atkinson*.

Order accordingly.

WEST *v.* COLE.(*a*) June 26th, 1839.—Plaintiff, in an administration suit, held not liable to pay the costs of certain legatees who were made defendants, but disclaimed.

A bill for administering a testator's estate. Some persons whose legacies (charged on lands) had been paid were made defendants and filed disclaimers. The Court refused to charge the plaintiff with their costs, considering he was not bound to take upon himself the burden of proving that the claims of those defendants had been satisfied.

(*a*) Ex relatione.

CONNELL *v.* HARDIE. June 27th, 1839.—Upon a bill filed to enforce an equitable mortgage by deposit without memorandum, costs will be given to the plaintiff as against the personal representatives of the mortgagor.

Bill by an equitable mortgagee by deposit of title-deeds, without memorandum, praying to have the benefit of the security by a sale of the mortgaged premises. The mortgagor being dead, the question was whether the mortgagee was entitled to costs as against his personal representative.

Mr. Simpkinson and Mr. Bacon, for the plaintiff, said that all the authorities agreed that as against the personal representative of the mortgagor, an equitable mortgagee was entitled to a sale; and he was, therefore, entitled to his costs.

[583] Mr. Spence, contrà, said that this was a deposit without a memorandum, and that in bankruptcy no costs under such circumstances would be allowed. So, also, in *Brocklehurst* v. *Jessop* (7 Sim. 438) nothing was said as to costs.

ALDERSON, B. That case does not decide that he is not entitled to costs.

Decree costs.

HARRIES *v.* JOHNSON. June 27th, 1839.—Where the decree or order in the original suit contains a specific direction, as that the defendant shall pay a certain sum of money, that direction cannot be carried into execution in the revived suit by the mere order to revive, but a decree must be made in the revived suit for that purpose.

The original bill was brought against one Fielder, as the legal personal representative of the testator in the cause, praying the usual accounts. By the decree, the accounts prayed were directed to be taken, and certain deeds were ordered to be delivered to Fielder for specific purposes. The Master afterwards made his report, finding Fielder to be indebted to the testator in a large ascertained balance; whereupon the Court, on further directions, ordered the defendant's costs of the suit to be taxed, and that he should pay the balance found due from him, after retaining his costs. Fielder having died, the suit was revived against his personal representatives, who, by their answer, admitted assets sufficient to pay Fielder's debt to the original testator.

Mr. Roupell, for the plaintiff, now asked for such a decree as would make the representatives of Fielder personally liable on their own admission.

Mr. Dixon, for the defendants. No decree is necessary. The order to revive is sufficient. The suit, by the terms of the order, is in the same plight and condition as it was **[584]** before the death of Fielder. In *Barlow* v. *Fowler*,(*a*) which was a revived suit, the Vice-Chancellor refused to make a decree.

Mr. Roupell, in reply. If the decree is general, an order to revive is sufficient; but where it directs a specific act to be done by any party, and he dies, the direction cannot be carried into execution. It falls by his death. The act here is the payment of a sum of money. The defendants admit assets. Instead, therefore, of being liable as personal representatives, they are liable by their personal admission. It is a distinct equity. The plaintiff does not ask that they should pay out of the assets of their testator, but that they should pay. Besides, the Master has refused to act, because the decree is now inoperative as to the delivery up of the deeds. There must be a direction to the present defendants to do the specific acts which their testator was directed to do.

ALDERSON, B., said he considered the cases distinguishable on the grounds which had been stated, and made the decree as prayed.

Decree accordingly.

GARTH *v.* EARNSHAW. July 1st, 1839.—An agreement by a wife to waive the further prosecution of an indictment against her husband for an assault, in consideration of his allowing her an annuity by way of separate maintenance, is an illegal contract, though entered into with the sanction of the Court in which the indictment is tried: and the wife cannot claim the arrears of the annuity as a debt against her husband, in competition with her husband's creditors.

(*a*) Not reported.

The bill was filed by the creditors of Thomas Hudson, for the purpose of having a trust-deed carried into execution, by which Hudson had conveyed his estates in trust for sale and payment of his debts. A decree was made **[585]** by which the Master was directed to take an account of the debts, and of the rents received by the trustees; and if any special matter arose, the Master was to state the same to the Court. In consequence of this decree, Sarah Hudson, the wife of the settlor, went before the Master to prove a debt alleged to be due to her from her husband, in respect of the arrears of an annuity, which was stated to have been settled by him to her separate use. The Master, however, disallowed her claim, and refused to report it as a special circumstance. Exceptions were therefore taken to his report.

Upon the argument of the exceptions, it appeared by the wife's affidavit that Hudson had on many occasions ill-treated her, and that ultimately she was obliged to prefer an indictment against him for an assault; that the grand jury found a true bill, but that the prosecution was not proceeded with in consequence of Hudson's agreeing to settle 35l. a year, the annuity in question, to her separate use; that the settlement was prepared, but that he refused to execute it; that he was then found guilty, but that the Court gave the parties leave to compromise the matter; that Hudson accordingly agreed to execute the settlement, upon condition that the wife did not proceed to judgment against him; that, notwithstanding this agreement, Hudson went abroad without executing the settlement.

Mr. Mylne, for the exceptions, contended that the claim of the wife was founded upon an agreement made upon good consideration, and entered into with the sanction of the Court in which the indictment was tried. He cited *Logan* v. *Birkett* (1 M. & K. 220) and *Jones* v. *Waite* (5 Bing. N. C. 341).

ALDERSON, B. It is clear that the wife cannot come in as a creditor. The contract was illegal; and there is this **[586]** further difficulty, that it was made between the husband and the wife. And with respect to the special circumstances, I think it was a plain point, and that the Master had no occasion to report it.

Exceptions overruled.

LIGHTFOOT *v.* HERON. July 1st, 1839.—Specific performance decreed in favour of a purchaser, though no solicitor acted for the vendor; and though the contract was executed under circumstances which might easily have led to fraud; no fraud being proved in the vendor or his agent.—The fact that a party was considerably in liquor when he entered into an agreement is no reason for the Court refusing a decree for specific performance if there was no fraud.

[Applied, *Cox* v. *Smith*, 1868, 19 L. T. 518.]

One Heron, who owned and kept a public-house at Cockfield, was desirous, in 1836, of selling that property, and the plaintiff, amongst other persons, wishing to become the purchaser, went over to Cockfield in November of that year and attempted to make a bargain with Heron. They, however, differed about the price, Heron wanting three hundred guineas, and the plaintiff offering only as many pounds; and no agreement was then made. Afterwards, however, the plaintiff sent Calvert, an attorney, to Cockfield, with instructions to buy the premises at Heron's price if he could do no better. Accordingly, on the 6th of December, Calvert went to Cockfield and put up at Heron's house. After some haggling the bargain was struck at the price of 300l., and two or three glasses of liquor were drank on both sides to bind the bargain. Calvert then said that, as the bargain was made, the best thing they could do would be to send for a solicitor and draw up the agreement. Heron then sent the ostler, Stanwix, to fetch Richardson, a schoolmaster, to complete the contract. Richardson being out, Calvert said he would draw up the agreement himself, which he did, in two parts, one whereof was signed by Heron, and the other by Calvert, as the plaintiff's agent. Both of these documents were witnessed by Stanwix, no other person but Heron and Calvert being present. Calvert returned home the next morning.

[587] About five days after this transaction the plaintiff received a letter from Heron, stating that he declined the sale of the premises; that the contract was void, inasmuch as his son-in-law Dealtry held the deeds of the property, and would not permit the sale; that he, Heron, had a family to provide for, and trusted the plaintiff would think no more about it.

The plaintiff having written an answer to this note, stating that the agreement must be performed, received a letter from Heron's solicitor, dated the 29th of March, 1837, stating that Heron had a daughter married to Dealtry, and that they had several children; that Dealtry's health was bad, and that keeping a public-house was the business best suited to his constitution. "Under these circumstances Heron is wishful to keep it, and if you will give it up, he will pay all the costs you have been put to. I am aware he has not a right to do so, but I put it to you as a matter of feeling."

In reply to this letter the plaintiff wrote to say that had the statement and proposition now made been made in the former letter, he might have acceded to it; but that he could not do so now, as the person for whom he intended the public-house had left his situation in order to take it. This reply of the plaintiff was followed by a letter from Dealtry, dated the 13th of April, 1837, refusing to allow the purchase to be made.

It appeared that the deeds of the property were not deposited with Dealtry, as stated in Heron's letter, but that Heron, in consideration of 100l. expressed to have been advanced to him by Walton (but which was in fact Dealtry's money) had conveyed the property to Walton, in trust by sale or mortgage of the premises, to raise the sum of 100l. for payment of the debt, and subject thereto in trust for the plaintiff, his heirs and assigns. By indentures of lease and release, dated the 19th and 20th of April, [588] 1837, Walton and Heron conveyed the property to Dealtry in consideration of 316l.

The bill, which was filed against Heron and Dealtry, charged Dealtry with notice of the plaintiff's contract, and prayed specific performance against Heron, and that Dealtry might execute a proper conveyance of the legal estate to the plaintiff. The plaintiff entered into evidence to shew that Dealtry had express as well as constructive notice of the contract, and that he offered 20l. to induce the plaintiff to relinquish it.

The case set up by the defendants was that the agreement had been obtained from Heron while in a state of intoxication. The defendants produced one witness, the servant-girl of the public-house, who deposed that, in the first instance, Heron concealed himself in the stable to avoid being pressed to make the bargain, but that afterwards Calvert and Heron sat up till a late hour drinking, and that both got drunk. This witness, however, was in the most material points contradicted by Stanwix.

Other points of evidence are adverted to in the judgment.

Mr. Temple and Mr. J. Russell, for the plaintiff. The acknowledgment of the defendant's own solicitor is that the contract was fair. Dealtry had not only constructive, but actual notice of the contract, and cannot resist the performance of it. The consideration money which he gave for his purchase, which was only a pound more than the price agreed to be given by the plaintiff, shews that the transaction was collusive on his part. Under the conveyance to Dealtry, the legal estate passes subject to the plaintiff's equities: *Daniel* v. *Davison* (16 Ves. 259).

Mr. Simpkinson and Mr. Faber, for the defendants. The defendant Heron has nothing to do with the purchase of [589] Dealtry. It is clear that Walton had a right to sell, and could make a good title to the purchaser; and if his title to sell was superior to that of Heron, which it clearly was, how could Heron defeat it? Admitting that Dealtry had notice of the contract between Heron and plaintiff, how will that affect his purchase from Walton? Besides, whatever right the plaintiff may have at law, he has no right to come into this Court. The evidence is strong that this agreement was obtained from Heron when in a state of intoxication. The defendants' witness goes the full length of saying that all the parties concerned were drunk. Under such circumstances a court of equity will not lend its assistance to carry the agreement into execution. The Court will not act on the one side or the other, where an agreement is obtained from a party in a state of intoxication: *Cooke* v. *Clayworth* (18 Ves. 12), *Cragg* v. *Holme* (id. 14, n.). This is precisely one of those cases adverted to by Lord Lyndhurst in *Brealey* v. *Collins* (1 Younge, 327), where the parties should be sent to law. Here, in addition to the fact of the defendant's intoxication, it is in evidence that he had no solicitor or legal adviser present on his behalf at the time the agreement was signed.

ALDERSON, B. It appears to me that I must make a decree in favour of the plaintiff. The question between the parties is whether or no a sufficient case is made out to enable the plaintiff to a decree for a specific performance of the agreement of the 6th of December, 1837. To prove the execution of the agreement, the plaintiff

relies on the testimony of his solicitor, Mr. Calvert, who appears to have been sent over to Cockfield to complete an agreement which had been begun by the plaintiff, but had not been concluded. Calvert therefore went over to Cockfield, and arrived there in the evening, and it appears that several **[590]** glasses of liquor were drank by the parties. But the question does not turn much on that. The question is whether Heron executed the agreement under such circumstances as fairly to induce the belief that he did so without the full understanding or knowledge of what he was doing. If the defendant could shew that he had not that full understanding or knowledge, the plaintiff of course would have no right to relief. But I do not see why Calvert's evidence is not deserving of credit. He had no motive, no personal interest in forcing the agreement. He acted merely as the solicitor of the plaintiff. The only doubt I have had as to the transaction is the circumstance that no professional man was present to act on the opposite side. But taking the whole facts into consideration, and more especially the evidence of Stanwix (who would naturally be biassed in favour of the party who employed him), I am led to the conclusion that the transaction was a fair one, and further, that the circumstances spoken to by Stanwix are of more weight to shew that the parties were not intoxicated than the vague testimony of the witness on the other side to shew the contrary. I then look at the agreement, and find it to have been signed by Heron, not in such a way as an intoxicated man would write, but the reverse. It is apparently the writing of a man in full possession of his faculties.

Then what are the subsequent transactions? Having repented of the bargain, the defendants apply to be let off. Was it on the ground of its being an unrighteous bargain? On the contrary, their attorney asks it as a matter of favour; putting his request on the ground of the circumstances of the family, and Dealtry's incapacity from ill health to hold any other situation. The latter ground turns out to be a falsehood altogether, for it is in evidence that Dealtry said he could get much better premises; so that the statement in the attorney's letter upon that point is incorrect. Then it is also proved **[591]** that Dealtry offered 20l. to have the bargain given up, and, after suggesting the mortgage of 100l. as a difficulty in the way of the title, ultimately refused, upon the plaintiff's offer to pay it off, to execute any conveyance to him. After this, he procures from Walton a conveyance of the premises to himself for one pound more than the plaintiff's price, with a view of making the transaction apparently honest. Now, with respect to Walton, if he was to execute the trust for sale, it was his duty to sell the premises for the most money that he could get. If, therefore, Walton and Dealtry were not in collusion with Heron in this transaction, they were acting most unfairly to him; and in that case, we must suppose them guilty of what would be no answer to the present bill. We must not, however, presume that; and when we take into consideration the date of Walton's conveyance, which was only a few days after the letter of the 13th of April, it is impossible not to come to the conclusion that this was a transaction in which Dealtry, Heron, and Walton were all concerned, and which was entered into for the purpose of defeating the plaintiff's contract. If, therefore, the plaintiff is entitled to a decree for specific performance, as against Heron, and I think he is, so it appears to me that he is entitled to a decree against Dealtry.

Decree accordingly.

RINGER *v.* BLAKE. July 3rd, 1839.—Injunction to restrain the setting up of outstanding terms, in bar of an ejectment, refused on motion, although the defendant, by his answer, admitted the plaintiff's legal title, but raised a question of equity, by which the plaintiff would be bound if the cause came to a hearing.

[S. C. 3 Jur. 1026.]

John Ringer, by his will, devised all his freehold and copyhold estates in Tuttington, in the county of Norfolk, to the defendant, whom he also appointed his executor, upon certain trusts mentioned in the will. The **[592]** testator, after making his will, purchased other freehold and copyhold estates in Tuttington, and died in May, 1838, without republishing his will, whereby the last-mentioned estates descended to the plaintiff as his heir-at-law. The plaintiff having brought an action of ejectment to recover the after-purchased lands, filed the present bill to remove outstanding terms.

The defendant, by his answer, admitted the plaintiff's title as heir-at-law, and that the lands in question were after-purchased lands, and that he the defendant was in possession of them; but submitted whether, as the plaintiff had an annuity of 50l. bequeathed to him by the will, he ought not to elect between the after-purchased estates and the benefits of the will.

Mr. Roupell, for the plaintiff, now moved, upon the coming in of the answer, for an injunction to restrain the defendant from setting up the outstanding terms in bar of the ejectment, contending that the question of election could only arise in the event of the plaintiff claiming the benefits of the will, and, therefore, that it ought not to be permitted to stand in the way of the plaintiff's legal rights.

Mr. Lovat, contrà. The bill in this case seeks equitable relief; and it is settled beyond dispute that where a bill seeks relief as well as discovery, the Court will not, upon motion, aid the plaintiff in proceeding at law except under its own control and authority. Therefore whatever relief the plaintiff may be entitled to at the hearing, he is not entitled to make this motion: *Hylton* v. *Morgan* (6 Ves. 293), *Byrne* v. *Byrne* (2 Sch. & Lef. 537), *Beer* v. *Ward* (Jac. 194), *Barney* v. *Luckett* (1 Sim. & Stu. 419), *Northey* v. *Pearce* (1 Sim. & Stu. 420).

[593] Mr. Roupell, in reply. If the plaintiff's title is disputed, he must no doubt shew a locus standi in curiâ. But the authorities cited do not apply to this case, where the plaintiff's title is admitted. Here the defendant says, I admit the estates are yours, but in some other suit, brought for another purpose, you will find that your success in this suit is a bar to your claim. That is no answer to the present bill. He never could argue the question of election on this record. That question may or may not arise in another suit, according to the success of the plaintiff in this suit. The defendant admits that in this suit there is only one issue to try, depending on the answer. If the cause came to a hearing, the plaintiff could only do what he does now—read the defendant's admissions. It is obvious from the judgment in *Northey v. Pearce* that that case could not have depended on the answer. In *Barney* v. *Luckett* and *Hylton* v. *Morgan* the plaintiff's title was expressly disputed.

THE LORD CHIEF BARON. I own, I think, if the mere object of the bill was to remove out of the way of the plaintiff outstanding terms which ought not to prevent the trial at issue, I should say, upon principle, that the plaintiff's title being admitted, if there was nothing suggested by the answer which could, by possibility, be made a defence at the hearing, a court of equity would grant the present motion. But where the bill is filed for relief, as it is here, and it appears by the answer that a question will arise at the hearing, which may be decided by this Court, why should I grant an injunction which would enable the plaintiff to try his ejectment in the meantime? It is admitted that the plaintiff is heir-at-law, and therefore the defendant sets up another defence, consistent with that admission, with a view of stopping the proceedings at law. That question is not ripe for decision now. It is suggested that it is a case of election. If so, the Court would **[594]** not decree an injunction at the hearing, unless by the same decree the plaintiff were compelled to elect. I see therefore no occasion to grant the injunction upon this motion, and I think it would be mischievous to do so, because the plaintiff would get into possession of the premises without that qualification which the Court would impose at the hearing, and the defendant would be obliged to file another bill to make the plaintiff renounce the benefits of the will.

Motion refused.

Roupell then offered to elect without proceeding to a hearing, but the Lord Chief Baron thought it was contrary to the practice to grant such relief, on motion in a suit brought in aid of an action at law.

ROTHSCHILD *v.* QUEEN OF PORTUGAL. June 24th, 1839.—A foreign prince who comes voluntarily as a suitor into a court of law in England, becomes subject, as to all matters connected with that suit, to the jurisdiction of a Court of Equity.

The bill was brought for discovery from the Queen of Portugal, as to the matters stated in the bill, and for a commission to examine witnesses in Portugal, and for an injunction to restrain an action commenced against the plaintiff by the Queen of Portugal. It appeared that the Portuguese Government had deposited with the plaintiffs certain Portuguese Bonds, as a security for monies advanced by them to the

government, and that a contract had been entered into by the plaintiffs with the Queen's agents in England, by which it was agreed that, on certain events, the plaintiffs should sell the bonds and place the produce of the sale to the credit of their account with the Portuguese Government. The plaintiffs sold the bonds, but claimed interest on their advances, and set up that claim in defence to the action; the Queen's agents denying their right to such interest, on the ground of delay in selling the bonds. The plaintiffs now sought by their **[595]** bill for discovery of certain correspondence, and other matters in aid of their defence to the action.

The Queen demurred to the bill on two grounds—first, that, as a sovereign, the suit was not maintainable against her; and, secondly, that the plaintiffs had made no case for discovery.

The case was argued at various times by Mr. Simpkinson and Mr. Roupell, for the demurrer; and Sir F. Pollock and Mr. G. Richards, for the bill.

The leading arguments for the demurrer were that the defence was purely a legal question arising out of the contract itself, which must be proved in the action, or otherwise the plaintiff could not recover. That the discovery, therefore was immaterial. That, moreover, the bill did not allege, nor did it appear that the Queen could make any discovery which might not be had aliunde, or that she had concealed or refused to discover any facts material to the plaintiffs' case. Lastly, that she could not be made a defendant to this suit, the matter not being of a personal nature, and that this case differed from that of *The King of Spain* v. *Hullett* (1 Cl. & Finn. 333) in that respect; for there the King having filed a bill in Chancery to recover a sum of money, a cross bill was filed against him charging him with personal fraud.

ALDERSON, B. In this case I expressed at the hearing my opinion on several points; but before I gave my opinion finally on the whole case, I wished to have an opportunity of reading the bill in order to ascertain whether any part of the discovery prayed by the plaintiff was material to the question at issue in the Court of Law. The question there clearly is whether the delay in selling **[596]** the Portuguese Bonds deposited as the collateral security for a debt, clearly, under ordinary circumstances, bearing interest, was such laches on the part of Messrs. Rothschild, as to deprive them of the right of charging Her Most Faithful Majesty with such interest in the account current between them. Now, if the conduct of Her Most Faithful Majesty, through her lawfully authorized agents, was such as to induce Messrs. Rothschild, as reasonable men, to suppose that by such delay they were acting in conformity to her Majesty's wishes, they would justly be entitled to charge her with that interest. Now, if the letters charged in the bill to have been written by her authority were so written, I think many of them, at all events, if not the whole correspondence, very proper to be laid before a jury in order to prove that fact. Then, if so, the bill which prays, amongst other things, a discovery whether those letters were so written, prays a discovery material to the plaintiff's defence at law. It may be true that part of the discovery prayed goes beyond the discovery to which the plaintiffs are by law entitled. But this is immaterial upon the present demurrer, which is a demurrer to the whole bill, and is not confined to the objectionable parts of it.

I am, therefore, of opinion that Her Most Faithful Majesty being a suitor voluntarily in a court of English law becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity. That the discovery prayed by this bill is material to the plaintiff's defence at law in that suit, and that this demurrer is too large and must be overruled, and that it must be with costs.

Demurrer overruled.

[597] WHITE *v.* HILLACRE. May 10th, Dec. 24th, 1839.—The principle upon which a court of equity allows the tacking of mortgages, does not apply to a case where the equity of redemption belongs to different persons at the time when the mortgagee's title to both estates accrues. Therefore, where A., being seised of Blackacre, mortgaged it to M. and then devised it to B. in fee and died; and B. being seised of Whiteacre, mortgaged it to N., and then devised the two estates to distinct classes of devisees and died; and then N. obtained an assignment of M.'s mortgage: Held, that N. could not, by tacking the two mortgages together, obtain payment out of Blackacre of the balance due in respect of his own mortgage after sale of

Whiteacre.—A creditor by mortgage and collateral bond cannot sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other; nor for the purpose of obtaining payment out of the real assets of his debtor can he sue as sole specialty creditor, unless he make all persons interested in contesting that fact parties to the suit.—Where a bond is entered into as a collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee takes possession and remains in possession upwards of twenty years without taking interest otherwise than by receipt of rents and profits, quære, whether his remedy on the bond is not barred in equity as well as at law by the Statute of Limitations?

[S. C. 8 L. J. Ex. 65. Observed on, *Beevor* v. *Luck*, 1867, L. R. 4 Eq. 549. Approved, *Jennings* v. *Jordan*, 1881, 6 A. C. 718; *Harter* v. *Colman*, 1882, 19 Ch. D. 630. Distinguished, *Pledge* v. *Carr*, [1894] 2 Ch. 328: affirmed, [1895] 1 Ch. 51. Referred to, *Pledge* v. *White*, [1896] A. C. 195. See 4 Y. & C. Ex. 583.]

James Hillacre being seised in fee of an estate called Madgeon, situate in the parish of Buckland St. Mary, in the county of Somerset, by an indenture dated the 16th of August, 1800, demised the same to Thomas Chave for a term of 2000 years by way of mortgage for securing the re-payment of 500l. and interest. This mortgage was afterwards assigned to George Clark, by an indenture dated the 13th of October, 1808, to which James Hillacre was a party, and at the same time Hillacre executed to Clark a bond as a further security for the re-payment of the mortgage-money.

James Hillacre, by his will dated the 29th of November, 1808, after bequeathing certain legacies and charging them on his real and personal estate, gave and devised his estate called Madgeon, charged with the mortgage and all other his just debts and the aforesaid legacies, to his brother Thomas Hillacre in fee, whom he made his sole executor and residuary legatee. Upon James Hillacre's death, which took place shortly after the date of his will, Thomas Hillacre entered into possession of the Madgeon estate, and from time to time paid the interest due upon the mortgage, and also proved and took upon himself the execution of the will.

In March, 1812, Thomas Hillacre being seised in fee of an estate called Westhay, by an indenture dated the 23rd of that month, demised that estate to Susanna Clit-[598]-some for 5000 years by way of mortgage for securing the re-payment to her of 1800l. and interest. That mortgage debt was likewise secured by bond of even date.

In addition to the equity of redemption in the Madgeon and Westhay estates, Thomas Hillacre was, at the time of making his will and of his death hereafter mentioned, seised in fee of a small piece of land adjoining the Madgeon estate called Peter Plot. By his will dated the 28th March, 1815, he devised the Madgeon estate, subject to the mortgage upon it, and Peter's Plot to Richard Meade and J. W. Warren and their heirs to the use of his, the testator's, mother Mary Hillacre for life, with remainder to his brother Henry Hillacre for life, with remainder to the use of all and every or such one or more of the children of Henry Hillacre for such estates &c. as Henry should by deed or will appoint, with remainder, in default of such appointment, to all and every such children at the age of twenty-one years as tenants in common in fee; and in default of such children, or of any who should attain the age of twenty-one, to like uses in favour of the testator's brother William Hillacre and his issue. And the testator devised and bequeathed all the rest and residue of his real and personal estate subject to the payment of his debts and funeral and testamentary expenses, all of which (with the exception of the mortgage on the Madgeon estate) he thereby charged upon his said residuary real estate, unto his said two brothers, William and Henry, their heirs, executors, administrators, and assigns for ever as tenants in common. And the testator appointed his brothers William and Henry to be the executors of his will.

Upon the death of the testator, Thomas Hillacre, in April, 1815, Mary Hillacre, William Hillacre, and Henry Hillacre entered into possession of the estates respectively devised to them, and the two latter took possession of the testator's personal estate, but neglected to prove the will. Shortly afterwards all these persons became insolvent, [599] and by indentures of lease and of assignment and release, dated the 8th and 9th days of July, 1816, and made between Mary Hillacre, William Hillacre, and Henry Hillacre of the one part, and Robert Knight and Thomas Saturley of the other part; reciting that the said Mary Hillacre, William Hillacre, and Henry Hillacre,

or some or one of them, as devisees, residuary legatees, and executors of Thomas Hillacre deceased, or otherwise, were or was seised, possessed, or entitled of or to divers freehold and copyhold messuages, lands, tenements, and hereditaments, subject to certain mortgages, charges, or liens thereon, and also of or to other estates and effects, and that Thomas Hillacre deceased, and also the said Mary Hillacre, William Hillacre, and Henry Hillacre, or one of them, stood indebted to divers persons in divers sums of money: it was by the said indenture of release and assignment witnessed that the said Mary Hillacre, William Hillacre, and Henry Hillacre bargained, sold, released, and assigned all and every the freehold and copyhold hereditaments whereof or wherein they, or any or either of them, were or was seised, possessed, interested, or entitled unto, in possession, reversion, remainder, or expectancy, or otherwise (save and except the estate called Madgeon), and also all their goods, chattels, and personal estate (except wearing-apparel), to the use of the said Robert Knight and Thomas Saturley, their heirs, executors, &c., respectively, upon trust for sale in such manner as the said Robert Knight and Thomas Saturley should think fit, and out of the monies to arise by sale or otherwise of such of the said messuages, lands, tenements, or hereditaments as were then in mortgage or charged by way of lien or otherwise to any person or persons whomsoever, to pay all principal, interest, and costs which should be due in respect of such mortgages, charges, or liens thereon, or so much thereof as such monies would extend to pay, and to apply the residue of such monies among the creditors **[600]** of the said Thomas Hillacre deceased, Mary Hillacre, William Hillacre, and Henry Hillacre, in manner therein mentioned.

In October, 1816, George Clark, the mortgagee of the Madgeon estate, received payment of his mortgage-debt together with an arrear of interest from Susanna Clitsome, and by an indenture dated the 13th of that month, and made between Clark of the one part and Susanna Clitsome of the other part, that mortgage security and the bond of the 13th of October, 1808, were assigned to Susanna Clitsome, subject to the equity of redemption subsisting in the heirs, devisees, or assigns of James Hillacre.

The trustees of the indentures of July, 1816, sold all the estates and effects comprised in those deeds, except the Westhay estate, and the life estate of Mary Hillacre, William Hillacre, and Henry Hillacre, in Peter's Plot, but they did not pay any of the monies received from these sales in discharge of the monies due to Mrs. Clitsome, and in April, 1817, she filed her bill in this Court, praying for a foreclosure of the Westhay and Madgeon estates, and, if necessary, for a declaration that neither of those estates might be redeemed without the other. She also brought ejectments under which she obtained possession of those estates, and remained in such possession until her death.

In 1817 Mary Hillacre and William Hillacre died, the latter leaving no issue.

In March, 1818, the trustees of the indentures of July, 1816, entered into an agreement with Mrs. Clitsome for the sale to her of the Westhay estate, and of Henry Hillacre's life interest in Peter's Plot, at the price of 1350l. Accordingly, by an indenture of release, dated the 24th March, 1818, founded on a previous lease for a year, and made between the trustees of the first part, Susanna Clitsome, of the second part, and Richard Meade, of the third part; reciting that there was then **[601]** due to Susanna Clitsome, for principal and interest in respect of the Westhay mortgage, the principal sum of 1800l. and 263l. 6s. 2d. for interest, making together the sum of 2063l. 6s. 2d., and that there was due to her on the other security the principal sum of 500l., and the sum of 14l. 15s. 4d. for arrears of interest, and that the Westhay estate, and also Henry Hillacre's life-interest in Peter's Plot, which were then vested in the trustees, had been valued at 1350l.; and that it had been agreed that for satisfying some part of the sum of 2063l. 6s. 2d. so due to Susannah Clitsome on the security of the Westhay estate she should become the purchaser thereof, and also of Henry Hillacre's life estate in Peter's Plot, at the sum of 1350l.; it was witnessed that in pursuance of the said agreement, the said Robert Knight and Thomas Saturley (by the direction of the said Susanna Clitsome) bargained, sold, and released unto the said Richard Meade, his heirs and assigns, the said estate called Westhay, and also the premises called Peter's Plot; to hold the said estate called Westhay unto and to the use of the said Richard Meade, his heirs and assigns, in trust for the said Susanna Clitsome, her heirs and assigns, for ever; and to hold the said premises called Peter's Plot unto and to the use of the said Richard Meade, his heirs and assigns, during the life of the said Henry Hillacre, in trust for the said Susanna Clitsome, her heirs and

assigns, and absolutely freed and discharged as to all the said hereditaments and premises, from all the estate, right, title, and equity of redemption of the said Robert Knight and Thomas Saturley, of and in the said premises, or any part thereof. The indenture then contained a proviso that nothing thereinbefore expressed and contained should discharge the said estate called Madgeon from any right, claim, or demand, at law or in equity, of her the said Susanna Clitsome, for the residue of the sums of money due to her on the said two mortgages (which were **[602]** stated in the indenture to amount together to the sum of 1228l. 1s. 6d.), and all interest due and to grow due thereon, secured to her by the aforesaid indentures of mortgage and assignment.

After the execution of this indenture, no further proceedings were had in the foreclosure suit; and in October, 1820, Sarah Clitsome died, whereby that suit became abated.

The present bill was filed by the surviving executor in trust under the will of Sarah Clitsome, against Henry Hillacre and his children, and other parties, charging that the indentures of March, 1818, were executed with the privity and approbation of the defendant, Henry Hillacre, and that, after the execution thereof, the said Susanna Clitsome held possession of the Madgeon estate, as a security, as well for the balance of the principal of the mortgage debt of 1800l. remaining unpaid on the completion of the sale of the Westhay estate (which balance amounted to the sum of 713l. 6s. 2d.), and for the interest, as for the mortgage debt of 500l. and interest originally secured upon the Madgeon estate; and that the plaintiff, as the only unsatisfied specialty creditor of Thomas Hillacre, had a lien upon the reversion of Peter's Plot, for so much of the debt of 713l. 6s. 2d. and interest, as the Madgeon estate should be insufficient to satisfy after payment of the mortgage debt of 500l. and interest.

The bill prayed for an account and payment of the mortgage monies, and that, in default of payment, the Madgeon estate might be sold, and the proceeds applied, first in satisfaction of the mortgage debt of 500l. and interest, and then in or towards satisfaction of the mortgage debt of 713l. 6s. 2d. and interest, and in case of a deficiency, then that the reversion of Peter's Plot might be sold and the proceeds applied in satisfaction of such deficiency.

The defendants Henry Hillacre and his children put **[603]** in a joint answer, in which they stated that the Westhay estate was purchased by Thomas Hillacre for 2300l., and was, as they believed, of that value, or, at all events, of greater value than 1350l., when it was sold to Mrs. Clitsome; and Henry Hillacre submitted that if any such indentures as were alleged to bear date the 23rd and 24th days of March, 1818, were made and executed, it was apparent that the same were in no manner authorized by the trusts upon which the Westhay estate was conveyed to Robert Knight and Thomas Saturley; but, on the contrary, that the same were and constituted a breach of trust on the part of the said Robert Knight and Thomas Saturley, to which the plaintiff became accessary; and that the plaintiff was not entitled against them to any benefit or advantage therefrom, and more especially as a purchaser of the said premises for the said sum of 1350l.; but that he ought to be still considered as the mortgagee thereof, for what, upon an account to be taken, should appear to be due to him in respect of the original mortgage money and the interest thereof.

It was also submitted by all the defendants that Susanna Clitsome was never entitled, and that the plaintiff, as her representative, was not entitled to hold the Madgeon estate as a security for the sum of 713l. 6s. 2d., or for any part of the principal sum originally secured by the mortgage of the Westhay estate or the interest thereof, in addition to the mortgage debt of 500l. secured on the Madgeon estate and the interest thereof; but that if she would otherwise have been so entitled, the effect of the indentures of the 23rd and 24th of March, 1818, was to deprive her of such right.

Mr. G. Richards and Mr. Thomas Turner, for the plaintiff.

Mr. Simpkinson and Mr. Wilbraham, for the principal **[604]** defendants. This is an attempt to tack various securities as against a property originally pledged to a stranger to the plaintiff. The cases as to tacking mortgages all proceed upon this, that both mortgages were created by the same person; and that the second mortgagee had obtained possession of the first mortgage at the time the second mortgage was made to him: *Willie* v. *Lugg* (2 Eden, 78). But here, at no one time were the two mortgages vested in Mrs. Clitsome, when the same person was interested in the equity of redemp-

tion. The rule of compelling a party to redeem both mortgages is restricted to the case where there is the same mortgagor and mortgagee: and in *Ireson* v. *Denn* (2 Cox, 425), and apparently also in *Ex parte Carter* (Ambler, 733), the rule was disapproved of even to that extent. Now here, when Thomas Hillacre died, Mrs. Clitsome had one mortgage only. It was more than a year after his death that she took an assignment of the mortgage on the Madgeon estate. On that ground, therefore, she would have no right to tack. But supposing she had such a right, it must be on the condition that the mortgagor is let in to redeem both estates. In the cases which have been cited, the right of redemption was offered as to both estates; but here they do not offer us the redemption of Westhay. They claim to retain Westhay, distinct from the mortgage, as a purchased estate. The right of tacking, therefore, supposing the sale of the Westhay estate to Mrs. Clitsome to be valid, does not arise in the present case.

But, secondly, the sale of the Westhay estate was not valid. The plaintiff obtained that estate at an under value by means of a conveyance made in breach of the trusts of the indentures of July, 1816. The only trust for sale in those indentures was to raise money to be distributed amongst the creditors mentioned in the deed. The **[605]** sale, therefore, of the Westhay estate to this particular creditor was a clear breach of trust. The indentures of March, 1818, if operative at all, can only be considered in the nature of a foreclosure; but even upon that supposition, it is difficult to see how they could be effectual in the absence of the parties having the beneficial interest: *Calverley* v. *Phelp* (6 Mad. 229). Assuming, however, that they operate as a foreclosure, the plaintiff not having offered the foreclosed estate for sale, is confined to that security: *Perry* v. *Barker* (13 Ves. 198. See ante, vol. 1, p. 348, n.), *Tooke* v. *Hartley* (2 Bro. C. C. 126). Until he has offered the estate for sale, he cannot, without opening the foreclosure, proceed upon the bond either by way of tacking it to his mortgage, or simply as specialty creditor. Independently, however, of these considerations, the bond is barred by the statute (3 & 4 Will. 4, c. 27, sect. 48).

Lastly, the plaintiff cannot sue in this Court both as a bond creditor and a mortgagee. If he sue as a bond creditor, he must do so on behalf of all other creditors similarly circumstanced, for a court of equity will not decree in favour of a bond creditor suing in his own right only, and not on behalf of himself and all others. On the other hand, if he sue as a general creditor, he cannot also sue as mortgagee, the rights being inconsistent. In *Raikes* v. *Hall* (*e*) Lord Abinger refused to give relief to a person suing as mortgagee and also as general creditor, and his Lordship put the party to elect in which character he would sue; the defendant not objecting to the bill being amended in that respect.

Mr. W. T. S. Daniel appeared for other defendants.

Mr. Richards, in reply. The parties who are attempting **[606]** to receive the 713l. adversely to the plaintiff are claiming as volunteers under the will of Thomas Hillacre. It is said that the rule as to tacking does not apply where the mortgage is made to different persons. Here no doubt the mortgages were originally made to distinct individuals, but they both ultimately vested in Mrs. Clitsome. Could Thomas Hillacre, if the mortgages had united in Mrs. Clitsome in his lifetime, have redeemed one without the other? Clearly not. But the persons entitled to the equity of redemption are Thomas Hillacre or the persons claiming under him. It is impossible to say that the mere volunteers under Thomas Hillacre's will are to be taken as different parties. The persons representing his interest are bound to satisfy the plaintiff's claim. Upon this point the observations of the Lord Chancellor in *Willie* v. *Lugg* are clearly in favour of the plaintiff. In *Ireson* v. *Denn* the mortgagee was allowed to tack two estates, even against a purchaser.

But, secondly, Thomas Hillacre, in 1812, gave the plaintiff a bond. He was then entitled both to the Westhay and Madgeon estates, and both estates were liable to satisfy that specialty debt. Henry Hillacre was executor of Thomas, and in that character was bound to pay the debt. He was likewise tenant for life of the Madgeon estate, and in that character was bound to keep down the interest of the debt. He was likewise, with his brother William, tenant in common in fee of the Westhay estate. Now Henry and William might have sold the Westhay estate, and after satisfying the mortgage security on it, might have paid over the residue in satisfaction

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(*e*) In Exch., E. T. 1838. See *Burney* v. *Morgan*, 1 S. & S. 362.

of the bond. And if the residue was not enough for that purpose, the bond creditor would have had a right to receive payment of the deficiency out of the Madgeon estate. The sale, however, of the Westhay estate does not take place in this manner; but the three Hillacres becoming insolvent make over that estate to trustees for sale, who [607] sell it to the mortgagee. Is it meant to be contended that the mortgagee has not a right to purchase of the mortgagor, or that this sale is not equally valid as if it had been effected directly by the Hillacres? It is not proved, though it is alleged, that the sale was at an undervalue.

But it is said that the bond is barred by the Statute of Limitations. It is impossible, however, to consider the bond as a mere insulated transaction; it must be looked at in connexion with the mortgage. Suppose the interest on the mortgage had been regularly paid for twenty years, could it have been contended that, because the mortgagee had not proceeded on his bond within that period, his remedy on that security was gone? You could not separate the interest on the mortgage from the interest on the bond. Here, it is true that interest has not been paid since 1817. But, in that year, possession was given to the mortgagee of both estates, and, in 1818, payment was made of part of the debt by the making over of the Westhay estate; and, during the whole subsequent time, the mortgagee has received the rents and profits. Is not the receipt of the rent a payment in respect of the mortgage security? In *Brocklehurst* v. *Jessop* (7 Sim. 438) it was held that the entering into the receipt of the rents and profits by a mere equitable mortgagee was sufficient to keep the debt alive. [Alderson, B. It may keep the mortgage alive; but quære whether it keeps the bond debt alive?] The question is, for what purpose the rents and profits have been received? In reduction of principal and interest due upon the mortgage security. If the plaintiff obtains a decree, the account which the defendants will ask will be of principal and interest which the plaintiff has received from the rents and profits since 1817; and the Master will be directed to take an account of principal and [608] interest due on the mortgage security, the bond forming part of that security.

As to the objection in point of pleading, the plaintiff has shewn, as far as he can, that he is the only specialty creditor of Thomas Hillacre; he is, therefore, justified in filing this bill alone. The Court, however, in case of any doubt upon that point, would direct an inquiry whether there are any other specialty creditors.

Dec. 24th.—ALDERSON, B. In this case the plaintiff, as the representative of Susanna Clitsome, claims to tack the two securities of Madgeon and Westhay, and to hold the former as a security for the balance of 713l. remaining due after the sale of the latter.

The circumstances are these:—In August, 1800, James Hillacre mortgaged Madgeon for a term of years to Thomas Chave for 500l. In 1808, by an indenture to which James Hillacre was a party, this mortgage was assigned to George Clark. James Hillacre then died, devising his estate (subject to the mortgage, and subject to certain legacies charged on it) to Thomas Hillacre in fee. Thomas Hillacre was also seised in fee of the estate called Westhay, and in 1812 mortgaged it for years, for 1800l., to Susanna Clitsome; giving, as is usual, a bond of even date for the amount. Thomas Hillacre died in 1815. At that time he was entitled to the equity of redemption in Madgeon, then under mortgage to Clark, and in Westhay, then under mortgage to Susanna Clitsome. He devised the equity of redemption of Madgeon to one set of devisees, and that of Westhay to another set. It is unnecessary to particularize those devises, because, though some of the devisees named are the same in both, there is a very substantial difference between the two classes.

This being the state of facts, Clark, in 1816, assigns to Susanna Clitsome the mortgage on Madgeon; and then, for the first time, the two mortgages are united in one person.

[609] I am of opinion that the plaintiff has no right to tack under these circumstances. The right seems to have been established upon this principle—that, where a mortgagee is in possession of the legal estate in two properties as a security for money lent on them, a court of equity will not allow the person entitled to the equity of redemption to redeem either of them unless he redeems both; and allows the mortgagee a lien on the whole for his whole debt. But this principle manifestly cannot apply to a case where the equity of redemption belongs to different persons. Here, that is so; and these persons, though volunteers, as it is said, became entitled under Thomas Hillacre's will, before the assignment of the mortgage in Madgeon was made

to Susanna Clitsome. There might, perhaps, have been some ground for the plaintiff's argument if the assignment had been made in the lifetime of Thomas Hillacre.

I am, therefore, of opinion that the plaintiff, as the representative of Susanna Clitsome, is not entitled to the benefit of the security of Madgeon for the balance remaining due in respect of the money secured on Westhay.

But then it is said that he is entitled to claim the same balance of 713l. as a specialty creditor; but I think he is not. In what way can this his claim be properly investigated upon this bill? He does not sue on behalf of himself and other creditors similarly situated. If he did, he would place them in a situation to question the propriety of the transaction out of which this balance arises, which, though it may be a fair one, they have as yet had no opportunity to investigate. But it is said he is sole creditor. How can this be ascertained? Who are before the Court competent to ascertain that? The usual mode is to send out advertisements to ascertain that fact by the claims of adverse parties, or their laches in not coming in to make such claims. The present defendants have no interest in this; for whether Madgeon be absorbed by the plaintiff **[610]** or by other creditors must be a matter of pure indifference to them.

I think, therefore, that, upon this bill, the plaintiff is not entitled to this relief, and that all that he is entitled to is to an account of the principal and interest upon the 500l. charged on Madgeon, and that he must give an account of the rents and profits received from that estate; that, in like manner, he is entitled to an account of the sums paid by him to the legatees, with interest from the time of payment; that he has a lien on Madgeon for the whole balance, and, unless it be paid, that there should be a sale of Madgeon to reimburse him.

Upon this part of the plaintiff's bill I think that the costs should be reserved, but that the rest of his bill should be dismissed with costs.

Decree accordingly.(*a*)

EX PARTE HUNTER; IN THE MATTER OF THE BIRMINGHAM AND DERBY RAILWAY ACT. July 4th, 1839.—Testator devised all his real and personal estate to his wife for life, and, after her decease, to such of his children as should be then living, their heirs, executors, administrators, and assigns, share and share alike, as tenants in common, with benefit of survivorship in case any died without issue under twenty-one; but if any of them his said children should happen to die, leaving lawful issue, the testator willed that such issue should take their father's or mother's share. The testator left several children, of whom one only, a son, survived the wife; but one of the others, a daughter, left issue: Held, that the son was entitled to the whole property, to the exclusion of the issue of the daughter; such children only of the testator being entitled to the benefits of the will as were living at the death of the wife.

Jonathan Hunter, by his will, devised as follows:—"I give, devise, and bequeath to my wife and her **[611]** assigns all and singular my real and personal estate, whatsoever and wheresoever, for and during the term of her life, and from and immediately after her decease, I give, devise, and bequeath all and singular such my real and personal estate unto all my children as shall be then living, and to their heirs, executors, administrators, and assigns, to be equally divided share and share alike, and to take as tenants in common, and not as joint-tenants; and in case any one or more of them shall happen to die under the age of twenty-one years, without leaving lawful issue, I will that the share or shares of each so dying shall thereupon go and belong and survive amongst the others of them living to attain the age of twenty-one, and their heirs, executors, and administrators, as tenants in common; but if any of them my said children shall happen to die leaving lawful issue, I will that such issue shall have and be entitled to his, her, or their father's or mother's share, and take as tenants in common, and not as joint-tenants; and I will the same accordingly."

(*a*) According to the modern practice in the Court of Chancery, a decree will not be made for payment of a specialty debt out of the deceased debtor's real assets, unless the creditor sues on behalf of himself and all other the specialty creditors; though leave will be given to amend the bill at the hearing. *Johnson* v. *Compton*, 4 Sim. 47.

The testator died on the day of making his will, leaving his wife, four sons, and three daughters surviving him. Of the four sons, William, the eldest, attained the age of twenty-one, and died in April, 1803, intestate and without having been married; Jonathan attained the age of twenty-one, and died in November, 1803, intestate, leaving an infant son only, who afterwards died in April, 1804, without having had issue; Josiah attained the age of twenty-one, and died in March, 1809, intestate, and without having had issue; and James, the present petitioner, attained the age of twenty-one. Of the three daughters, Mary died an infant in April, 1809, without having been married; Elizabeth attained the age of twenty-one, and, having married John Johnson, died in the lifetime of the testator's widow, leaving three children of the marriage, **[612]** who were now living; and Ann attained the age of twenty-one, and, having married William Smithies, died in June, 1818, leaving issue one child, who died, in 1819, an infant, without having had issue.

Upon the testator's death his widow entered into possession of the real estate devised by the will, and continued in possession till her death in February, 1829. At that time, the only parties living, who were referred to in the will, were the petitioner and the three children of Mrs. Johnson, and they divided the estate in moieties, the petitioner taking one moiety, and the children the other. Upon the sale, however, of the property to the Birmingham and Derby Railway Company, it was suggested by the counsel for the company that the petitioner was entitled to the whole property; and the purchase money having been paid into Court, the petitioner now presented his petition for payment of the whole of it to himself.

Mr. Simpkinson and Mr. Turner, for the petitioner, contended that, by the terms of this will, there was no gift to any of the children of the testator, except such as should be living at the death of the wife; that it was of the essence of the gift that the children taking the benefit of the will should survive the wife. They referred to *Smith* v. *Farr* (ante, p. 328) and *La Roche* v. *Davies*; (*b*) and said that

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But the practice seems originally to have been otherwise. See per Lord Hardwicke, 1 Ves. sen. 213, 214. And see *D'Aranda* v. *Whittingham*, Mosely, 83; *Acton* v. *Peirce*, 2 Vern. 480; *Madox* v. *Jackson*, 3 Atk. 406.

(*b*) This case was cited from a brief, but it is reported in the Jurist, vol. 1, p. 574. It is as follows:—John Davies by his will, dated April 5, 1806, gave the residue of his personal estate to his executors and executrix, and directed the same to be invested in three per cent. Bank annuities, in their names, and that they should stand possessed thereof "in trust, for the benefit of his wife and children, living at his decease and born in due time afterwards in manner following—(that is to say) in the first place, to pay the dividends and interest thereof unto his said wife during the term of her natural life, and of her remaining unmarried, trusting to her well-known affection to him and her children that she should maintain and educate them to the best of her means, and from and after the decease of his said wife or marriage, he declared it to be his will that the interest and dividends of the aforesaid annuities should be applied for the benefit of his children then living; but his meaning was that such of them as should have then attained the age of twenty-one years should be paid their, his, or her equal share and proportion of the said annuities, and of his estate and effects, and that such of them as should not have then attained the said age of twenty-one years, his said executors should maintain and educate as well as the interest of their shares would allow of; and he directed his said executors to pay them their shares of the principal upon their respectively attaining the age of twenty-one years, with a proviso that, if any of his said children should die under the age of twenty-one years, the share or shares of them, him, or her so dying, should go to and be divided amongst the survivors or survivor of them; and in case of the death of all his children under the age of twenty-one years without lawful issue, he directed that such residue and remainder of the stocks and annuities, and the dividends due thereon, should be transferred and paid to his said wife, if living, notwithstanding she might have married again; but he declared it to be his will that if there should be issue living of any of his children, after the death of the whole of his children as aforesaid, then that such residue should go to and be paid to them equally, or if only one of them, then to such one in preference to his wife if she married again; and he nominated and appointed his said wife and her father and brother and other persons executrix and executors of his said will.

[613] the various cases which had been decided upon the construction of similar words contained in settlements would not apply here.

[614] Mr. Bethell, for the children of Mrs. Johnson. It was obviously the intention of the testator not to exclude the issue of any of his children from the benefits of his will; and the Court will lean against an intestacy. The testator says, "If any of them my said children shall die leaving lawful issue." It is clear that the words, "them my said children," mean all the children who should survive the testator. The children took an absolute interest, as is evident [615] from the words, "heirs, executors, and administrators," and their issue take by way of substitution for their parents, upon a certain event happening. That event is the death of the parents in the lifetime of the tenant for life. The words "shall happen to die," being words of contingency, do not apply to the death of the party whenever it shall happen, but to his death in the lifetime of the tenant for life: *Hinckley* v. *Simmons* (4 Ves. 160), *King* v. *Taylor* (5 Ves. 806), *Home* v. *Pillans* (2 M. & K. 15), *Cripps* v. *Wolcott* (4 Madd. 11). Those words here referring to the death of the testator's children in the lifetime of the widow, it follows that the issue of each child dying within that time must take their parent's share. If the words of the will are referred to the death of the parent at any time, you reduce the interest of the parent (which is clearly absolute) to a mere life interest, and impute to the testator an intention of leaving the issue of his

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The testator died shortly after making his will, and the same was duly proved by the executors and executrix therein named, and he left four children and his wife surviving him. One of the children, John Watson Davies, died in the lifetime of the widow, under the age of twenty-one years, and unmarried. Another of the children, Agnes Connop Wakefield, died in the lifetime of the widow, having first attained her age of twenty-one years, leaving one child. The widow died in November, 1836, without ever having married again. The plaintiffs Joanna Eliza La Roche and Elizabeth Ann Rowland, who had long since attained the age of twenty-one years, were the only children of the said testator living at the time of the decease of his widow. The Master of the Rolls decided that the plaintiffs, being the children who survived the widow of the testator, were entitled to the residue of the said testator's personal estate, in equal moieties, to the exclusion of the child of the daughter who died during the lifetime of the testator's widow.

Mr. Tinney and Mr. Rudall, in support of the appeal from the decision of his lordship, cited *Maitland* v. *Chalie*, 6 Madd. 243, and said that the present case was distinguishable from *Woodcock* v. *Duke of Dorset*, 3 Bro. C. C. 569, *Hope* v. *Lord Clifden*, 6 Ves. 499, *Tucker* v. *Harris*, 5 Sim. 538.

Mr. Wigram and Mr. Turner, for the children who survived the widow, cited *Woods* v. *Woods*, 1 M. & C. 401, and Roper on Legacies, vol. 1, p. 507.

THE LORD CHANCELLOR. The terms made use of in this will are positive and distinct. The residue of the testator's personal estate is given for the benefit of his wife and children living at his decease: but this alone does not constitute the gift, for the testator proceeds to direct the dividends to be paid to his wife during her life and her remaining unmarried, trusting to her to maintain and educate her children; and after the decease or marriage of his wife, the testator declares the interest and dividends of the three per cent. Bank annuities should be applied for the benefit of the children then living; by which expression the testator intended such children as were then living, and infants under the age of twenty-one years of age. The testator then says that his meaning is that such of the children as should then have attained twenty-one years should be paid their shares of the said annuities —here the testator speaks of the annuities, he having previously only spoken of the dividends of the annuities: then follows the expression in the will that "such of them as should not then have attained twenty-one years" should be educated &c. by the executors, referring to the last antecedent expression, "the children living at the wife's decease;" for there is no evidence to justify me in passing over the last antecedent, and giving the preference to an earlier expression in the will. The subsequent parts of the will only prove an omission on the part of the testator to provide for children attaining the age of twenty-one years, and dying during the mother's lifetime. The case may be a hard one, but the words are clear, definite, and distinct, and I have no alternative but to affirm the order of the Master of the Rolls. But this is not a case for costs.

children who die in the lifetime of his widow without any provision; which is contrary to the whole tenor of his will. *Smith* v. *Farr* and *La Roche* v. *Davies* are distinguishable in their circumstances from the present case. In the former the fund was not to be divisible till the youngest child attained the age of twenty-one. In the latter case the grounds of the judgment do not appear. [The Lord Chief Baron. You say that the word "said" does not refer to the last class of children mentioned, but to all.] It refers to all the children surviving the testator. In *Smith* v. *Smith* (8 Sim. 353), under limitations very similar to those of this will, the issue of a child dying in the testator's life were held entitled to a share of the residuary estate. [The Lord Chief Baron. The words which you call upon me to imply are expressed in that case.] No doubt the dying in the lifetime of the wife, which is here clearly **[616]** implied, was there expressed: *Collins* v. *Johnson* (8 Sim. 356), *Giles* v. *Giles* (id. 360).

Mr. Bacon, for the company.

Mr. Simpkinson, in reply.

THE LORD CHIEF BARON said that he would consider this case; but, as he was about to go the circuit, he should have no opportunity of giving judgment upon it. He would, however, if time permitted, look into the authorities and make an order in the case.

His Lordship afterwards made an order in favour of the petitioner.

MEMORANDA.

At the close of the Long Vacation, the Right Honourable Sir John Vaughan, Knt., one of the Justices of the Court of Common Pleas, died; and in the early part of Michaelmas Term his place was supplied by Sir William Henry Maule, Knt., one of the Barons of Her Majesty's Exchequer.

Sir William Henry Maule, Knt., was succeeded in his office of Baron of the Exchequer by Sir Robert Monsey Rolfe, Knt., Her Majesty's Solicitor-General, who was at the same time called to the degree of the coif, and gave rings with the motto "Suaviter et fortiter."

Thomas Wilde, Esquire, one of Her Majesty's Serjeants at law, was about the same time appointed Her Majesty's Solicitor-General, in the room of Sir Robert Monsey Rolfe, Knt.

[617] EX PARTE HASELL; IN THE MATTER OF THE MANCHESTER GAS ACT. Nov. 2nd, 1839.—By a marriage-settlement a husband became entitled to the moiety of an estate in fee, which moiety originally belonged to his wife. During the coverture the other moiety descended to the wife as heiress-at-law of her brother. The wife afterwards died in the husband's lifetime without issue; and the husband, from the time of her death in April, 1815, till a sale of the estate in November, 1838, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person: Held, that this was a case falling within the 15th section of the stat. 3 & 4 Will. 4, c. 27; and that, notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir-at-law of the wife not having made his claim within five years after the passing of the act, was barred by the statute.—The 19th section of the stat. 3 & 4 Will. 4, c. 27, which removes disabilities by reason of residence in Ireland, &c., is applicable to cases of residence in Ireland before the passing of the statute, if the controversy has not arisen till after the passing of it.—A constructive trust may be barred by long acquiescence.

[S. C. 3 Jur. 1101.]

By the marriage settlement of Lewis Matthias with Elizabeth his wife, in the year 1769, lands were conveyed to the use of Lewis for life, with remainder to Elizabeth for life, with remainder to their children as tenants in common in tail, with remainder to Elizabeth in fee. Elizabeth Matthias died in the lifetime of her husband, leaving only two children of the marriage, namely, John and Zenobia Ann. In 1804, upon the marriage of Zenobia Ann with the petitioner Hasell, a settlement was made, whereby it was agreed, with the concurrence of John Matthias, that the whole of the

lands should be conveyed to trustees, in trust for sale, and the trustees were to stand possessed of the fund arising from the sale in trust as to one moiety for John Matthias, his heirs, executors, and administrators, and as to the other moiety for Zenobia Ann for life, with limitations over to her children and John Matthias and his children; with an ultimate limitation in default of children of both of them, to the petitioner absolutely. At the same time, for the purpose of barring the estates tail, a fine was covenanted to be levied of the estates, to the use of Lewis Matthias and John Matthias, and their heirs, upon the trusts of the settlement. The fine was never levied, and John Matthias died without issue in 1809, leaving Zenobia Ann Hasell his heiress-at-law; and thereupon the petitioner, in right of his wife, entered into possession of John Matthias's moiety of the estate. Administration of the personal estate of John **[618]** Matthias was granted to his father, Lewis Matthias; and upon the father's death, in 1815, administration was granted to the widow of John Matthias. In April, 1815, Zenobia Ann Hasell died without issue; and from that time until the year 1838, when the Commissioners under the Manchester Gas Act purchased the property, the petitioner remained in the uninterrupted possession of the entirety of the estate, without acknowledging the title of any other person. On the occasion of that purchase, however, the petitioner's title being considered doubtful, the company declined to pay the purchase-money till the question of title should be settled.

In November, 1838, the petitioner presented his petition, praying for payment of the purchase-money for the whole of the property; and, by an order of the 24th of that month, one moiety was directed to be paid to him, but the other moiety, namely, the produce of the share formerly of John Matthias, was ordered to be paid into court; and it was referred to the Master to inquire who were the heirs-at-law of Zenobia Ann Hasell at the time of her death, and who were the personal representatives of John Matthias; and by a subsequent order of the 30th January, 1839, the Master was to inquire whether the petitioner was entitled by adverse possession to the last-mentioned moiety.

The Master made his report, stating the several facts before mentioned, and that, at the death of Zenobia Ann Hasell, in 1815, certain persons, whom he named, were her heirs-at-law; and that one of those persons, John Boulton, was at that time resident in Ireland, and had since died, leaving his two sisters his co-heiresses-at-law. It did not appear from the report that John Boulton had ever returned to England. Under these circumstances, the Master requested the opinion of the Court as to the petitioner's title.

Mr. Wilcock, for the petitioner. The petitioner claims **[619]** this moiety by adverse possession, whether it be considered to have accrued to the personal representative of John Matthias in 1809, or to his heiress-at-law in 1815. It will be contended, on the other side, that the possession of the petitioner was the possession of the parties representing John Matthias, and, therefore, that they are not barred by length of time. But even under the old law, thirty-six years' uninterrupted possession of the entirety of the estate by one tenant in common was held to be a bar to his companion; actual ouster being presumed: *Doe* v. *Prosser* (Cowp. 217). Now, however, any difficulty arising from the presumption of actual ouster is removed by the provisions of the statute 3 & 4 Will. 4, c. 27, s. 12, by which it is enacted, when any one or more coparceners, joint-tenants, or tenants in common, shall have been in the possession of the entirety of the land for his own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares, such possession shall not be deemed to have been the possession of such last-mentioned person or persons. And even supposing the petitioner's possession not to have been adverse, the personal representatives of John Matthias are barred by the 15th section of the statute, there having been no acknowledgment of their title, and they having made no claim within five years after the passing of the act. The act was passed on the 24th July, 1833, and the first order for inquiry in this matter was that of the 24th November, 1838.

Mr. Tennant, for the heiresses of John Boulton, who were some of the real representatives of John Matthias, contended that his clients were not barred by the statute, as John Boulton, when his right accrued in 1815, was beyond the seas, and it did not appear from the Master's report that his disability had ever ceased; and that, although it **[620]** was enacted by the 19th section of the stat. 3 & 4 Will. 4, c. 27, that Ireland should not be deemed to be beyond the seas within the meaning of that act, yet that

enactment did not apply to any absence beyond the seas which took place before the passing of the act.

Mr. Turner, for another real representative of John Matthias. The settlement of 1804 was a good and valid settlement, which never could have been made without the concurrence of John Matthias. He concurred in it in consideration of having the reversion in fee limited to him. When he died in 1809 the covenant to levy a fine remained in fieri, and the equitable fee in his moiety vested in the petitioner's wife. That fee is bound by the settlement of 1804, and the wife being dead the petitioner is trustee for the real representative of John Matthias. [The Lord Chief Baron. It does not appear to me that the petitioner, upon the death of his wife, came into possession as trustee.] Can he convert a possession so obtained into an adverse possession? Suppose a party, as in *Beer* v. *Ward* (see Jac. 195), to get possession as the committee of a lunatic, would he be allowed to make that an adverse possession? [The Lord Chief Baron. *Beer* v. *Ward* was not determined on that point; but it is not applicable here, for the husband never was trustee.] The petitioner acquired possession by his wife, to whom the trust estate descended. Besides, how can twenty-six years be an ouster, when the party was out of the country when the legal title accrued?

Mr. Gardner, for the personal representatives of John Matthias.

Mr. Wilcock, in reply. The alleged disability of John Boulton will not, under the 16th section of the statute, prevail against the petitioner's title. The absence beyond **[621]** seas contemplated by the statute is not merely absence after the passing of the act, but absence at any time. The controversy, in which the question of absence arises, must take place after the passing of the act, but not the absence itself. Then, as to the alleged trust, it is clear that the heirs-at-law cannot affect the petitioner with a trust. Sustaining the trust annihilates their title.

The Lord Chief Baron. It appears to me that the petitioner is entitled to have the payment of his money, whether the property in question be considered as real or personal estate. Taking it first as real estate, it appears that the parties interested were brother and sister, and that the brother died in 1809. Upon that the sister became entitled to it, and upon her death her husband treated it as his own. The person, however, who was rightfully entitled to it was her heir-at-law; and admitting that, from the year 1815 to the year 1838, he was tenant in common with the husband (the husband being entitled to the other moiety) the act then applies; because, supposing there is no question about actual ouster, yet, as the husband has not accounted to the heir-at-law, he is in the situation of the party contemplated by the act, who has not committed actual ouster, but who has enjoyed the estate without making any acknowledgment of any other party's title. Then the act allows five years for the other party to make his entry or bring his action. But here the party has not done this, or taken any other steps for the recovery of his land within the proper time; for, of course, the mere payment of the money into court is immaterial. The tenant in common, therefore, is barred by the statute, if this be considered as real estate.

On the other hand, if this be considered as personal estate, you must assume that the property was converted into personalty at the proper time, namely, in the lifetime of her brother. If so, it devolved, upon his death in 1809, **[622]** to his personal representative, and his personal representative therefore is barred by length of time.

As to the alleged trust, I cannot think that, for the purposes of the present argument, the petitioner can be considered as a trustee for anybody, when he has not been made so by the parties, but simply as a wrong-doer. I remember, however, that in *Beckford* v. *Wade* (17 Ves. 97) Lord Eldon drew a marked distinction in regard to length of time between actual and constructive trusts, holding that the latter might be barred by long acquiescence.

Order as prayed.

Plumbe *v.* Plumbe. Nov. 8th, 1839.—Plaintiff in contempt may compel the production of deeds and documents relating to the matters in issue, and admitted by the answer of the defendant to be in his possession.

[S. C. 9 L. J. Ex. Eq. 9; 3 Jur. 1144.]

The original bill was filed by the plaintiff as heir-at-law of one Plumbe, for the recovery of certain estates of which the defendant, Anne Plumbe, was by virtue of a settlement tenant for life, with remainders over, and Jane Plumbe and Ellen Plumbe were mortgagees. The bill prayed an account of the rents and profits. In the course of this suit the plaintiff made a motion, which was dismissed with costs, and he was attached for non-payment of those costs. Afterwards Anne Plumbe died, having by her will appointed Jane Plumbe and Ellen Plumbe her executrixes, and thereupon the plaintiff filed a bill of revivor and supplement against them, calling upon them to admit assets of their testatrix. To this bill, while the plaintiff was still in contempt for non-payment of the costs in the original suit, the defendants put in an answer, whereby they admitted that they had in their possession or power, both as mortgagees of the estate and as executrixes of **[623]** Ann Plumbe, divers deeds, papers, and documents relating to the matters in question in the cause.

Mr. Dixon, for the plaintiff, now moved for the production of those deeds and documents, observing that, if the original and supplemental suits were to be considered as distinct suits, the plaintiff's contempt in one could not affect his interest in the other. If, on the other hand, they were to be considered as the same suit, the defendants had waived the contempt, by putting in their answer: *Anon.* (15 Ves. 174), *Smith* v. *Blofield* (2 Ves. & B. 100), *Best* v. *Gompertz* (2 Y. & C. 582).

Mr. Follett, contrà. This is merely a bill of revivor, and not a supplemental bill in the strict sense of the expression. All that is asked by way of supplement is that the defendants may admit assets. The whole proceedings, therefore, are to be considered as one suit, and the plaintiff can make no motion without clearing his contempt. It cannot be said that the defendants putting in their answer is a waiver of the contempt, because it was compulsory upon them to do so, notwithstanding the plaintiff's default: *Wilson* v. *Bates* (3 Myl. & Cr. 197). [The Lord Chief Baron. One view of that case is against you. It shews that, though the plaintiff is in contempt, he may compel a full and proper answer by the production of documents.] The right the plaintiff now seeks is distinct from any right which he might have to make the defendants set out those documents in their answer. In *Adams* v. *Fisher* (id. 542) the Lord Chancellor said that, if the mere enumeration of documents in a schedule to the answer were a ground for compelling their production, it would make every application for their production a matter of course. No doubt, **[624]** if the bill calls upon the defendant to set out the documents, and he does so, the plaintiff has a right to their production. But that is not the plaintiff's case. [The Lord Chief Baron. It seems to me that, on a motion to produce documents, the question whether they shall be produced is open for discussion, whether the bill calls upon the defendant to set them out or not.] It is submitted that annexing to the answer a schedule of documents does not make their contents part of the answer, and, therefore, that the plaintiff cannot make this motion. But, admitting that he can, he has no right to see the deeds which destroy his title as heir-at-law, *Mountnorris* v. *Dungannon* (2 Molloy, 317), nor the mortgage-deeds.

Mr. Dixon, in reply.

THE LORD CHIEF BARON. If the plaintiff is entitled to compel an answer he is also entitled to all the incidents of the answer; and, therefore, the decision which has been cited of *Wilson* v. *Bates* goes the full length of justifying the present motion. I think that the plaintiff is not entitled to the production of the deeds destroying his title as heir-at-law, or the mortgage-deeds, but that he is entitled to the production of the others.

Order accordingly.

[625] TOULMIN *v.* COPLAND. December 1st, 17th, 1836; April 27th, May 2nd, 1837; Nov. 14th, 1839.—Where persons carry on business in the nature of a banking business, as, for instance, that of navy agents, and a change takes place in the house by the death or retirement of a partner, on taking the partnership accounts, the rule in *Clayton's case* will be held primâ facie to apply as well between the partners themselves as between the partners and third persons; and there must be strong evidence to rebut the presumption as to that mode of taking the partnership accounts. Therefore, where A. and B. were partners as navy agents, and A. becoming a lunatic that partnership was

dissolved, and the business was carried on upon the same terms by B. and C., and B. died, and the accounts of both partnerships were unsettled: Held, that the accounts of A. and B. must be taken on the foundation of the rule in *Clayton's case*, although C., in order to establish an agreement to the contrary, set up certain affidavits made by B. in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. and C., which, in some instances, had been acted upon, that the advances made to the customers of their firm should be repaid before any portion of the monies paid in by those customers was applied in liquidation of their debts due to the original firm.—Where a remaining or surviving partner, upon taking a new partner, agrees to bring a large amount of good debts into the firm, that is so advantageous a guarantee to the incoming partner as to afford a strong inference (even against evidence on the other side) that the remaining or surviving partner did not intend to waive the benefit of the rule in *Clayton's case*.—Although generally the best evidence for a litigant is his adversary's testimony in his favour, yet this rule must be qualified where the evidence was given in a suit in which the controversy was not between the same parties, or put upon the same footing, and where the adversary had an interest in giving the testimony in question.—Money admitted to have been received by a surviving partner on account of the late partnership, ordered to be paid into Court, although by his answer and examination he alleged that partnership debts to a large amount were still outstanding, for which he was liable, and also that his co-partner had drawn out of the partnership sums to the amount of double the sums drawn out by himself; it appearing that there was a sufficient sum in Court to pay the outstanding debts, and that taking into consideration the true shares of the partners, which the defendant had not done, the co-partner had not overdrawn his co-partnership account.—The partnership of A. & B. being dissolved, is succeeded by that of B. & C., who take upon themselves to adjust the affairs of the former partnership. B. dies, and his executors file a bill against C. for an account of the partnership dealings of B. & C. In the progress of the suit the Court directs the accounts of both partnerships to be taken, and C., by his answer and examination, admits that he has received a sum on account of the partnership of A. & B.: Held, that he must pay that sum into Court notwithstanding A.'s representatives are not parties to the suit, inasmuch as he must be taken to have received it (subject to his explanation to the contrary) as surviving partner of B.—Upon the death of one of two partners, the surviving partner continued the business, and, without the consent of the executors, took upon himself certain of the debts due to the firm; at the same time transferring the accounts of those debtors to new books, which he had opened on his private account. He also transferred to the new books the accounts of the debtors whose debts he did not undertake. He, however, swore, in conjunction with an accountant, that the entries made in the new books for the last class of debtors were uniformly, and without alteration, transferred to the partnership books, which were open for the executors' inspection: Held, that he must produce the private books for the inspection of the executors, in order to shew the entries made of both classes of debts: of the first class, because he might have made a profit of the debts which the executors had a right to share; and of the second class, because he might have made an improper appropriation of the payments made from time to time in their discharge, by applying those payments in discharge of his own advances, and not in discharge of the balance due to the partnership.

[S. C. 3 Jur. 1048. See, further, 4 Hare, 41: reversed 2 Ph. 711.]

For several years previous to the year 1806 Richard Toulmin and Abraham Toulmin carried on the business of navy agents in partnership together, in equal shares. That partnership was dissolved on the 31st of August, 1806, in consequence of the lunacy of Richard Toulmin. Abraham Toulmin having then become entitled to carry on the business on his own account, formed a partnership with John Copland, and they carried on the business of navy agents in partnership, under the style and firm of Toulmin & Copland, from the 1st of September, 1806, to the 4th of January, 1819, when Abraham Toulmin died, having by his will bequeathed all his estate and

effects to Margaret Toulmin, his widow, and appointed her and the other plaintiffs his executrix and executors.

There being no deed or written memorandum of the terms of the partnership between Toulmin & Copland, a dispute arose between the plaintiffs and Copland, respecting each partner's share in the capital and profits of the business; and on the 16th of January, 1819, the plaintiffs filed their bill in this Court against Copland and the Bank of England, in whose books a sum of 16,000l. in stock was then standing in the name of Toulmin & Cop-**[626]**-land, praying for the usual accounts of the partnership dealings; a receiver, injunction, &c. With respect to the partnership shares, the bill alleged that on or about the 1st of September, 1806, it was agreed between Abraham Toulmin and the defendant Copland that the defendant should become a co-partner with Abraham Toulmin in the business of navy agents, and should bring into the business 8000l., and that Toulmin should be entitled to two third shares of the profits, and the defendant to the remaining one-third share. That the business had been carried on upon these terms up to the time of the death of Abraham Toulmin (except that the defendant did not bring into the concern more than 4000l.).

The defendant by his answer stated that the co-partnership was to be carried on upon the terms that Abraham Toulmin should bring into the concern good outstanding debts due to the partnership of Richard and Abraham Toulmin, to the amount of 40,000l. at least, in order to set them against debts to that amount due from that concern, and by that means to preserve the connexions of the old firm to the new firm, without subjecting the latter to liability for the debts of the former. That the defendant should bring into the partnership 4000l. in cash. That, upon these conditions being fulfilled on both sides, Abraham Toulmin should be entitled to two-thirds of the profits and subject to the like proportion of any losses that might be sustained, and that the defendant should be entitled to the remaining one-third of the profits, and subject to one-third of any losses of the partnership, but that, at the expiration of five years from the time of such agreement, the parties were to be interested as partners in equal shares; and that in case Abraham Toulmin should fail to bring in good and available debts to the amount of 40,000l. from the old partnership, to answer the purposes before mentioned, the partnership should in that case be carried on upon equal terms, both being entitled to equal **[627]** moieties of profits, and liable to the losses in like moieties. The defendant by his answer also insisted that Abraham Toulmin failed to bring in the sum of 40,000l. of good debts of the former co-partnership, and that the latter alternative of the agreement was adopted and acted upon by him and Abraham Toulmin, and that they became interested in the partnership in equal shares from the 1st of September, 1806, to January, 1819, and he submitted that he was entitled to half of the profits of the partnership concern.

Before the defendant put in his answer he had made an affidavit in support of a motion in the cause, by which he stated that it was agreed in the first instance between him and Abraham Toulmin, on the formation of their partnership, that upon Toulmin's bringing into the partnership 40,000l. of good debts which were owing to the late concern of Abraham and Richard Toulmin, and upon the deponent's bringing 4000l. into the partnership, Abraham Toulmin should be entitled to two-thirds of the new partnership, and the deponent to the other third; but that Abraham Toulmin, not being able to bring 40,000l. of good debts into the partnership, it was afterwards agreed between them that they should carry on their co-partnership trade or business of navy agents upon equal terms as to profit and loss, and they did accordingly so carry on such trade or business.

The cause came on for hearing in June, 1828, when a decree was made by which it was referred to the Master to take the accounts of the partnership of Toulmin & Copland, and to inquire and state to the Court whether Abraham Toulmin brought into the partnership 40,000l. worth of good debts according to the true intent and meaning of the agreement stated in the affidavit of the defendant. In pursuance of the decree the Master made his report, by which he found that Abraham Toulmin did not bring in the 40,000l. worth of good debts pursuant to **[628]** the agreement. The plaintiffs then took exceptions to the Master's report, which being overruled the question was carried to the House of Lords, who came to a conclusion at variance with that of the Master; thereby establishing that Abraham Toulmin was interested in the partnership in two-thirds, and the defendant in one-third. The Master therefore proceeded to take the partnership accounts on that footing.

By a separate report, dated the 15th of February, 1836, the Master, after stating the evidence produced before him, found that, in taking the accounts between Abraham Toulmin and the defendant Copland as directed by the decree, all sums received by the firm of Toulmin & Copland from their customers and clients, who had been debtors of the former firm of Richard and Abraham Toulmin, and to whom advances had been made by the firm of Toulmin & Copland in the ordinary and necessary course of the business and practice of navy agents, should, in the first place, be applied towards the discharge of such advances and interest respectively; and that the surplus only should be applied towards the discharge of debts due from such customers and clients respectively to the firm of Richard & Abraham Toulmin. The Master further certified that he made this separate report at the instance of the plaintiffs for the purpose of taking the opinion of the Court, and that in the meantime he had forborne the prosecution of the accounts in order to save unnecessary expense.

To this report the plaintiffs took several exceptions, of which the most important was to the effect that, instead of the above finding of the Master, he ought to have found that all the sums received by the firm of Toulmin & Copland from their customers, debtors of Richard & Abraham Toulmin as mentioned in the report, ought, in the first place, to be applied towards the discharge of the said debts owing to Richard & Abraham Toulmin, and **[629]** of the interest thereon respectively, and that the surplus only should be applied towards the discharge of the advances and interest in the said report mentioned.(*a*)

The exceptions now coming on for argument, the defendant endeavoured to maintain the Master's report, on the ground that it had been expressly agreed between him and Abraham Toulmin that the accounts should be taken in the manner stated by the Master; and he founded his case principally on two affidavits made by Abraham Toulmin in the suit brought against him by the committee of Richard Toulmin. In the first of these affidavits, dated in January, 1814, Toulmin stated that he had had several interviews with Mr. Powell, the committee, and Mr. Reynolds the brother-in-law of the lunatic, and with Mr. White their solicitor, on the subject of the debts due to the late partnership of Richard and Abraham Toulmin, and the best mode of getting in the same; at which meetings he, the deponent, explained the nature of the debts, as being, with very few exceptions, due from officers in the navy, many of them at that time on half-pay, and having in most instances little or no property, except in their pay and expectances, wherewith to discharge their debts, and that the principal prospect he the deponent had of obtaining payment of the majority of the debts was the expectance which the officers had of obtaining appointments or getting in commission so as to become entitled to prize-money, &c., and thereby be enabled to pay off such debts; and that if legal proceedings were resorted to, the consequence would be the imprisonment of the debtors, and probable loss, not only of the debts, but the costs of such proceedings. That **[630]** Messrs. Powell, Reynolds and White perfectly acquiesced and approved of the deponent making advances to such officers for the purposes above set forth, and that it was under that impression, and on the express condition of his being allowed to reimburse himself out of the first monies to be received by him and his partner on account of such officers, and solely with a view of retaining the agencies of the officers whereby alone he the deponent might be able to discharge the debts in question, that the deponent and his partner were induced to and did make such advances to them. In a subsequent part of the affidavit Abraham Toulmin spoke of the debts being transferred to the books of Toulmin & Copland on "the understanding" that they should not be personally chargeable with them as if actually received.

The other affidavit on which the defendant relied was one in which Abraham Toulmin stated that in very many instances in which he and his present partner had received monies on account of officers for whom they were agents, it had been upon a previous and express understanding that the deponent and his partner were to make advances throughout, to or on account of such officers respectively, and not to apply

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(*a*) It was contended for the defendant in the Master's office that this case was distinguishable from *Clayton's case*, 1 Mer. 572, *Bodenham* v. *Purchas*, 2 Barn. & Ald. 39, and *Pemberton* v. *Oakes*, 4 Russ. 154, inasmuch as those were cases of strangers dealing with a partnership, and not partners dealing with one another.

such receipts to the discharge of the balances respectively owing from them to the late partnership of Richard & Abraham Toulmin.

It appeared from the accounts of the officers that the arrangement stated in the last-mentioned affidavit had been acted upon in several instances.

Mr. Simpkinson and Mr. Duckworth, for the exceptions.

Mr. Knight and Mr. G. Richards, for the report.

Dec. 17th.—THE LORD CHIEF BARON (after stating the former proceedings in the cause). The question upon these exceptions turns upon this—whether or not there was an agreement between Toulmin & Copland, at the time they [631] entered into their partnership, or at any other time, by which it was arranged and settled between them, that upon the introduction of the balances from the old house into the books of the new, all the advances made by the new house should be first paid, and all monies paid in by the customers of the house, as the debtors of the house should be applied, in the first instance, to discharge the new advances, before they were made applicable to the discharge of the old balances. If there were such an agreement, however fatal it might be to the interest of Toulmin, he was competent to make it, and it was binding upon him, and the Master's report must be confirmed; if no such an agreement existed, the exceptions to the Master's report, at least this part of them, must be allowed.

Now this question requires great consideration, and I hold myself bound, sitting in this place, not to abandon the burthen of determining a question of fact which arises upon the evidence in the cause, merely from the difficulty of doing it, if I can do it satisfactorily to myself. I think the parties are entitled to have the judgment of the Judge in equity upon the fact as well as the law, if he is able to form a judgment; and that he is not bound to send the cause to an issue unless he finds such evidence as makes it necessary to contrast the credit of the witnesses before a jury, in order to obtain a satisfactory decision. If both parties prefer the judgment of that tribunal to the judgment of a Judge in equity, it is reasonable they should be satisfied; but unless both parties do so, which I am sorry to say is not the case at present, then the duty is cast upon the Judge to determine the facts himself. Now, in order to consider this subject, it will be necessary to take a review very shortly of the history of the parties. It appears that Abraham and Richard Toulmin were in partnership for a considerable time before the year 1806, as navy [632] agents. The business of navy agents consists partly in acting as bankers for their customers, and partly as factors. As factors they receive the pay, the prize-money, the pension and other matters that their customers choose to make them the organs of receiving, charging a commission on their actual receivings of so much per cent. on the money received. Again, some of their customers keep money in their hands, and draw upon that money as they would upon bankers. It appears to be the practice to receive the money as bankers, and to allow no interest upon it. Another class of customers require advances, and to these they make advances, and charge five per cent. interest, and they render annual accounts at stated periods to their customers, carrying forward the balance either for or against them as the case may be, just as any ordinary banker does. It is plain, from the nature of their business, therefore, that it is very important for a navy agent to have both classes of customers. It appears that in 1806 Richard Toulmin became a lunatic, and that a commission of lunacy was taken out against him. The original partnership therefore ceased, and Mr. Abraham Toulmin contracted the partnership with John Copland, the present defendant. Soon after that partnership commenced, a bill was filed by the committees against Abraham Toulmin for the purpose of taking the account between them; and the proceedings under that suit are made evidence in this, and were adduced before the Master to enable him to come to the conclusion that he formed. Amongst those proceedings, it appears that a controversy arose in what way the balance due from the old customers to the house should be treated. By the old customers I mean those who dealt with the first firm. It appeared that soon after they commenced their partnership, balances were transferred from the books of the old firm to the books of the new—both those balances that were for the firm, and [633] those that were against the firm; so that the house of Toulmin & Copland undertook to liquidate the balances due from the house of Abraham & Richard Toulmin; and likewise proposed to the creditors of that house that they would be responsible to them for the debts due from the old house. This result is the necessary consequence of the change in the house, as will immediately be seen by

attending to the operation of the accounts. A customer of the house who might owe a certain sum of money to the old house, finds himself addressed by the new house with a statement to this effect: that the new house is now formed, and they propose to carry on the same concern, and that they have transferred his balance to their accounts, and have rendered him a new account, the first item of which debits him with the balance due to Abraham & Richard Toulmin. That forms the first item on the debit side of the account, and that account is opened with the new house of Toulmin & Copland Then they introduce other payments made to him, and payments made by him on the credit side of the account, and at the end of the year they draw a balance, and they charge him as debtor to the new house with that balance. That balance includes the interest of the debt to the old house. The account is carried on from year to year, and in that manner for several years. Now it is quite obvious that, as between the debtor and the creditor, that balance becomes absorbed and discharged by the first payments that are made in point of time that are applicable to it, and the account assumes altogether the shape of an account between the new parties. It is no longer an account between the former house and the customer, but an account between the new house and the customer. And the customer in effect engages to pay the new house what he before owed the old house, and pays accordingly upon a general account what he pays in. That is the necessary and legal consequence of the form of the account (with-**[634]**-out referring to the rule laid down in *Clayton's case* (1 Mer. 572) by Sir William Grant, which is now become thoroughly understood and acted upon in all Courts of Justice). From the very nature of the account, without the application of any legal rule, the old balance becomes a balance in which the new house is interested, and becomes absorbed and satisfied by the subsequent payments made, unless there be some agreement to the contrary. So, on the other hand, with respect to the accounts of the creditors of the house. Some customers of the house have money in their hands. The house renders accounts to those customers, giving them credit for the money which the old house owed to them, and carrying on the account with them, soliciting a continuance of their favours and making themselves their debtors. The very point which I am now discussing arose in the matter of the lunacy of Richard Toulmin (id. 598), in which Master Alexander reported that the balance should be dealt with in the way I now state.

But Mr. Copland has set up before the Master an agreement between him and his partner, the effect of which he alleges to have been, that they were to apply all the monies they had received from the debtors of the house in the first instance to pay off and discharge the advances made by the new house, before they set apart any of them to reduce the old balances; and it lies upon him to prove the existence of such an agreement. That is the issue now between the parties, whether there was such an agreement. Now, if we look at the acts of the parties, there certainly can be no colour for supposing that such an agreement existed. If such an agreement had existed, one can hardly conceive it possible that no evidence should be found of it in their books. What would be the consequence of such an agreement kept as the **[635]** books now are? Why, that after a certain period, no payment being made of the old balances, and six years having run upon them, the Statute of Limitations would apply to cut off from Toulmin all hope of recovering them; or this would be the consequence, that nobody could now recover these sums, Toulmin being dead, but Copland alone, as surviving partner, being competent to deal with those balances, and being alone entitled to receive them. It is admitted that, as to the customer, that must be the necessary consequence, because he has a right to insist that his first payment should go to pay the first demands against him.

It would therefore follow that the representatives of Abraham Toulmin could not at this moment enforce any claim against any of the debtors of the house of Richard & Abraham Toulmin, to the whole of which debts Abraham Toulmin's estate is now entitled. That would be the first consequence of such a mode of keeping the books. Now, if such an agreement had been made between men who had any understanding of business (and I must presume these persons had a competent understanding of business), one would have thought it would have found its way into the books in this manner that, though the old balances might be carried into the new books, they would have formed separate heads of account, and you would have had an account opened with the estate of Abraham & Richard Toulmin, and the old balances would have been summed up in that; and then, as each customer's account was rendered, the new

account would have been rendered to him as an account with the new house, and then the old balances brought forward; and if any payment were made more than sufficient to satisfy the advance of the current year, that payment would, upon the face of the account, have been appropriated to satisfying part of the old balance. Nothing could be more simple than that. It would be just as easy as the present mode of keeping the accounts, **[636]** and the same evidence would have been found in their books to shew how the balances were gradually reduced. Nothing of the sort is found. There is no indication in any one of the books of the new house of Toulmin & Copland of any other mode of keeping the accounts than that which must lead to the conclusion that the new partners have not taken upon themselves to represent the old ones in these balances, and that the same consequence must follow as if the old house had still continued, the balances being paid off by the sums paid in in the order of time.

But there is another reason which renders it difficult to suppose that such an arrangement could have been made. It appears Mr. Toulmin undertook to bring into the concern 40,000l., of good debts. In effect that means that he would guarantee that, to the extent of 40,000l., the balances due to the old house, if the accounts had been made out, should be paid, so as to furnish capital to carry on the firm with. Now, when you consider that his partner, Mr. Copland, had the benefit of the engagement that 40,000l. should at all events be paid—with respect to those balances which embrace the 40,000l., what occasion was there for such a contract? He had his partner's undertaking that those balances should be in effect paid at some time or other; consequently he was safe. His partner taking on himself the responsibility of those balances, there would be no occasion for the contract so far as regarded either those balances or any other balance coming from a customer, which they had reason to think would be paid. The bringing in 40,000l. into the concern as capital was of much less importance than the bringing in customers to the amount of 40,000l., because the customers afforded the profit to the house, and when both were brought in together it became a very advantageous bargain for Mr. Copland, for he entered into a house where the undertaking was to bring in not only 40,000l. capital to meet the **[637]** calls that might be made on the new house, but also 40,000l., if I may so say, of customers, who were to furnish a continual source of annual profit.

I have looked very much into the evidence on the subject of the payment of that 40,000l. with reference to the contract set forth by Mr. Copland in his affidavit, and I must say I entirely concur with the House of Lords in opinion that that 40,000l. was brought in in good debts according to that statement. [His Lordship here commented on the evidence as to this part of the case.] In fact, it appears by affidavit, uncontradicted by anything in the evidence, that up to 1812, not the sum of 40,000l. only, but nearly 42,000l. had been paid in of the balance due to the house of Richard & Abraham Toulmin, over and above all the new advances claimed by the house of Toulmin & Copland. Now it never could have been intended, when the contract was made, that Mr. Toulmin should bring in 40,000l. of good debts, that that 40,000l. should be paid the first year. We cannot contemplate that to be the meaning of the contract. The meaning was that he should bring in a class of customers owing sums to that amount, which should be paid beside the new advances. That has been complied with, and in the meantime the house has been deriving profit from that branch of the customers.

Now it appears to me that this throws some light on the question; because, if we are to suppose that this gentleman made a contract that there should be 40,000l. of the old balances actually realized over and above all the new advances, and yet he was to say that all the new advances should be paid first before any part of the payment should be applied to the old balances, he must have made a very improvident bargain for himself. You would require strong evidence of such a bargain, which places him in this situation necessarily, that on his death, or even during his lifetime, he might not be able to recover the old balances at all.

[638] But it is said you must look at the evidence independently of the evidentia rei. Now, in all cases of doubtful evidence, the safest thing to look at is the evidentia rei. But here each party contends there is evidence, independent of the mode of keeping the accounts, to shew what his own construction of the contract is.

We will first take the case made out by Mr. Toulmin's executors. First, they say that when Mr. Copland is called on to state what were the terms of the partnership

between himself and his partner Toulmin, he does not make the slightest allusion in his affidavit to this very singular contract: and that is true. Secondly, it is said that when the first suit was in agitation in the Court of Chancery between the committee of the lunatic and Abraham Toulmin, Mr. Copland himself took a very active part in defending his partner in that suit, having in fact the same interest as Toulmin, because the immediate effect of the decree was to withdraw from the house a certain portion of the capital that they were playing with; and yet that he did not at that time venture to set up this agreement. Now, it is certain that Mr. Toulmin endeavoured to introduce some notion of that sort into the proceedings in that cause, that there was such a bargain. I shall come to that bye and bye, because that forms part of Copland's case; but it is remarkable that Copland, who might have been a witness in that cause, was never called on—that he never made any affidavit—that there is no trace of any suggestion by him that such a contract existed—that his own rights were affected by the proceedings, which endeavoured to take from the house immediately a portion of its capital, before the capital which they had advanced had been repaid—that he had as strong an interest as Toulmin had to resist that—that he did resist it (for although not nominally, yet it appears from the evidence that he took a part in it and was at the joint expense of resisting it)—and yet, although he might **[639]** have made an affidavit in favour of the contract insisted on, he did not.

Now, it appears to me an important observation in this case that when the Court of Chancery had decided that the balance was to be dealt with in the way that they did decide, if such a contract had existed, it was time for Mr. Copland to have said something about it to his partner. There being no contract in writing, it was determined by the Court of Chancery that the mode of keeping the books was the true evidence of what the real contract was, or at least it was determined that any arrangement at variance with that mode would have no effect on the lunatic partner's interests. Was it not necessary to Mr. Copland at that time, if such a contract as he states existed, to come to an understanding with his partner on the subject, and have it put into writing? It is very remarkable—I presume that it is the use intended to be made of the correspondence—that in the letters addressed by Copland to Toulmin about the time the decree in that suit was made, there is not the slightest existence of allusion to such a contract. He is endeavouring to suggest the means of raising money, in order to pay off what is decided by the decree, and to comply with the terms of the decree; and his letters are full of very friendly intimations, and although they do not appear to be the letters of a man of very exalted education, they are by no means deficient in very rational and just views of business. It is therefore very remarkable that the party who would be most interested to establish, and to insist on such a contract if it existed, does on no occasion, when most called on to do so, either privately or publicly, make any demonstration that he thought or conceived that such a contract existed.

But now comes the evidence against Mr. Toulmin, and I am by no means disposed to deny that, in one view of that evidence, it certainly is of very great importance. It principally consists of the testimony of two witnesses, who **[640]** speak to conversations with Toulmin, and Mr. Toulmin's own affidavit, made in the month of January, 1814. Now, this is certainly evidence which might be used with considerable effect against Mr. Toulmin, in order to shew that he had made such a contract with his partner. It becomes me, therefore, to weigh the evidence on both sides, and to consider whether the statement made by Toulmin—taking first his own affidavit—goes directly to the point of such a contract, or whether it was not made alio intuitu with the concurrence of his partner at that time, and in order to obtain a particular object.

Now, from looking at the affidavit, it appears to me that he was labouring at that time to relieve himself from what he thought was the attempt on the other side to impose on him and his partner the obligation of paying those balances, although they had received no money on account of them at all; for he thought, and there is some plausibility in that notion, that the very act of transferring the balances in his books, and making those parties debtors to him and Copland, instead of making them debtors to the old firm, was taking on themselves the liquidation of the old balances, so as to give Richard Toulmin's committee a right to call upon them for payment. It is quite plain this affidavit was framed with a view to resist that. He first states a conversation he had with the committees of the lunatic; that he represented to them that the

usual course of business made it necessary, in order to recover those balances, that the business should be kept in the new house; that if they had been transferred to another house, and they and he had attempted to recover those balances, many of the persons would have been unable to pay; that their ability depended on their prize-money and future events, which those who wished to have the balances paid ought to watch for, in endeavouring to adjust them; nay, that it was impossible to expect, without bringing immediate actions, that they should succeed; and he **[641]** says the committees and their solicitors appeared to acquiesce in that statement; and then he represents that in the course of a navy agent's business it is always usual to consider that the payments made by the clients were made to satisfy new advances, before they were applied to the old balances. He says that is the course of business.

Now, on that I should think Mr. Toulmin was clearly mistaken; but, in urging that, he goes on to say that such was the understanding between himself and his partner. This is the strongest passage against him—but it is observable in this passage he does not state a contract; he states an understanding. Now, if this gentleman had an opportunity of safely swearing, so as to satisfy his own conscience, that a specific contract existed which bound him and his partner to each other, surely there was no reason why he should not have stated that in the fullest way. He would have stated it was agreed positively, as the very terms on which they formed the partnership, that, before a single balance was transmitted into the books, this should be the condition of it—that all new advances should be first paid. But he states no such thing as a contract; he only states it as an understanding. He had already stated, in the first part of his affidavit, that he understood that to be the general course of trade; and his conscience is sufficiently satisfied by repeating that he and his partner had that understanding when they went into business.

It appears to me, therefore, that the effect of this, supposing it was evidence extracted from a party giving it reluctantly, giving it unwillingly, would be very important; but when you consider it was the evidence of a party who had a strong interest to swear directly to a contract, if such a one existed, his omission to do it, when it was his interest to have set it up, appears to me a very strong argument to shew he was endeavouring to make the best possible case for that particular object, but yet that he **[642]** could not, with a safe conscience, go far enough to swear to the contract, which his partner now says actually took place between them, and for which he adduces this evidence alone. I feel that if a jury was to investigate this case, with that calm deliberation which no doubt they would do, if it had gone to be tried on an issue before them, that argument ought to have great weight with them. It is very true that the evidence comes from the adversary, and all the evidence of an adversary undoubtedly is more important against him than evidence coming from a neutral quarter. That is very true, but then it is evidence coming from the adversary under circumstances in which it was his great interest to have stated, more strongly than he has stated, the fact you want to prove. It is not evidence adduced by him in this case, where the controversy is put on its true footing, whether such a contract existed between him and his partner; but it is used by him in a case where it was his interest to establish such a contract. And this great delicacy in refraining from swearing in terms to such a bargain, accompanied with the circumstance of his partner himself never suggesting it from the beginning to the end in the whole transaction, does, I own, appear to me to diminish the weight of this testimony, very properly adduced and very ingeniously urged by the counsel who supported it; but it appears to me to diminish the weight of it, so as not to make even an even balance with the testimony on the other side.

His Lordship then, after commenting upon the evidence of the witnesses who spoke to the conversations (which he characterized as inconsistent with the acts of the parties, and not called for by any circumstance naturally leading to them), and after adverting to the second affidavit of Abraham Toulmin, which he said only applied to particular accounts, and not to accounts of officers generally, allowed the most material exception.

Exception allowed.

[643] In pursuance of the power given to him by the decree made in this cause, the Master directed certain interrogatories to be exhibited for the examination of the defendant Copland, touching his receipts and payments on

account of the late firm of Toulmin & Copland, and his opening new books on his own account, and carrying into such new books the accounts of the customers of that firm.

In answer to the first of these interrogatories the defendant, in his answer and examination, stated that, shortly after the death of Abraham Toulmin, namely, on the 28th of January, 1819, he opened a new set of books of account, including a new ledger, for the purpose of carrying on the business of a navy agent, theretofore carried on by him in partnership with Toulmin; and he admitted that he did thereupon open new accounts in such new ledger with some, but not all the several persons who had been customers of Toulmin & Copland, and that he did transfer, bring forward, or enter from the books of account of the said firm into the new accounts of such of the several persons as were debtors to the said firm, and with whom he had opened such new accounts, the respective debts or balances due from them to the said firm, "as debts or balances due to or taken to account or paid by" him the defendant; and he stated that he had in the first schedule to that his examination annexed, set forth a full, true, and particular account of such debts and balances, with the names &c.; and he stated that he verily believed that the firm of Toulmin & Copland were much benefited by the defendant bringing forward such debts, inasmuch as he **[644]** thereby kept up the connexion, and was, to a certain extent, the means of such debts being paid and liquidated; and he stated that he did not bring forward, transfer, or enter from the books of Toulmin & Copland into the new accounts of such of the said several persons as were creditors of Toulmin & Copland the respective debts or balances due to such persons by Toulmin & Copland. And he further stated that he had in the said schedule set forth an account of the claims then outstanding against the firm of Toulmin & Copland, and the amount of a sum which Abraham Toulmin had overdrawn his account at the time of his death. And he alleged that there was then in Court, to the credit of this cause, a sum of 25,354l. Consols, and 1300l. Three per cent. Reduced Annuities, of which he claimed a moiety.

The first schedule above referred to stated the amount of the debts and balances mentioned in the examination to be 12,243l. 5s. 2d. It then stated the amount drawn out by Abraham Toulmin to be 19,642l. 5s. 9d., and the amount drawn by the defendant to be 9844l. 5s. 4d., and the debts due by the firm of Toulmin & Copland on the 4th of January, 1819, when that partnership terminated, and which remained outstanding on the 31st of March, 1835, to be 14,144l. 13s. 4d.

In answer to the second interrogatory the defendant stated that he had, since the death of Abraham Toulmin, possessed and received such goods, chattels, debts, sums of money, property and effects belonging to the partnership of Toulmin & Copland, and also such sums which had accrued due for interest on debts due to that firm, and such dividends on securities belonging to that firm, as thereafter mentioned; and that he had in his second schedule, to that his examination annexed, set forth a full, true, and particular account of such goods, chattels, &c. And he further stated that he treated and dealt with the accounts of the said late firm as if they were the accounts of **[645]** the clients of him the defendant. And he alleged it to be a custom among navy agents, when a partner dies or retires, for the continuing or surviving partner to act as the agent of the previous firm, and that such custom had been observed by his predecessors in the firm. And he stated that in the regular course of business he gave the late firm of Toulmin & Copland credit in his books for all such sums as he received on their account, and in like manner debited them with monies paid by him on their account. And he further stated that before the death of Abraham Toulmin, he, the examinant, had capital and monies of his own in the late firm of Toulmin & Copland to a large amount, and also monies of his own used in the business carried on by himself subsequent to the death of Abraham Toulmin. And he admitted that he had used some of the monies and debts received by him on account of the late firm of Toulmin & Copland (but not to a greater extent than what was due to him from the late firm), in carrying on the business of a navy agent on his own account. And he stated that he had not placed out or applied any of the sums or sum of money received by him, belonging to the late firm, at interest, or in the purchase of government or other stocks or funds, or in any other manner, so as to make any profit or advantage thereby, save as aforesaid.

The second schedule stated the amount of the defendant's receipts and payments on account of Toulmin and Copland.

A third schedule was also annexed to the examination and answer, stating the amount of certain sums received and paid by the defendant on account of the estate of Abraham Toulmin as surviving partner of Richard Toulmin.

The above examination and answer being considered by the plaintiffs unsatisfactory, in not containing a sufficient admission by the defendant of his receipt of the **[646]** 12,243l., and likewise in not stating whether the sums mentioned in the second schedule were entered in the new ledgers (none of those sums being included in the first schedule, or having any connexion with the persons named in that schedule), the defendant was examined on fresh interrogatories in order that he might supply the deficiencies in his former examination.(*a*)

In answer to the first interrogatory of the second set of interrogatories the defendant stated that he had, since the death of Abraham Toulmin, possessed, got in, and received a portion of the several debts or balances due to the late firm of Toulmin & Copland, which were set forth in the first schedule to his former answer and examination, amounting to about 11,957l. However, he, the examinant, said that he took into his books the several debts mentioned in the said first schedule, as it would have been impossible to carry on the business of navy agent or get in the debts due to the said firm without so doing; he the examinant having been left without any available assets, and a distringas having been placed by the representatives of Abraham Toulmin on the funded property of the partnership.

In answer to the second interrogatory of the second set the defendant stated that since the death of Abraham Toulmin he had opened new ledgers other than and besides the new ledger mentioned in his former answer and examination, for the purpose of carrying on the business theretofore carried on by him in partnership with **[647]** Toulmin, but that none of the debtors of Toulmin and Copland, as mentioned in the said second schedule, were transferred to such new ledger until such debts were paid.

To the last-mentioned answer and examination were annexed two schedules in continuation of the second and third schedules of the former examination and answer. From the whole of the second and third schedules respectively taken together it appeared that the balance of the receipts over payments, contained in the second schedule, amounted to 5508l. 17s. 5d., and that the balance of receipts over payments contained in the third schedule amounted to 1397l. 18s. 7d.

Upon the admission contained in these examinations the plaintiffs made two applications to the Court—first, the motion for payment of money as next reported, and, secondly (see post, p. 655), an application in the shape of exceptions, for the production of the defendant's new books of account.

April 27th, May 2nd, 1837.—And first the plaintiffs moved that the defendant might be ordered within a given time to pay into Court, in trust in this cause, the several sums of 11,957l., 5508l. 17s. 5d., and 1397l. 18s. 7d., admitted by his said two answers and examinations to be in his hands, and that upon such payments being made, the Accountant General might be ordered to pay to the plaintiffs two equal third parts or shares of such several sums, and might also transfer and pay to the plaintiffs two equal third parts or shares of the sums of 25,887l. 3s. 8d., Consols, and 388l. 6s. 1d., cash, standing in his name in trust in this cause.

Mr. Simpkinson and Mr. Duckworth, for the motion. Upon the whole of the answers and examinations taken **[648]** together, there is a sufficient admission by the defendant of the receipt of these sums, to authorize your Lordship to order the payment of them into Court. If, upon the case made by the defendant, the plaintiffs shew that they have an interest in these sums, that is sufficient for the purpose of the present motion. In *Domville* v. *Solly* (2 Russ. 372) a bill was filed by an executor against his co-executors, for an account of the estate of a testatrix who had been partner with the defendants. By their answer the defendants insisted that they had

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(*a*) Exceptions were taken by the defendant to the Master's certificate allowing the fresh interrogatories, but the exceptions were overruled. That the Master has power to allow fresh interrogatories for the examination of a party (which is a less expensive course than referring the former examination for insufficiency) appears from *Cowslade* v. *Cornish*, 2 Ves. sen. 270, 1 Dick. 149; *Willan* v. *Willan*, 19 Ves. 593; *Hatch* v. ———, 19 Ves. 116; *Lynn* v. *Buck*, 3 Madd. 280; *Price* v. *Lytton*, 5 Madd. 465; *Sidden* v. *Foster*, 1 S. & S. 335; and see *Ex parte Saunderson*, 2 Cox, 196.

paid all the partnership debts, and amongst others the claim of the testatrix; yet, as it appeared from a correspondence stated in the answer that a large sum was due to her estate, the plaintiffs were permitted to move for the payment of that sum into Court, and a large portion of it was ultimately paid in. That was a strong case, because there the defendants swore there was nothing coming to the plaintiff, and yet it was held that the plaintiff was entitled to avail himself of the whole answer. Here we have an admission that the defendant drew out of the partnership upwards of 9000l., though he says that that was only a moiety of what his partner drew out. But taking into consideration the whole of the answers and examination, it is submitted there is enough to shew, independently of the question of debts, that this sum of 11,957l. ought to be paid into Court.

But then the defendant says that there are debts now due from Toulmin & Copland to the amount of 14,000l. Ought that, however, to prevent the money from being brought into Court? There are cases of executors analogous to this. In *Yare* v. *Harrison* (2 Cox, 377) an executor, having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a large debt due from the testator; liberty however was given to him to apply to the Court for the **[649]** amount of the debt in case it was recovered. In *Mortlock* v. *Leathes* (2 Mer. 491) an executor, admitting a balance due from the testator upon an unsettled account, was ordered to pay the amount into Court, notwithstanding there were debts of the testator outstanding, the testator having died three years before. [The Lord Chief Baron. It must have appeared from the answer in that case that there was no good reason why he had not paid the debts.] This case is clearly within the principles laid down in *Foster* v. *Donald* (1 J. & W. 252), and *Mills* v. *Hanson* (8 Ves. 68, 91). In the latter case, on the hearing of the first motion, Lord Eldon said the motion must be made on an admission in the answer, or incorporated in the answer. A second motion was then made, founded on the result of casting up the accounts in the partnership cash-book and ledger. It appeared that the reference in the answer was to other books as well as these, and therefore Lord Eldon refused the motion. But his Lordship said that if the plaintiff could make an affidavit, stating that the balance sought for was the result of casting up the accounts in all the books, he would grant the motion. That case is not distinguishable from the present.

The defendant says that the money in Court amounts to about 25,000l. Consols. Considerable part of that arises from accumulations, for the original sum paid in was under 16,000l. The rest of the partnership property has been in his hands ever since. He admits that he has traded with it to the present moment. To give some colour for his conduct he alleges that there are outstanding debts to the amount of about 14,000l., and he insists that for that reason the whole of this property should be left in his hands. Is that just? The Court will consider whether there is any danger to him to pay the money, or any danger to the applicant of the money being lost. If he is **[650]** in danger from the outstanding debts of the partnership, the estate of Abraham Toulmin is in like jeopardy, in the proportion of two-thirds to one-third. But these debts are debts of customers of twenty years' standing, and probably will never be asked for. He says he is liable to arrest, but he does not venture to say that he is in any danger.

The money received on account of Richard and Abraham Toulmin is payable into Court in this suit, because the accounts of that estate must be taken in this suit in order to wind up the affairs of Toulmin & Copland. That has been already decided by the Court. And as Toulmin & Copland took upon themselves to collect the property of R. and A. Toulmin, they are strangers as to that money and liable for it as to any other creditor.

As to the last part of the motion, namely, for payment of two-thirds of the money out of Court, there are several authorities shewing that, where there is a clear fund, the Court will direct it to be paid, or payments on account of it to be made, to the party entitled to it: *Pearce* v. *Baron* (12 Ves. 459), *Worter* v. ——— (13 Ves. 92), *Jerroise* v. *Silk* (Cooper, 52). [The Lord Chief Baron. Where it is clear that, whatever be the result, there must be a surplus in favour of the party applying, it would be unjust to compel that party to wait, perhaps twenty years for it.]

Mr. Knight (with whom was Mr. G. Richards), contrà. Your Lordship cannot take cognizance of the money due to R. and A. Toulmin in this suit; you have not

the representatives of Richard Toulmin here. A supplemental bill is necessary to enable the plaintiff to get this money. As to the outstanding debts, they are sworn to amount to upwards of 14,000l. It is said that they are of long standing, but I do not know that there is any obligation on the partner to plead the Statute of Limitations; perhaps **[651]** common honesty would require he did not. It is, at all events, necessary for navy agents or bankers not to do so. Suppose bankers did so after a ong deposit—a deposit is no more than a debt—would they not be hooted from society? Admitting, however, that the defendant had that defence, it is now gone; for his acknowledgment of the debt takes it out of the statute. The acknowledgment to a third person is sufficient, and Lord Tenterden's Act makes no difference in this respect. If A. owes B., and acknowledges it to C., that takes it out of the statute.(*a*) This examination, therefore, takes it out of the statute. [The Lord Chief Baron. If he acknowledge it in a contest with his own partner, it may be a question whether he ought not to pay it out of his own funds.] At all events, there are accounts, as prize accounts, against which no Statute of Limitations runs. Besides, there is more than an equivalent in Court. Upon the footing upon which the plaintiffs move, your Lordship will not accede to the motion. They ask to have the whole paid in, and they to take half, instead of paying in half. As long as the accounts are uncertain you cannot order a sum to be paid out; where there is a clear surplus, it is otherwise. All that the defendant knows is from the partnership books; he has not seen Toulmin's books. In one of the cases cited the motion was refused, because the party was an accounting party.

Mr. Simpkinson, in reply. It is admitted that the three sums in the hands of Copland are the results of the balances of the three accounts. The question then is, whether your Lordship will allow any portion to remain in his hands. The whole of the Bank Annuities were ordered into Court; therefore to refuse this motion would be to go against that order, more especially as Copland admits **[652]** that, from the time of receiving these monies, he has employed them in his own business of navy agent, endangering the share of the plaintiffs.

The Lord Chief Baron. It appears to me, upon the defendant's own statement, as it stands at present, without regard to his statement on the former hearing in this case, that the sum due from him, as the representative of his deceased partner, is very considerable. I observe that in the mode of making out the account he has assumed that he is entitled to one-half the property of the concern. Now, according to the form of the order already made in the cause, he is entitled only to one-third; and though that is the subject of appeal, I do not see why I should not assume that the order is right. I think, therefore, the balance must be divided, having regard to the manner in which I thought that account ought to be taken. This will apply to the two first sums which are the subject of this motion. Then comes the additional sum of 1397l. 18s. 7d., which he admits to have been received on the balance of debts due to and from the firm of Richard and Abraham Toulmin. Now, his objection to the payment of that is, that the representatives of Richard Toulmin have an interest in that sum. If that were clear upon the whole state of facts now before the Court, his argument would be unanswered, because the manner in which he received the sums would be at least capable of explanation; but as long as he leaves it certain that he received them, but doubtful in what manner he received them, it appears to me that I do no great violence in thinking that he received them as the surviving partner of the house of Toulmin & Copland, and that he is the only party liable to pay them. If that is a wrong conclusion, and he can set it right, I will have the order so framed as to correct the error; but unless he can shew that he received those sums in some other character, I think he ought to pay **[653]** them in, as having been received by him as the representative of his deceased partner.

If I confine the order only to such parts of the balances as, on taking the accounts in the way I think they ought to be taken, appear to be due from him to his partner, it appears to me that no injustice at all can arise; it is only ordering him to pay the amount of the debt which he owes to his co-partner. I think, therefore, I ought to direct the payment of 11,659l. 6s. 6d. into Court, being the balance admitted by him to be due, if the account be taken on the footing that he is entitled to one-third only of the partnership funds; and if it turns out that I am right in thinking that he is

(*a*) But see the opinion of Alderson, B., contrà, ante, vol. 2, p. 676.

entitled only to one-third, then, on taking the accounts hereafter, he will not be entitled to any part of the 11,659l. 6s. 6d. Of the sum now in Court, he will be entitled to one moiety if he is right in his statement, but to one-third if I am right in the conclusion to which I have come. As to the sum of 1397l. 18s. 7d., that, as I have already said, must form a separate part of the order, and must be brought into court, subject to his explanation.

But it is suggested that the debts due from the partnership have been due for many years; that some of the debts are owing for prize-money to seamen, and that, whatever length of time they may remain unpaid, the defendant is liable, under some particular statute, to be sued for them; and that he ought to be at liberty to take out of the fund in court what he is called upon to pay on that account. I certainly think it reasonable that he should have such liberty, and a provision may be made in the order to that effect.

As to the last part of the motion, which relates to the payment of the money out of Court to the plaintiff, I must postpone making any order upon that until the Master has made his report upon the accounts to be rendered by the plaintiffs as executors.

[654] It was ordered that the defendant should pay into Court, by moieties payable at the times mentioned in the order, the several sums of 11,659l. 6s. 6d. and 1397l. 18s. 7d., admitted by him to be in his hands; and that such sums, when paid in, should be invested; and that the sum of 1397l. 18s. 7d. should be paid in, subject to any application the defendant might make to the Court as to the character in which he received it; and the defendant was to be at liberty to apply for payment, out of the money already in court, for any sums which he might be called upon to pay in discharge of the debts of Toulmin & Copland. Payment out of Court reserved.(*a*)[1]

[655] Nov. 14th, 1839.—The defendant having, by his answers and examinations, referred to certain new books which had been opened by him, for the purposes of his own trade, after the death of Abraham Toulmin, and having admitted that he had opened new accounts therein with some of the debtors of Toulmin & Copland; (*a*)[2] and the Master having certified (see ante, p. 382) that the defendant had produced the partnership books, but not the new books of which the plaintiffs sought the inspection, and that he, the Master, was satisfied with the production of the partnership books, an exception was taken to the Master's certificate as to this matter.

In support of the exception, the affidavit of the plaintiff's solicitor was read. It stated that, on taking the accounts before the Master, some of the items in the account of the defendant's payments being unsupported by the usual evidence, it was proposed by the defendant, and acceded to by the deponent, that the books of account opened by the defendant, since the death of Abraham Toulmin, should be, and they were

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(*a*)[1] The principles upon which motions are entertained for the payment of money into court are very fully discussed by the Lord Chancellor in *Richardson* v. *The Bank of England*, which will be found reported in 4 Myl. & Cr. 165. His Lordship there states that, in order to support a motion of this nature, two things are necessary; first, a clear liability in the defendant to pay; and, secondly, an admission by him of the facts from which such liability arises. In that case the Lord Chancellor discharged an order of the Master of the Rolls, by which the defendant, a partner, had been ordered to pay into Court the sum of 21,591l., which he admitted he had drawn out of the partnership. The circumstances in that case were strongly in favour of the order; and yet, because there was nothing in the defendant's answer amounting to an admission of that sum being due from him, but, on the contrary, an allegation that on account taken he would be found a creditor to the concern, the Lord Chancellor thought the order could not be made. The circumstance which distinguishes the principal case from *Richardson* v. *The Bank of England* is the order of the House of Lords, which being, as it were, matter of record, affected the whole of the defendant's statements, and turned them into an admission of the debt, or the greater part of it. In other respects, it is conceived that the principal case comes within the rule laid down in *Richardson* v. *The Bank of England*. It may be remarked, however, that the judgment in that case proceeds on stronger grounds than were necessary for the decision, and that the case of *Domville* v. *Solly* was not brought to the attention of the Court.

(*a*)[2] See ante, p. 643. One ledger only is mentioned in the examination, but it appeared from the schedule that the debts were transferred to three new books.

accordingly produced, and accepted by the deponent as evidence of the defendant's payments on account of the firm of Toulmin & Copland; that, on a subsequent occasion, it was agreed before the Master, after some discussion, that the deponent should see such of the accounts in the new ledgers as contained transfers of debts due to the firm of Toulmin & Copland; that the deponent accordingly soon afterwards attended at the defendant's counting-house, and inspected **[656]** some of the accounts in the new ledgers marked A, B, and C; that the accounts so inspected contained transfers from the accounts of Toulmin & Copland of sums due to that firm, but that none of the monies appearing to have been received by the defendant on account of the debts so transferred were, so far as the deponent could discover, carried to the credit of the firm of Toulmin & Copland, or entered in the books of that firm; that, in one of the accounts so inspected, the amount therein appearing to have been received on account of Toulmin & Copland exceeded the amount placed opposite to the name of the same debtor in the first schedule to the defendant's answer and examination, and that such excess was not, so far as the deponent could discover, carried to the credit of the said firm of Toulmin & Copland, or entered in their books; that the defendant afterwards refused all further inspection of his books; that the deponent verily believed the said Master could not take the accounts referred to him by the decree without the production of the books of account opened by the defendant since the death of Abraham Toulmin, or some of them; but that the Master had refused to grant a certificate of the defendant's default in producing the same

On the part of the defendant, the joint affidavit of himself and John Harrison, accountant, was read. The defendant, after stating that he had, upon the death of Abraham Toulmin, opened a new set of books on his own account, and transferred from the books of Toulmin & Copland to such new books the several debts or sums mentioned in the first schedule to his answer and examination, proceeded to allege that the balances so transferred were severally correctly transferred and transcribed; the sums mentioned as due from the different customers in the partnership book, No. 6, tallying with and being precisely the same with those entered in the new books in every individual instance, both as regarded the name of **[657]** each client and the amount of each sum; that the deponent Copland had received and paid monies from and to various persons, customers of the late firm, whose debts he had not transferred to his own private account, and that, for the purpose of assisting the liquidation of the debts due to Toulmin & Copland, he had advanced to these persons various sums of money in anticipation of their pay, and that whenever he received any sums on account of the late firm of Toulmin & Copland from the last-mentioned class of debtors, he gave credit for the same in the said partnership books; that, in the opinion of both the deponents, the new books opened by the deponent on his own account did not in any way tend to elucidate the accounts of the late firm of Toulmin and Copland. And the deponent Copland protested against the inspection of these books, on the ground that they were private books, used by him in the ordinary course of his business.

Mr. Simpkinson and Mr. Puller, for the exception. The defendant now admits that he has taken upon himself the debts mentioned in the first schedule, although, upon a former occasion, when he was called upon to pay the money received by him into Court, he would not admit even that. Now, however, he admits that he has taken upon himself debts of some portion of the creditors of the old firm to the amount of about 12,000l., and that he has received about 11,000l. on that account. The particulars of these debts he has included in his first schedule, and these he has carried to his private account. On the other hand, the debts which he did not choose to undertake he has included in his second schedule, and has not carried over to his private account. But what right has he to make this distinction? He has no right to pick and choose the best debts for himself. He could not open such an account for himself without the authority of the executors **[658]** of Toulmin. There were, no doubt, many debts which were sure of being settled in the progress of time. Has he a right to say, I will take those debts with interest at 5l. per cent., with annual rests, and pay 4d. per cent. (the usual rate of interest) to the partnership? Suppose the money was out on mortgage at 5l. per cent., could he take the difference? If not, what right has he to refuse the inspection of books which shew how the difference was employed? Besides, it is material to know when the debts were paid. The plaintiff is not bound to take either the defendant's assertion as to when the debts were paid, or Harrison's opinion as to what credits are to be attributable to the partnership. There

can be no doubt that, at the death of Toulmin, his representatives became jointly entitled with Copland to all the partnership property, subject to the payment of the partnership debts; and it was not competent to him to purchase any part of the property without their consent. As a partner, he had a right to receive and pay; but he had no right to say, I have placed myself in the situation of debtor to the partnership, and will not tell you what I have received. These debts are partnership property. Suppose he became bankrupt, we should have lost the responsibility of the original debtor: *Wedderburn* v. *Wedderburn* (2 Keen, 722). Besides, it is evident, notwithstanding the statement of the defendant and his clerk, that he has not entered all the monies received in the partnership books.

Mr. G. Richards, contrà. The books of which inspection is sought are the private books of Mr. Copland. They never existed during the partnership of Toulmin & Copland, but were made after that partnership was dissolved. The partners have had credit for every item composing the 12,000l.; but because the defendant admits **[659]** that he has entered that sum in his private books, they contend they have a right to see what he has done with it, and what profits he has made of it. That, however, is in effect to raise the question whether he is entitled to the 12,000l. or not—a question which is not now before the Court, and which has never been raised in this suit. What are the facts of the case? Upon the death of Toulmin, the concern ought in strictness to have been sold and the accounts taken. Copland, however, carried on the business for the purpose of giving Toulmin's representatives what it would else have been difficult to realise. It is proved that, if he had not continued the business, a great part of the credits would have been lost. Then arose a question as to the shares, and with reference to that alone the bill was filed. Under these circumstances, and in a suit so framed, it cannot be discussed whether we had or had not a right to set apart this fund: that may be the subject of another suit, but is not determinable in this; and therefore there is no pretence for inspecting the defendant's books as to these sums. As to the other sums, which form no part of the 12,000l., it is clear that the plaintiff has no right to look at our books, the affidavit of Harrison being that the entries there are precisely the same as in the partnership books.

The Lord Chief Baron. The first question is whether or not, upon the facts contained in the bill, answer and decree in this suit, the Master has done right in excluding from his view the books relating to the sums contained in the first schedule. Mr. Richards says the object of the bill was simply to obtain an account of the partnership dealings, and that the defendant's mode of dealing with the sums mentioned in that schedule is not within the purview of the bill. Supposing that to be the object of the bill, he says that, if in the course of the cause it is discovered that the defendant has made a profit of the partnership money, the plaintiffs ought, in order to obtain **[660]** relief on that head, to file a supplemental bill. Now, I do not apprehend that what the plaintiff asks to investigate from the books, is confined to what profits he the defendant made of the partnership monies. The bill is to have an account of all monies that Mr. Copland has received and paid on account of the partnership; and the decree directs an account of monies so received and paid. That being so, is it satisfactory for Mr. Copland to say, There was a sum of 12,000l. due to the partnership at the death of my co-partner, which I have received, and I am willing to charge myself with it? The representatives of the other partner might say, If you received it, we wish to know when you received it; but, in fact, you have received no part of it, but it has been bearing interest at 5l. per cent. since the death of your partner—you have no right to purchase the advantage of it, by giving us credit for it at 4l. per cent., retaining to yourself the excess of interest on a permanent balance. Therefore, on the terms of the decree, this is not a sum received. By the defendant's own confession, it is a sum given credit for as if he had received it; but the plaintiffs say they have a right to know the time and mode of its reception. All that appears on the partnership books is that on a certain day he gives them credit for certain sums; but when and where, and how the sums were had, nothing will shew but his own private books. Therefore I think the Master should have allowed the inspection of the books.

Then, as to the second class of debtors. The defendant says, I transfer to my own individual account a number of accounts of monies due from certain customers to the firm, and for those I consider myself a debtor to the firm. But there are certain other customers whose debts I have not transferred to my own account. I have, however,

opened a new account for those creditors, containing a balance due to the partnership as before. I have, it is true, received from them divers sums on various occasions, all which I have entered in my own private ledger; but I **[661]** have also entered them in the partnership books, and consequently the entries in the partnership books ought to satisfy you. The first observation to be made on that is that the circumstances present a case of considerable suspicion. In the selection of accounts he has chosen to keep the old partnership credits as he found them, where the accounts of the debtors are bad; but he has taken upon himself the debts where the accounts are good. That requires some explanation; and the explanation may be gained by seeing how he dealt with the new account in his own private books. If he had said that he kept a separate account of these debts, which was to be found in his ledger, and that he was ready to shew that account as it stood in his books, the effect of that might be to shew that the other books had nothing to do with it. But the affidavit admits that the other books contain the mode of his dealing with this class of customers. Then, when I consider the point which I have already determined on another occasion, that he had no right to consider payments made to him as payments made on a fresh account to meet the advances made by him, it follows that, although it may be true that he has not transferred to his debit the debts of the customers of the second class, yet it may also be true that he has rendered to the customers, first, an account containing the old account and then a new account; and that he has applied the money paid in by them in satisfying his own advance before he has applied it in reducing the old balance. Now, it may appear from these accounts that he ought to have transferred it to the credit of the firm at an earlier period. It seems to me that, in the inquiry already directed, we ought to see when and in what manner he has received these monies. Therefore, I think the Master ought to have admitted these books also.

Exception allowed.

[662] JESUS COLLEGE *v.* KING. Nov. 12th, Dec. 4th, 1839.—In the Court of Exchequer, the plaintiff, who establishes some, but not all, the points put in issue by his bill, will be allowed the costs of the suit generally, though he may be disallowed the extra costs occasioned by the points on which he fails; and, on the other hand, the defendant who succeeds in some, but not all, the points put in issue by the bill, though he may be allowed the extra costs of the points on which he succeeds, will not be allowed an apportionment of the general costs of the suit.

[S. C. 9 L. J. Ex. Eq. 15; 4 Jur. 120.]

The bill was filed by the plaintiffs, as lessees of the great and small tithes of the parish of Tredington, against the defendant for an account and satisfaction of tithes of divers lands occupied by him within that parish, including a farm called Rowneys. The defendant, by his answer, relied on five several moduses, and succeeded in his defence, except as to the modus affecting Rowneys' farm.

By the decree in the cause, the Master was directed to take an account of what was due from the defendant to the plaintiffs, in respect of the great and small tithes of Rowneys, and the amount so found due was to be paid by the defendant to the plaintiffs; and it was thereby referred to the Master to tax the plaintiffs their costs of this suit, so far as it sought an account of the tithes of Rowneys, and that such costs, when taxed, should be paid by the defendant to the plaintiffs; and it was further ordered that the plaintiffs' bill, so far as it sought an account of the tithes of the lands in the defendant's occupation, other than Rowneys, should be dismissed out of this Court, with costs, to be paid by the plaintiffs to the defendant; and the Master was to tax such costs.

In pursuance of this decree, the parties attended before the Master, for the purpose of having the principle settled on which the costs should be taxed. After some discussion, the Master decided that the plaintiffs should have all the costs of the suit, except what arose from the extra length of pleadings, evidence and briefs which had been occasioned by the first four moduses set up by the defendant; and that the defendant was entitled only to the costs of the extra length of the pleadings, evidence and briefs occasioned by such first four moduses. The Master therefore certified that he had considered the bill of costs of the plaintiffs of this suit, so far as it sought an

account **[663]** of the tithes of Rowneys, amounting to the sum of 392l. 6s., which he had taxed at the sum of 175l. 16s. 1d.; and he had also considered of the bill of costs of the defendant, of dismissing that part of the plaintiff's bill which sought an account of the tithes of the lands, other than Rowneys, amounting to the sum of 334l. 9s. 8d., which he had also taxed at the sum of 11l. 2s. 9d.

The defendant now presented his petition, praying for liberty to file exceptions to the Master's certificate of costs, or that it might be referred back to the Master to review his taxation of costs; and that he might be directed to allow to the plaintiffs only one-fifth part of the costs of prosecuting this suit, and to the petitioner four-fifth parts of the costs of defending this suit.

Mr. Simpkinson, for the petitioner, contended that, as his client had succeeded in establishing four moduses out of the five which he had set up, he ought to be allowed four-fifths of the costs of defending the suit; and on the other hand, that the plaintiffs having overturned only one modus, ought to be allowed only one-fifth of the costs of prosecuting the suit. He referred to the case of *Heighington* v. *Grant*,(*a*) as shewing the practice of the Court of Chancery as to the apportionment of costs between plaintiffs and defendants.

Mr. Boteler, contrà, relied on the practice of the Court of Exchequer in cases of this nature.

After argument, the petition stood over for the purpose of obtaining the Master's certificate as to the principle on **[664]** which he had proceeded in the above-mentioned taxation.

The Master accordingly certified that he had taxed the plaintiffs' costs upon the principle of allowing them all such costs as they would necessarily and properly have incurred if they had confined their bill to seeking an account of the tithes of Rowneys; disallowing to them all such costs as were occasioned by their also seeking an account of the tithes of lands other than Rowneys; and allowing to the defendant, in his costs, all such costs as he necessarily and properly incurred by reason of the plaintiffs having sought an account of tithes other than the tithes of Rowneys; and he certified it to be the course and practice of this Court to tax the costs, under similar circumstances, upon the principle aforesaid.

Dec. 4th.—ALDERSON, B. I have considered this case, and have come to the conclusion that the petition must be dismissed.

It appears that this taxation has been conducted according to the practice of this Court; and, indeed, the case cited to me of *Heighington* v. *Grant*, which I have since found reported in Beavan's Reports (vol. 1, p. 228), seems to me in principle an authority for my present decision; for there the Master of the Rolls did not decide so much whether the mode of taxation adopted in that case was a proper one, although there are some observations directed to that point, but mainly, that there the taxation had been conducted according to the practice of the Court of Chancery. For that purpose he was furnished with certificates from the officers of the Court, establishing that view of the case. In this Court the practice is different and this taxation has been conducted according to the practice here. If so, I ought to adhere to it, unless I saw that it is founded on clearly inequitable principles. I cannot say **[665]** that I am satisfied of that; indeed, I am disposed to think that, if we were considering the practice of an uniform practice in all Courts of equity—a thing greatly to be desired no doubt—there is much to be said in favour of the Court of Chancery assimilating its practice in some respects to that of this Court; adopting, for instance, the practice of this Court in regard to costs, rather than adhering rigidly to the practice as established in *Heighington* v. *Grant*.

A plaintiff in equity has several demands, all of which are disputed by the defendant. The necessity of a suit in equity does not depend on the resistance of the defendant to the whole, but on his resistance to each and every of the plaintiff's demands. So much, therefore, of the general costs as is necessarily incurred, whether the demands are reduced to one or extended to all those contained in his bill, is in

(*a*) Cited from a brief, but since reported in 1 Beavan, 228. From this case it should seem that in Chancery the allowance to a party of his costs of a particular point in issue carries with it a share of the general costs of the suit, bearing such proportion to the whole of the general costs as one to the whole number of points in issue.

fact, wholly caused by the defendant's default and improper resistance. On the other hand, any expences beyond those which the plaintiff incurs, or which the defendant is put to by the plaintiff's including more than one demand in his bill, which he cannot sustain, are justly attributable to the default of the plaintiff. Now the just principle is that each party should be charged with the costs necessarily attributable to his own misconduct; and this approaches very nearly to the practice of the Court of Exchequer. That it is not in exact conformity with the above rule may perhaps have arisen from this—that the rule of this Court has been adopted in conformity to that in Courts of Law; which, in such cases, in apportioning costs, though they allow a defendant the costs of all issues on which he succeeds,(*a*) yet, if the plaintiff succeed on any one issue which entitles him to the general judgment, give to the plaintiff the **[666]** whole of the costs of the original writ, and of the other general costs of the record and trial.

Although, however, I have thought it right to make these observations, yet I beg it to be understood that my judgment proceeds on the ground that I find, on inquiry, this taxation to have been in conformity to the practice of this Court; and that, if it had come before me, I should have decided *Heighington* v. *Grant* in conformity to that of the Court of Chancery.

Petition dismissed.

PRINGLE *v.* CROOKS. Nov. 14th, 1839.—Bill, by the executor in England, of a merchant (consignor) in Jamaica against the consignee in England, and against the personal representatives in Jamaica of the consignor's executor in Jamaica, praying against the consignee an account of consignments before and since the consignor's death, and praying process against the representatives in Jamaica, when they should come within the jurisdiction. Upon the demurrer of the consignee, on the ground that his co-defendants, the representatives in Jamaica, were not proper parties, and that, if they were, they had not taken out probate in England: Held, that the demurrer must be overruled, because they were not strictly parties till they came within the jurisdiction of the Court. But, quære, whether, under any circumstances, a demurrer will lie for the misjoinder of a co-defendant.—Where a bill alleged that the defendant, who was the consignee of a testator in Jamaica, received various consignments, &c., and received and paid various sums of money on account of the testator's estate until his death, and that after the testator's death the defendant continued to receive consignments, &c., on account of the testator's executors, or his estate, in the same manner as before: Held, that this allegation was not sufficient to render the executor of the testator in Jamaica an accounting party, and that a demurrer for misjoinder might be sustained by such executor.—Quære, whether, by analogy to proceedings at law under the stat. 3 & 4 Will. 4, c. 42, s. 2, it is necessary, in charging executors in their representative character, for the plaintiff to allege by his bill that he has commenced proceedings against them within six months after they have taken out administration.

[S. C. 9 L. J. Ex. Eq. 3; 3 Jur. 1074. See further, 7 Beav. 257.]

The bill stated that Robert Marshall, of St. Ann's, Jamaica, previous to and up to the time of his death, was the owner of plantations, called the Ridge estate, and during that period employed Thomas Todd and William Crooks in London, as his agents and correspondents, to whom he shipped sugars and rums to a large amount. That the account between them continued current till the death of Marshall, when a considerable sum was due to Marshall's estate on account of these consignments. That Marshall died in Jamaica on the 19th December, 1818, having made his will, by which he appointed the plaintiff **[667]** and Thomas Todd his executors in England; and James L. Hilton, since deceased, and James Phillips Utten, his executors in Jamaica. That the will was proved shortly after his death by Hilton and Utten in Jamaica. That Todd & Crook continued their partnership from the death of Marshall to the death of Todd; and that they continued after the death of Marshall to receive and sell and dispose of consignments of produce, and to get in and receive monies, and securities for money, and to make payments on account of Marshall's executors or his estate in the same manner as in his lifetime; and the account current was continued

(*a*) See Reg. Gen., H. T. 1832, sec. p. 74.

with his executors or estate in the same manner as with Marshall in his lifetime. That Todd & Co. received divers sums and bills of exchange and other securities for money due to Marshall's estate; and in particular in 1821 and 1825 they received the monies due on certain bills of exchange, and entered the same to the credit of the estate of Marshall in the account current; and that Marshall's estate was greatly increased by these payments. That in 1825 and 1826 remittances amounting to about 900l. were made by Todd & Crook to the plaintiffs; and that, in 1833, other payments were made by Todd & Crook on account of Marshall's estate, but that, notwithstanding these payments, a large balance remained due from Todd & Crook to the testator's estate. That Todd died in 1836, having appointed R. J. S. Todd and J. P. Utten his executors; and that his will was proved by R. J. S. Todd alone. That the plaintiff duly proved the will of Marshall in the Prerogative Court of Canterbury in 1838. That James L. Hilton, who was one of the executors of the testator in Jamaica, died in Jamaica, the 13th of March, 1836, having made his will, by which he appointed J. P. Utten, S. W. Rose, James Hilton, and John and Charles Whitehouse, when of age, his executors. That Hilton's will was proved in Jamaica; **[668]** but that there was no personal representative of Hilton in England.

The bill was filed against R. J. S. Todd, as the personal representative of James Todd, and against James P. Utten, S. W. Rose, James Hilton, and John and Charles Whitehouse, as the personal representatives in Jamaica, of Hilton; and process was prayed against the latter individuals when they should be amenable to the jurisdiction of the Court. The prayer of the bill was for an account of the dealings and transactions between Thomas Todd and the defendant Crook, as his partner on the one hand, and Marshall on the other hand; and of the sums received by Todd & Crook on account of Marshall's estate during his lifetime and since his death; and for payment to the plaintiff, as the personal representative of Marshall, of what should be found due to Marshall's estate on taking the account; and if Todd should not admit assets of his testator, then that an account might be taken of his testator's estate, &c.

To this bill the defendant R. J. S. Todd demurred: first, for want of equity; secondly, because it did not appear by the bill that S. W. Rose, James Hilton, and John and Charles Whitehouse, were necessary or proper parties; thirdly, because, in the event of their being proper parties, representation had not been taken out to Hilton in England, and that his personal representative in England was a necessary party to the suit.

Mr. Simpkinson and Mr. E. Montague, for the demurrer. The first ground of demurrer depends on the two others, and therefore the argument will be confined to those two. This is a bill by the personal representative in England of a testator, against a partnership in England, and against the testator's executors in Jamaica, praying for an account of the dealings of that partnership **[669]** with the testator, and with his estate after his death. The dealings with the testator are pretty distinctly stated in the bill, but no dealings are stated to have taken place with Hilton, the executor of the testator in Jamaica. All that the bill says on that head is that after the death of the testator the partners continued to receive consignments, &c., on account of the testator's executors or his estate. Now, if Hilton was alive, he could not file his bill to call on the partners to account. But, even if he could, his representatives in Jamaica could not file a bill against them without obtaining an English probate. It is a misjoinder, therefore, to make them parties either as plaintiffs or defendants. Besides, no account is prayed against Hilton, and, therefore, on the ground of want of interest alone, those parties ought not to be made defendants. If they had been made plaintiffs, the objection would have been insuperable. Will their being made defendants make any difference? [The Lord Chief Baron. They who have no interest may demur, and then, as against them, the bill will be dismissed.] It is impossible to know whether they will demur or not. Process is prayed against them when they shall become amenable to the jurisdiction. It seems clear that one defendant may demur for misjoinder of co-defendants: *Farquharson* v. *Pitcher* (2 Russ. 81), *Glynn* v. *Soares* (3 M. & K. 450), *Westhead* v. *Keene* (1 Beavan, 287). At all events, there are no authorities to the contrary.

Mr. Stuart and Mr. Parry, for the bill. The two grounds of demurrer as to parties are directly opposed to each other; namely, that these are not proper parties, but if they are, they are not clothed with their proper character. If a bill is multifarious, the objection may be raised by demurrer; but it has never been heard that

one defendant may demur for mere simple misjoinder of co-[670]-defendants. Besides, process is prayed against the co-defendants when they shall come within the jurisdiction. They have not appeared, and therefore the objection is premature. The co-defendants, however, are properly joined, being clearly interested in the suit. The account is sought of transactions in which the executor in Jamaica took the most prominent part. The right and duty of the executor in England is to realise the assets in England. Involved in that is the right and duty of calling to account all others having assets, or interfering in the testator's affairs; all persons who have intervened in the account. Now the object of the bill is to get payment of what shall be found due from Todd & Crook on an account taken of all dealings between that partnership and the testator's estate. The consignments since the testator's death were some of those dealings. By whom were those consignments made? By the testator's executors in Jamaica. By whom else could they be made? But it is said we ought to have brought before the Court the legal personal representatives in England of Hilton. Why so? The plaintiff does not ask an account of Hilton's estate, but of Marshall's, and the plaintiff himself represents the whole estate of Marshall.

Mr. Simpkinson, in reply. It does not appear from the bill that Hilton ever acted in the trusts of Marshall's will, or that the partners ever dealt with Hilton, either as executor or in his own individual character. The bill does not state that Hilton made any consignments, but that the partners continued to receive consignments, not on account of the testator's or executor's estate in Jamaica, but on account of the testator's estate generally. Then, if Hilton has nothing to do with the question, how are his representatives concerned in it? The bill does not treat them as executors de son tort, but as the proper legal representatives of Hilton. But they cannot be sued [671] in that character: first, because the testator had no interest, and there is nothing in the bill to charge them in that character; and, secondly, because they have not proved the will in this country.

THE LORD CHIEF BARON. It is admitted by the counsel for the defendant that upon the equity of the case the demurrer must be disallowed. There is no question that the executor in England is the proper person to call to account the persons holding the balance of the testator's estate. It is quite clear that the plaintiff has a right to file this bill.

The other objections have given rise to some discussion. It is said that Hilton's representatives in Jamaica, not having taken out probate in England, are improperly joined as defendants in this suit; and upon the frame of this bill there seems to me considerable ground for this objection, though not sufficient to sustain this demurrer. I own if the bill had suggested that Hilton had been a party remitting money to England on account of the testator's estate, and dealing with the fund in Todd's hands as part of the testator's estate, he would, in my opinion, be a proper accounting party, and therefore his representatives would be proper parties; and I should not have been disposed to decide that his not being in England, or having no representative in England, would have made any difference. If Hilton had been in England, and had received a sum of money on account of his testator's estate, the executor in England would have had a right to say to him, "What have you done with the money you lost in England?" And if Hilton had died, the bill might be sustained against his representatives; because I apprehend that, before the late statute, the rule of law as to executors was this—That an executor might be sued for anything done before probate, because he might do anything before probate but bring an action or file a bill. [672] He could not do those acts, because the Courts would not allow him, unless he was clothed with the proper character of representative; but in all other cases he had a right to act: *Wankford* v. *Wankford* (1 Salk. 299). The late act has rendered it necessary, in bringing an action against executors for injury done by their testator, to shew that it has been brought within six months after they took out administration. But the common law was such as I have stated and applies to this case. The plaintiff was not bound to shew that Hilton was the testator's representative. Hilton was to shew that he was not so either at law or in equity: by his plea to the action at law and by his answer to the suit in equity. Or again, he might be charged as executor in his own wrong. So that Hilton might have been sued whether he was executor or not; and his representatives might equally have been sued had they intermeddled with his estate and assumed that character even in Jamaica.

But the question to which I have adverted does not arise here. It appears to me that no charge is made against Hilton in the bill sufficient to render him an accounting party, and, consequently, that there is nothing to charge his representatives. It seems to me that if they had been here and had demurred, the demurrer would have been allowed; and what would have been the consequence? The bill would have been dismissed as to them, but would have remained as against the other defendant. But those parties not being here, it becomes a question whether the defendant who is here may demur because the others are joined. I own that upon that point, if it were necessary to decide it, I should have had great doubts. Cases have been cited to shew that such a demurrer will lie, but the question has only arisen incidentally in any of them. Suppose there were two defendants, and each were to demur because the other had no [673] interest, would the bill be dismissed against both? If it be so, it seems to me to place a suit in equity in a singular position. I am glad to escape from an actual decision upon this point by adverting to the fact that the bill does not actually make these persons parties, but only prays to do so when they come to England. Upon their coming within the jurisdiction, the Court would be bound to do justice by striking these defendants out of the bill, but I doubt whether that can be done on this demurrer. I shall therefore disallow the demurrer, because, on a future occasion, the same subject may be reconsidered.

Demurrer overruled.

SLOMAN *v.* KELLY. Nov. 14th, 1839.—The bill, after alleging that certain securities were given for money lost at play, inquired into the consideration for those securities. The answer, without insisting on protection from penalties, stated that the securities were given for "money lent": Held, that the answer was insufficient.

[S. C. 9 L. J. Ex. Eq. 17. See further, 4 Y. & C. Ex. 169.]

The bill alleged that the defendant kept a gambling-house at Herne Bay; that the plaintiff had dined in company with the defendant, and afterwards, having drank a considerable quantity of wine, sat down to play with him; that the plaintiff not having sufficient money with him to continue the game, the defendant advanced several sums to him for that purpose, all of which he lost; that he afterwards gave the defendant several cheques on his bankers for part of the money so lost, and an "I O U" for other part. The bill after charging that the securities so given, though post-dated, were given for money lost at play, inquired of the defendant what consideration he gave for those securities? The defendant by his answer did not insist on any protection from answering this inquiry, but simply stated that the securities were given for money lent.

An exception having been taken to his answer for insufficiency,

[674] Mr. Simpkinson, for the exception, said that, unless the defendant relied on being protected from answering by reason of the penalties imposed by the statutes, he was bound to answer fully.

Mr. Terrell, contrà, contended that it was not necessary for the defendant to rely on the statutes; it was sufficient if he was silent as to questions tending to criminate him: *Paxton* v. *Douglas* (16 Ves. 242; 19 Ves. 225), Hare on Discovery, p. 262. [The Lord Chief Baron. If at Nisi Prius he had been asked this question, and had answered that he lent the money, he would have been subject to a cross-examination.] Counsel would have been prevented putting the question.(*b*) Besides, it should seem from the language of Lord Tenterden in *Rex* v. *Rogier* (1 B. & C. 275) that excessive gaming is an offence at common law. [The Lord Chief Baron. I am not aware of any authority for that.]

THE LORD CHIEF BARON. The defendant in effect says this—I will not answer your question fully, but only so much of it as serves my own purpose; so much as will primâ facie shew that the consideration was good. Such an answer is not sufficient.

Exception allowed.

(*b*) Secus per Lord Eldon, in *Paxton* v. *Douglas*. However, Garrow, B., continually laid down at Nisi Prius that the question which need not be answered ought not to be put.

[675] COOPER *v.* HEWSON. Nov. 26th, 1839.—Where publication has passed in a tithe suit, the cause may be heard as against the living defendants, though a bill of revivor may have been filed against the representatives of such as have died pending the suit. The Court in such a case will be guided by considerations of convenience.

[S. C. 9 L. J. Ex. Eq. 17.]

The bill was filed against several defendants, occupiers, for an account and satisfaction of tithes. Evidence was entered into, publication passed, and the cause was set down for hearing. Some of the defendants, however, having died, a bill of revivor was filed against their personal representatives as accounting parties.

Mr. Simpkinson and Mr. O. Anderdon, for the plaintiff, now moved that the cause might be heard on an early day as another cause, involving the same points and same description of evidence, was fixed for hearing at the same time.

Mr. Sutton Sharpe and Mr. Bethell, for the three original defendants, opposed the motion on the ground that the effect of the bill of revivor was to make the defendants to the revived suit defendants to the original suit, and that no cause could be set down for hearing till issue had been joined and publication passed as against all the defendants: *Rumney* v. *Morgan* (4 Price, 266).

THE LORD CHIEF BARON. In that case there were living defendants against whom the bill had not been dismissed, and yet it was attempted to have the cause heard without them. That might have been productive of much inconvenience. It seems to me that this is a mere question of convenience, and that the motion may be granted.

Order accordingly.

[676] MATON *v.* HAYTER. Nov. 26th, 1839.—Where the Master states by certificate and not by report that a party has done an act for which he may be attached, the party may move for leave to except to the certificate, without laying any special grounds for the motion.

[S. C. 9 L. J. Ex. Eq. 14.]

In this suit a decree had been made against the defendant for an account of tithes, and he had been ordered to produce before the Master all books, papers, and writings in his possession which were necessary for taking the account. The defendant refused to produce some of the books in his possession on the ground of their being private, whereupon the Master made the usual certificate of default.

Mr. Temple and Mr. Ellison, for the defendant, now moved for leave to accept to the Master's certificate.

Mr. Simpkinson, for the plaintiff, contended that if leave was necessary to enable the defendant to except to the Master's certificate, he should lay some ground for his present motion.

THE LORD CHIEF BARON. I do not think it is necessary for the defendant, for the purposes of this motion, to go into the merits of the case. He came here merely to intercept the attachment for non-performance of the order for production. He had no remedy but to make this application; for if he had filed exceptions without putting himself under the protection of the Court, he might in the meantime have gone to prison. Where the Master makes a report there is no immediate proceeding in consequence of it, for in order to render it final it must be confirmed; but in the case of a certificate of a man being in contempt the attachment may be immediate, and therefore the application to set aside the certificate must be immediate.

Motion granted.

[677] CONNELL *v.* HARDIE. Dec. 3rd, 1839.—Biddings ordered to be opened on an advance of 80l. on 775l.

Mr. Chandless moved to open the biddings for an estate, which had been sold under an order in this cause for 775l. The proposed advance was 80l.

Mr. Sutton Sharpe, contrà, said that according to *Andrews* v. *Emerson*,(*a*) 10l. per cent. was not a sufficient advance where the purchase-money which had been paid was under 1000l. In such a case as this the Court would require the advance, of at least such a sum as that which was ultimately offered in the case cited.

ALDERSON, B. The object is that the estate should gain something. In sums beyond 1000l., less than 10l. per cent. would be a sufficient advance. In this case I think 80l. is enough.

Order accordingly.

DIXON *v.* BUTLER. Dec. 5th, 21st, 1839.—Testatrix bequeathed a sum of money to trustees in trust, in case the inhabitants of the parish of A. should, within seven years after her death, build a church within the said parish, to pay and apply the said sum as they should think fit, for and towards defraying the costs and expenses of building and erecting such church: Held, that the bequest was valid within the Statute of Mortmain.—And, at all events, where the sum so bequeathed does not exceed 500l., and the testator appears to have survived the making of the will more than three months, the bequest is good, within the stat. 43 Geo. 3, c. 108, sect. 1.

Elizabeth Beavan, by her will dated the 10th of April, 1833, after disposing of her household furniture and other effects, gave and bequeathed as follows:—And I do hereby direct that the said Thomas Butler and John Slack, my said executors, do and shall appropriate and set apart out of my personal estate, and invest in some or one of the public stocks or funds of Great Britain, **[678]** or on good or sufficient mortgage security or securities, the sum of 500l., and do and shall stand possessed of the same, and the interest, dividends, and annual produce thereof upon the trusts hereinafter mentioned; that is to say, upon trust, that in case the inhabitants of the township of Abram, in the said county, shall, within the space of seven years next after my decease, erect, build, and finish a church or chapel within Abram aforesaid, founded on the principles of the Established Church of England, and procure the same to be consecrated by the Bishop of the diocese for the time being; to pay and apply the said sum of 500l. and the interest, dividends, and annual produce, which, from the time of my decease until such church shall be built and consecrated, shall have accrued, as they shall think fit, for and towards defraying the costs and expenses of building and erecting such church or chapel; and in case the inhabitants of the said township of Abram shall not build such church or chapel, within the space of seven years next after my decease, then I direct that the said sum of 500l., and the stocks, funds, and securities in or upon which the same shall be invested, shall sink into and become part of my personal estate. And in the next place I do hereby further direct that my said executors do and shall appropriate, and set apart out of my personal estate, and invest the same in some or one of the public stocks or funds of Great Britain, or on good and sufficient mortgage security or securities, the further sum of 200l., and do and shall stand possessed of the same, and the interest, dividends, and annual produce thereof, upon the trusts hereinafter mentioned; that is to say, upon trust that in case the said inhabitants of the said town of Abram shall build and finish such church or chapel, and procure the same to be consecrated in manner aforesaid, to pay the interest, dividends, and annual produce of the said sum of 200l. to the officiating minister of such church or chapel, for **[679]** the time being, to and for his own use and benefit. And in case the said inhabitants of Abram shall not build such church, within the said space of seven years next after my decease, and I shall not before my decease have legally and effectually conveyed, settled, and assured my undivided moiety in the cottage and hereditaments situate in London aforesaid, now in the possession of Miss Mawdsley, in trust for the benefit of the Master of Abram School built by me, then that my said trustees or trustee, for the time being, do and shall invest the interest, dividends, and annual produce, which shall have accrued and accumulated from and after my decease, before the expiration of seven years, and do and shall stand possessed of such sum of money which shall have so accrued, and the said sum of 200l., and the stocks, funds, and securities in or upon which the same shall be invested, in trust to pay the interest, dividends, and annual produce thereof

(*a*) 7 Ves. 420. See *Domville* v. *Berrington*, ante, vol. 2, p. 723.

to the master for the time being of the said school. And subject to the trusts hereinbefore declared of the said sum of 200l., and the interest, dividends, and annual produce of the accumulations thereof, I do hereby declare and direct that the same shall be part of my personal estate and be disposed of accordingly.

The testatrix died in December, 1833. In 1836 a committee was formed, and subscriptions raised, for building the church, and in October, 1837, a piece of land which had been purchased by the committee for the scite of the intended church, was duly conveyed to them by bargain and sale enrolled in the Court of Chancery. The church was built on this land in the year 1837, and consecrated in June, 1838.

The subscriptions which had been received by the committee, having been in fact raised for the endowment as well as the building of the church, but the whole having been expended for the building, on the faith that the **[680]** bequest of the testatrix would be applied to reimburse the endowment fund, a petition was now presented by the executors in this cause (which was instituted for administering the will of the testatrix), praying for liberty to apply the fund in which the 500l. was invested, in discharge of the monies so borrowed for building, and that the funds in which the 200l. was invested might be applied to the purposes directed by the will.

The only question was whether the bequests of 500l. and 200l. were good within the Mortmain Act (9 Geo. 2, c. 36).

Mr. Purvis, for the petition.

Mr. Sutton Sharpe, for some of the defendants.

Mr. Wray, for others of the defendants.

Dec. 21st.—ALDERSON, B. The only question in this case is whether these bequests are void by reason of the Statute of Mortmain.

It seems agreed that, if a testator give money to trustees to build a church, or school, or almshouse, the natural meaning of the word "build" includes not merely the expending the money in making the erection itself, but the purchasing of land on which such erection is to be made; and that the doctrine of Lord Hardwicke that if the trustees could obtain the land by gift from a third person, the bequest might be good, cannot be supported. Lord Eldon, in *The Attorney-General* v. *Parsons* (8 Ves. 186), expressly so rules, and says, that if a testator directs a school to be built, and does not himself advert by words in his will to a purpose that the land is to be acquired otherwise than by purchase, the inference is that he **[681]** meant it to be acquired by purchase, and that the bequest is void. By "purchase," here, Lord Eldon clearly means "purchase out of the fund bequeathed for building." The same rule was, in substance, laid down by the Master of the Rolls in *The Attorney-General* v. *Davies* (9 Ves. 535), where the bequest was to a person or body corporate, in order to induce them to give the land; that is treated as, in truth, a purchase of the land from them; and the bequest was held void. But, I apprehend, where a testator gives money to be laid out on land already purchased by others for such building or on land to be given by a third person for that purpose, and the trustees have only authority to lay out the money in building on such land so procured, and cannot employ it in procuring such land, the bequest, if such an object appear clearly from the language used in the testator's will, is good. For then the word "build" is not to be taken in its extended sense as including the purchase of the land, but is by the language of the testator applied specially to the mere cost of erecting, as contradistinguished from procuring the land on which such erection is to take place.

This is, I think, the result of all the cases on this point, and the true reading of the Statute of Mortmain.

Now, let us apply this rule to the facts of the present case:

There is a bequest of 500l. to trustees; and it states the condition to be that if within seven years the inhabitants of Abram shall erect, build, and finish a church or chapel, and procure the same to be consecrated, the trustees, as they shall think fit, shall appropriate the money with its intermediate interest for and towards the defraying the costs and expenses of building and erecting such church or chapel.

Now, here, the church is to be finished and consecrated **[682]** before any part of the money is to be laid out; the land must, therefore, have been purchased, and must have been finally dedicated to the church; or otherwise the church would not be consecrated; and, thereupon, the trustees are to apply, not at all events and generally, but as they shall think fit, the money bequeathed for and towards the expenses of building and erecting the church. I think this does not devote the money to the

purchase of the land, but gives the trustees an option of contributing towards the assistance of the inhabitants in the erecting a church on land, which they, the inhabitants, at their own costs, were previously to procure. And if the trustees have any option to do one of two things, and that one be legal, the cases seem to establish that they may do so, and that such a bequest would not be void. As, where they are to vest the money either in land or in the funds, the bequest is good.

I should, therefore, probably have come to the conclusion that this was a valid bequest, and that the second bequest also was good, even if it were dependent on the first. But I think the second bequest is not dependent on the first, and may well stand, even if the first failed.

Independently of the above consideration, however, I apprehend that the statute 43 Geo. 3, c. 108, s. 1, makes the first bequest valid. For here, the bequest is for a church—amounts only to 500l.—and the testatrix survived the making of the will more than three months.

The two bequests must be declared good, and the costs must fall on the personal estate of the testatrix.

Order accordingly.

[683] CLAYTON *v.* THE EARL OF WINCHELSEA. Jan. 18th, 1840.—To a bill for an account of tithes, charging that the defendant had in his possession deeds and documents relating to the matters in the bill mentioned, or which would furnish evidence material to the plaintiff's case, the defendant pleaded no titheable matters, and traversed, by answer, the general charge as to possession of deeds and documents: Held, that such plea and answer was sufficient.—Where a negatived plea is pleaded, the charge as to deeds and documents, though general in its terms, must be answered, if it clearly apply to the principal matter put in issue in the suit.

[S. C. 9 L. J. Ex. Eq. 18.]

Leave having been given to the defendant Lord Winchelsea to amend his plea in this case (see ante, p. 426), the amended plea now came on for argument.

It should here be remarked, in explanation of some part of the argument used on the present occasion, that the bill contained a charge—that the defendants "have respectively had growing, increasing, and renewing upon the said lands and premises, divers woods, coppices, and plantations from which they have respectively cut and felled divers quantities of young trees, poles, and saplings, and divers quantities of young trees, poles and saplings, and divers quantities of underwood, which they have carried away." And the interrogating part of the bill contained this inquiry, "Whether, since the passing of the said Act &c., the said defendants, respectively, or some or one and which of them, have or has not had growing, increasing and renewing upon the said lands and premises so occupied by them respectively as aforesaid, or some and what part or parts thereof, woods, and whether or not coppices, and whether or not plantations, and whether from them or some or one and which of them the said defendants respectively, or some or one and which of them have not or hath not cut and felled, and whether or not carried away divers large, or some and what quantities of young trees, and whether or not of poles, and whether or not of saplings, and whether or not divers large or some and what quantities of underwood?"

The defendant, Lord Winchelsea, put in the following amended plea and answer:—

This defendant, &c., as to the whole of the relief sought by the said bill, and also as to the whole of the discovery **[684]** sought by the said bill, except such discovery as is sought by so much of the said bill as calls on this defendant to answer and set forth, whether this defendant and the other defendants named in the said bill, respectively, or one and which of them have not, or hath not now and had not lately, and when last, in their or his possession, custody, or power, &c., divers, or some and what deeds, &c.,(*a*) mentioning, or referring to, or containing some entries or entry relating to such of the matters in the said bill mentioned, as are hereinafter pleaded unto, or some, or one, and which of them; and whether such documents, or some, or one, and

(*a*) See the charge, ante, p. 427.

which of them, would not furnish evidence important and useful to the said plaintiff with reference to such of the matters in question in this cause as are hereinafter pleaded unto, or some or one and which of those matters—doth plead thereto; and for plea thereunto saith that this defendant hath not, since the passing of the act of Parliament in that behalf mentioned, had growing or arising &c., any corn &c. [this part of the plea was in the same form as ante, p. 428, except that the articles were mentioned in the singular as well as the plural number], or had growing, increasing or renewing upon the said lands and premises, or any part thereof, any woods or wood, coppices or coppice, plantations or plantation, from which he has cut or felled any young trees or tree, or other trees or tree poles, or saplings or sapling, or any underwood, which he has carried away; or had growing or renewing upon the said lands and premises, or any part thereof, any other titheable matters or matter, things or thing, whether great or small tithes or tithe. And this defendant doth therefore plead the matters aforesaid, and doth demand the judgment of this honourable Court, whether he shall be compelled to make any further answer to so much of the said plaintiff's **[685]** said bill as he has before pleaded to. And this defendant, not waiving his said plea, but relying thereon for answer to so much of the said bill as he has not pleaded to, saith that he and the other defendants in the said bill named have not, and never had, in their joint possession, custody or power, &c.; and this defendant never had in his possession, custody or power, &c., any deeds or deed, &c., mentioning or referring to, or containing any entries or entry relating to such of the matters in the said bill mentioned as are hereinbefore pleaded unto as aforesaid, or any, or either of them, or which would furnish evidence important or useful to the said plaintiff with reference to such of the matters in question in this cause as are hereinbefore pleaded unto, or any, or either of them. All which matters, &c.

Mr. Simpkinson and Mr. G. L. Russell, for the bill. This plea does not differ from the former in negativing the perception of the several titheable articles seriatim. Therefore the objection arising from *Wing* v. *Murrells* (11 Price, 723) still applies. Your Lordship's decision, however, on the former hearing of the plea, proceeded principally on the ground that the defendant had not answered the general charge as to the possession of papers and documents. But it is clear from several authorities that the defendant is not bound, and ought not to answer such a charge; and in *Macgregor* v. *The East India Company* (2 Sim. 452) the plea of the Statute of Limitations was allowed, although the defendants neither by their plea nor their answer negatived the general charge as to papers and documents. [The Lord Chief Baron. I am at a loss to know how that plea was good. How can the Statute of Limitations be pleaded to a bill of discovery? It is a good plea at law.] In *Forbes* v. *Skelton* (8 Sim. 335), which was not a bill of discovery, **[686]** the same thing was held. At all events, where a partial answer is given, as is the case here, it overrules the plea. It is true that you may answer to the whole of the discovery, and plead or demur to the relief; but if you answer to part of the discovery when your plea or demurrer would otherwise be good, the answer overrules the plea or demurrer: *Hodgkin* v. *Longden* (2 Ves. jun. 2), *Blacket* v. *Langridge* (4 Gwill. 1368), *Sherwood* v. *Clark* (9 Price, 259), *James* v. *Sadgrove* (1 S. & S. 4), *Thring* v. *Edgar* (2 ejusd. 272), *Denys* v. *Locock* (3 M. & Cr. 226). Here the charge in the bill is specific, only quoad the books, papers, and writings relating to the title; general as to the titheable matters. Now the defendant has not answered the specific charge, but only the general charge, and therefore his answer overrules the plea.

Another objection to this plea is that even as it now stands it does not cover all the statements in the bill. It is quite consistent with the plea that Lord Winchelsea, may have cut the wood and sold it afterwards. He is asked whether he has not cut and whether he has not carried away? His answer is, that he has not cut any wood which he has carried away. But he may have cut without carrying away, and the wood so cut would be titheable: Eagle on Tithes, vol. i. p. 282.

Mr. Boteler, Mr. Stuart, and Mr. Parry, for the plea. Upon the argument of the plea on the former occasion, your Lordship was of opinion that the defendants ought to have answered this charge, which, in substance, is special, being directed to the perception of titheable matters, though in form general. The principle upon which your Lordship proceeded is now fully recognised, and it may be doubted whether the propositions laid down by Sir John Leach in *Thring* v. *Edgar* and *James* v. *Sad-* **[687]** *-grove* can, to their fullest extent, be supported. The second marginal note,

however, in the latter case, refers to the principle in question. The principle is that if there be a bill seeking relief, and seeking discovery incidental to that relief, a plea going to the whole relief puts the bill out of Court; but if the incidental discovery sought might prove that which the plea undertakes to displace, the defendant must accompany the plea with an answer to the discovery. It is said that if the defendant answers to the general matter of discovery, the answer would overrule the plea. We concede that: but here it is alleged against us as a sole ground of relief that we have taken divers titheable matters; and the bill contains a charge that we have certain documents which would prove the matters thereinbefore stated. One, and the principal, of these matters is that we have taken tithes; and in regard to the omission to answer the charge as it relates to that particular matter, your Lordship was of opinion that the defence did not cover the whole bill. That decision was sound and unimpeachable on any ground whatever, and the only question is whether the defendant, as the defence now stands, has transgressed the limits of the answer. Now, undoubtedly, upon the authority of *Thring* v. *Edgar*, and *Hardman* v. *Ellames* (2 M. & K. 732), it is necessary for the defendant, in denying this charge, to confine his answer to the special matter charged, but we conceive that the frame of this plea is unexceptionable on that point.

As to the other objection, it is submitted that the allegation that the defendant has taken no "other titheable matters" will be sufficient to supply the omission, if any, in the pleading as to the wood. [The Lord Chief Baron. I think not. I think that charge only relates to other species of titheable matters. The point to be considered is whether it is not sufficient if the plea follows the words **[688]** in the charge, without following the words in the interrogating part of the bill.] It is conceived that a plea so framed will be sufficient. It is not thought necessary, on a plea of no administrator, to deny that the defendant has received the personal estate of the deceased in any other character. It is sufficient if he deny the allegation in the bill that he is an administrator.

Mr. Simpkinson, in the course of his reply, contended that the charge which the defendant had answered was merely general, and by no means amounted to a specific statement that the defendant had books which shew that he had taken titheable matters.

The Lord Chief Baron. It appears to me that the question in this case rests on a simple point. In determining these cases, one would be desirous, if possible, to shew that the pleadings both at law and in equity were reconcileable with common sense; and I think that, upon a careful examination of the principles on which they rest, they will, generally speaking, be found to be so. Now, I think that the distinction which may serve to reconcile many of the cases on this subject is, that which exists between a negative and affirmative plea. If you charge matters in the bill, and demand discovery as to those matters, and the defendant pleads affirmative matter, the issue of which lies upon him to prove, and he then goes on to answer any matter charged in the bill, the answer overrules the plea, because it is wholly immaterial to the plea. But if he plead a negative plea; that is to say, if he traverses matters charged in the bill, and the bill not only alleges those matters, but also that the defendant has documents which would prove them, the plea is not satisfactory if he does not also deny the possession of those documents. The plaintiff has a clear right to a defence upon both points. No doubt the defendant by his plea denies **[689]** what the plaintiff puts in issue, and may do so conscientiously enough; but if the plaintiff calls on him to produce documents to prove the issue, it is not sufficient if he do not make some statement as to that which relates to the proof of the allegation.

It is said, indeed, by the learned counsel for the plaintiff, and very justly, that in this bill there is no special charge that the defendant has deeds which would shew that he had taken titheable matters; but surely the general charge is sufficient to embrace that. It states, generally, that the defendant has documents in his possession which would tend to shew the truth of the matters charged in the bill, or some of them. Suppose he had a book shewing the produce of corn for the last year; that would be a document. I think that a plea, in order to be a good defence as a negative plea, ought to go on to meet that part of the bill which relates to the proof of the matter of the plea. An affirmative plea stands on a different ground.(*a*)

(*a*) The same doctrine applies to an affirmative plea, where the bill contains charges anticipatory of such a plea: Mitf. Pl. 271, 274; Story on Pleading, sects. 754, 806.

As to the pleas of the Statute of Limitations, they stand by themselves. I cannot see, on the principles of common sense, how a defendant can to a bill of discovery plead the Statute of Limitations; because that is a plea at law. It is unnecessary, however, to dwell upon that point, or to overrule cases which are not before me; it is sufficient to say that those cases are not applicable here.

Then as to that part of the plea which relates to the wood. I cannot say that my mind is entirely free from doubt on that point; but on the whole I think the plea is a sufficient answer to the charge. I do not think it necessary that the plea should go beyond the words of the charge. Suppose the defendant had cut wood which he had not carried away; non constat that he would have **[690]** got the tithe from the person to whom he sold it. The plaintiff charges him only with the tithe of poles, wood, &c., which he has cut and carried away. Certainly the interrogating part goes to both points—the cutting and carrying away; and he might have answered as to both points; but I think I should stand too much on forms of expression if I did not say that the plea was a sufficient answer to the charge.

Plea allowed.

EX PARTE THE BISHOP OF DURHAM; IN THE MATTER OF THE NEWCASTLE AND CARLISLE RAILWAY ACT. Nov. 27th, 1839.—Where, under a Railway Act, the company are liable to the expenses of "all purchases" to be made by virtue of the Act, this will include the expenses of investing the money in the funds, previously to its being laid out in lands, to be settled to the like uses as the land purchased by the company.

[S. C. 9 L. J. Ex. Eq. 14. See 4 Y. & C. Ex. 584.]

This was the usual petition, praying that a sum of money paid into the bank by the company, as the purchase-money of certain lands belonging to the See of Durham, which they were enabled to take under their Act, might be invested and the dividends paid to the petitioner and his successors until the money should be laid out in the purchase of lands, to be settled to the like uses as the lands agreed to be purchased were settled or limited. The petition also prayed that the costs of this application and the investment might be borne by the company.

By the 44th section of the stat. 10 Geo. 4, c. lxxii., establishing the company, it is enacted that where, by reason of any disability or incapacity of the person or persons, or corporation entitled to any lands, tenements, or hereditaments required for the purposes of this Act, the money awarded to be paid for the same shall be required to be paid into the Bank of England, to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses, in pursuance of this act, it shall be lawful for this Court to order the "expenses of all purchases" from time to time to be made in **[691]** pursuance of this act, or so much of such expenses as the Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the company.

Mr. Faber, for the petition, submitted that the words "all purchases" would embrace a purchase of stock; and that in this respect the present case was distinguishable from *Ex parte Taylor* (1 Y. & C. 229), where the words were "such purchases."

Mr. Mitchell, for the company, objected that this construction would fix the company with the costs of two investments instead of one.

THE LORD CHIEF BARON. The words of the 44th section are "all purchases." I think the company are bound to pay the costs occasioned by the investment of the money in the funds, and also the costs of the subsequent investment in land, whenever that takes place.

Order accordingly.(*b*)

(*b*) Dec. 2, 1839. *Ex parte the Bishop of Ely; In re the Sewers Amendment Act.* In this case the words of construction being the same, Alderson, B., followed the precedent laid down by the Lord Chief Baron in the above case; observing that it was a liberal mode of constructing the act, which ought to be adopted, if possible.

Mr. Faber, for the petition.

Mr. Prendergast, for the company.

[692] FARRER *v.* HUTCHINSON. Nov. 19th, 1839.—Where, under an order for the production of documents, part only of a document is left with the defendant's clerk in Court, an order may be made against the defendant for production of the remainder, though he may also be proceeded against for non-performance of the original order. Where the bill alleged that the defendant, a trustee, had purchased an estate with the testator's monies, and the defendant gave no satisfactory answer as to the manner in which he had employed those monies generally, though he denied the allegation in the bill as to this particular purchase, and he referred, by his answer, to a schedule containing a list of the title-deeds &c. of the estate, as documents in his possession relating to the matters mentioned in the bill, but relied on them as forming his own title only and not that of the defendant, and insisted that he was not bound to produce them:—Held, nevertheless, that he was bound to produce those deeds.—On a bill for an account, books of account and other documents which are alleged to shew an item or a balance in favour of one party, must be produced for the inspection of the other party; for such documents are the common title of both parties.—Generally, a reference in the answer of the defendant to deeds contained in a schedule, makes them part of his answer, and he is bound to produce them: but where he denies, and it does not appear on the face of the pleadings that the plaintiff has any interest in them, he does not make them part of his answer by merely referring to them, or even by stating them in a schedule.—Upon a motion against a defendant, trustee or executor, for payment of money admitted to be in his hands into Court, if the interest of the plaintiff in that money depends on documents stated in the bill, but which are neither admitted nor denied by the answer, the plaintiff is at liberty to verify such documents by affidavit.

[S. C. 9 L. J. Ex. Eq. 10; 3 Jur. 1119.]

The bill was filed against the executors and trustees under the will of Thomas Farrer to have the trusts of the will carried into execution, and for an account of the real and personal estate of the testator. It charged the defendant, James Hutchinson, who was the acting trustee and executor, with various acts of fraud and misapplication, and called upon him to set forth on what securities he had invested the trust monies, which by the will had been directed to be laid out on good landed security.

The defendant, Hutchinson, put in an answer, to which he annexed several schedules—one of which, namely, schedule D., professed to contain an account of landed and other securities on which he had invested the testator's monies. Affixed, however, to particular items in that schedule were statements that the sums so invested were made made up for other monies besides the trust monies, although securities for the whole sums invested had been taken in the joint names of himself and his co trustee; and he alleged that the difference was made up on those occasions by private advances from himself. He also stated that the testator was indebted to him at the time of his death in the sum of 436l., for goods sold and delivered. He enumerated in a schedule, called schedule E., the several deeds, books, papers, and documents in his possession, relating to the several matters mentioned **[693]** in the bill, but from which he denied that the truth of the allegations in the bill would appear.

After this answer was put in, an order was obtained on the 24th of November, 1838, that the defendant, Hutchinson, should leave with his clerk in Court, for the usual purposes, the several deeds, books, papers, and documents mentioned in schedule E. Amongst these was a cash-book, from which there appeared to have been taken the first eighteen leaves, the book having been taken to pieces and re-bound after the leaves had been abstracted.

In consequence of this circumstance, and of the other unsatisfactory statements given by the defendant, the bill was amended by charging that the statement in Hutchinson's answer as to the alleged debt of 436l. was untrue; that the cash-book was mutilated, and that the monies, for which the securities mentioned in schedule D. were taken, belonged wholly to the testator's estate. The bill also charged that the defendant, Hutchinson, while in poor circumstances and obliged to borrow money for his own necessities, had purchased, with the testator's money, an estate at Pudsey, in Yorkshire, which had been conveyed to him, and which he had for some time enjoyed to his own use. The bill further charged that the defendants had in their custody,

possession or power, divers deeds, books, &c., parts or leaves of books, accounts, letters, &c., relating to or containing some entries of or reference to the several matters and things in the bill stated and charged, and whereby the truth thereof, if produced, would appear, and which they refused to produce: and that they had formerly in their custody, possession, or power, divers other documents of a like nature relating to the matters aforesaid, and particularly to the said purchase at Pudsey, &c., which they had since parted with or destroyed.

[694] The defendant, Hutchinson, by his answer to the amended bill, stated the particulars of which he alleged the debt of 436l. to consist, and set forth copies of the entries relating to such particulars from his private day-book.

With respect to the charge of mutilating the cash-book of the trust estate, he stated as follows:—That in December, 1820, he purchased the cash-book, with certain other books, for the use of the testator's estate, and that these books remained in his possession or power till December, 1838, when they were deposited with his clerk in Court in pursuance of the order of the Court; that previous to and for the purpose of his compliance with the said order, the defendant and his solicitor (who, it appeared aliunde, was one of the defendant's sons), and his son, William Hutchinson, examined all the documents then in his possession, including the said books; that in the cash-book numerous entries had been made by William Hutchinson of matters personal to himself, which had no reference to the trust accounts, and which extended over eighteen leaves, and no more, of the said cash-book; that William Hutchinson, having heard that the book was about to be sent to London for the inspection of the plaintiff, applied to him, the defendant, to allow him to take out these leaves; and that the defendant finding, upon examination, that that could be done without removing or interfering with any entries relating to the matters mentioned in the bill, consented to this application; that, accordingly, the eighteen leaves were, by the direction of the defendant, taken out by his solicitor, and delivered up to William Hutchinson, after which the book was re-pasted; but whether these leaves had since been destroyed, or if not destroyed, in whose possession they now were, the defendant did not know, and could not set forth as to his belief or otherwise; that the cash-book now contained all the entries it ever did contain **[695]** relative to all or any of the matters in the amended bill in that behalf mentioned, and that, except as aforesaid, no alteration had been made, and no entry relating to the said accounts had been thereby mutilated, altered, or taken away.

In answer to the other allegations of the bill the defendant denied that the monies advanced upon the securities mentioned in schedule D. were wholly or beyond a certain extent trust monies. He, however, gave a very intricate account of the manner in which he had from time to time drawn out and replaced the trust monies; nor did it appear clearly how the monies lent out on these securities, which he alleged were not trust monies, had been obtained; but in the course of his explanations on this head he referred to several documents. He denied having purchased the Pudsey estate with the testator's money, but admitted that a small estate which he then had was mortgaged to the extent of about 800l., and that he gave a promissory note in payment of the deposit on the purchase of the Pudsey estate.

In answer to the charge of possession of documents he averred that, except as aforesaid, and except what are mentioned and set forth in the said schedule, marked E., and in the sixth schedule to this his answer annexed, and which he prays may be taken as part thereof, this defendant hath not now, and to the best of his knowledge, information, remembrance, and belief, never had in his possession or power any books, &c. [following the words of the bill]. And this defendant is advised and insists that he ought not to be compelled to produce the documents mentioned in the said sixth schedule, so far as they relate entirely to the property of this defendant, and do not in anywise relate or refer to the trust property of the testator.

The defendant then stated that he was frequently obliged to lend his own money at the same time that he **[696]** lent the said trust monies on mortgage, as the persons desirous of borrowing required a sum of an amount exceeding the value of the trust monies then under the control of the defendant; and that if he had not made up the amount so required out of his own funds, the said trust monies would have remained a long time uninvested and unproductive. He added that in so doing he acted bonâ fide or with an intention of benefiting the said trust estate, and which he believed

was benefited thereby. Then followed an averment that in this his answer to the said amended bill he craves leave, for his greater certainty as to the several matters above set forth by him, to refer to the deeds, agreements, promissory notes, letters and other documents above mentioned respectively, when produced.

The sixth schedule to the answer was in two parts; the first part containing a list of documents which the defendant alleged related to his private affairs and property, and the second part containing a list of documents relating to the affairs of the testator. In the former list was mentioned the defendant's private day-book, from which the entries relating to the 436l. were extracted; also one or two of the documents referred to in the explanations in his answer, and various deeds and documents relating to the Pudsey estate, including the conveyance of that estate to the defendant.

A motion was now made that the defendant Hutchinson might, within a given time, produce and leave with his clerk in Court for the usual purposes the eighteen leaves of the cash-book, which had been so removed after the order of the 24th of November, 1838, and likewise the several deeds, papers, and documents mentioned in the sixth schedule to his answer to the amended bill.

In opposition to the motion the defendant filed an affidavit in which he stated that the eighteen leaves were not then, and had not since the time they were delivered **[697]** over to William Hutchinson ever been, in the deponent's possession or power. Also that the books, letters, deeds and other papers mentioned and described in the sixth schedule, related exclusively and entirely to the property and concerns of the deponent, and not in anywise to the trust property of the testator.

Mr. Simpkinson and Mr. Dixon, for the motion. As the defendant did not, by his original answer, allege that any part of the entries in the cash-book related to other matters than the testator's, and he has given no satisfactory reason for having omitted to leave the entire book in the hands of his clerk in Court, he is bound to produce the remainder of it now. He is likewise bound to produce the other documents now asked for. We say that the money lent out on the securities mentioned in schedule D. were wholly the monies of the testator, and we deny the defendant's allegation that the testator was indebted to him in 436l., and we say he has books, papers &c. in his possession which would prove the truth of our statement. But, independently of this, the defendant has referred to the documents, and on that reference alone we are entitled to their production. [The Lord Chief Baron. He refers to them as documents by which his title would appear.] It has been held that a reference to documents incorporates them in the answer and entitles the plaintiff to a production, even where, without the reference, he would not be entitled: *Herbert* v. *The Dean and Chapter of Westminster* (1 P. W. 773), *Bettison* v. *Farringdon* (3 id. 363), *Evans* v. *Richard* (1 Swanst. 7), *Unsworth* v. *Woodcock* (3 Mad. 432), *Hardman* v. *Ellames* (2 Myl. & K. 745. But see ante, vol. 2, p. 22).

Mr. Elmsley, contrà. There is no principle or authority for compelling the production of the eighteen leaves **[698]** or such of the other documents as constitute the defendant's title. For the purposes of a motion of this nature the record is alone to be relied upon. As to the leaves, if the defendant had appeared on the original motion, and asked to have them sealed up, it would have been a matter of course to grant his application. It is true that he omitted to do this, and it may be conceded that the step he has taken is improper and at variance with the practice of the Court. But if so, the plaintiffs ought to proceed against him as for a contempt in not complying with the order of the Court on the former occasion. They have no right to ask your Lordship for a new order for production. It is only on a constat on the record that you can order the production of documents: *Princess of Wales* v. *Earl of Liverpool* (1 Swanst. 121). Besides, here the defendant pledges his oath that the leaves are not in his possession, so that, in fact, the present motion calls upon him to do an impossibility. As to the other documents, the plaintiff has no right to the production of such as constitute the defendant's title, even though he may refer to them by his answer. An answer consists, first, of the defendant's reply to the inquiries in the bill; and, secondly, of his defence with reference to his own case. Admitting that he is bound to produce documents which he refers to in connexion with the plaintiff's inquiries, he is not bound to produce those which he refers to in support of his own defence. In order to enforce the production of documents, the plaintiff must at least shew that he has common title with the defendant. In *The Princess of Wales* v. *The Earl of Liverpool*,

Lord Eldon observes that, notwithstanding the older cases, later decisions have established that it is not the mere reference in the answer that makes the documents part of the answer for the purpose of production. The only case decided by Lord Eldon which has been cited on the other side is that of *Evans* **[699]** v. *Richard;* but probably in that case the documents were such as gave the plaintiff and defendant common title. In *Tyler* v. *Drayton* (2 S. & S. 309), *Sampson* v. *Swettenham* (5 Madd. 16), and *Sparke* v. *Montriou* (1 Y. & C. 103), reference was made by the answer to the documents, as in the present case, and the defendant was not held to be bound by such reference. *Hardman* v. *Ellames* is not supported by any previous authorities, though all the authorities were there cited. At all events, the case of *Sparke* v. *Montriou* is the law of this Court, and this Court is not bound by the practice in Chancery. That case was decided by a Judge of the highest attainments and greatest eminence. To the defendant the answer is everything. If he swear that the documents form part of his title, the universal rule is not to compel him to produce them.

Mr. Simpkinson, in reply. The argument on the other side depends entirely on Mr. Wigram's hypothesis, which is at variance with the practice of the Courts. *Hardman* v. *Ellames* is a decision of general principles, and brought *Sparke* v. *Montriou* into question. It is said that *Hardman* v. *Ellames* is supported by no authority, and yet in one of the authorities cited on the other side—that of *The Princess of Wales* v. *The Earl of Liverpool*—Lord Eldon went much further. In *Evans* v. *Richard*, as appears from a note to *Hardman* v. *Ellames*, the defendant referred to the documents, as in the present case, and he was held to be bound by those documents, though if he had not referred he would not have been bound.

THE LORD CHIEF BARON. With respect to the eighteen leaves, there cannot be a doubt that the defendant has greatly misconducted himself in cutting them out, and fabricating a book for the purpose of meeting the statements in his answer; and Mr. Elmsley, in his very able **[700]** argument, admits that as to this part of the case there might be another proceeding against him in another shape. The present proceeding is in a milder form, and one which I apprehend the Court may enforce. It is true that an affidavit has been produced by him for the purpose of shewing that in fact these leaves are not in his possession. That is an affidavit made by the card. A party who has misconducted himself in the way this defendant has done, lays himself open to much suspicion. The statements of his own affidavit shew what he is capable of doing. Now, I do not find it alleged by the affidavit that his son has ever destroyed these papers, or that they are not legally in the defendant's power; and therefore there should be a minute inquiry into those circumstances. The bill is for an account of all his transactions as trustee. He professes to say that certain books have been kept for the purposes of the trust, and, among others, this. He treats it as the book of the cestui que trusts. In one view, therefore, he is the agent keeping it for their benefit; and his son being allowed to make entries in it is an extraordinary qualification of that fact which demands inquiry. He says that the leaves are not now in his custody; but he has admitted that the whole of the book was in his custody, and that, by his own direction, his attorney took them out. I hope, therefore, that he will produce them, for I think it essential that they should be produced.

Upon the second point which has been mentioned in the argument, I do not think that it would become me, at this moment, to affect to decide upon a question of practice which has been so much disputed. *Hardman* v. *Ellames* was a case very carefully considered. Upon the argument of the motion in that case, reference was made to most of the former cases and to the Registrar's book, and several precedents were examined. Upon those grounds, therefore (independently of the respect which every one must **[701]** feel to be due to the learned Judges by whom it was decided), that is an authority entitled to much respect. If, therefore, I were now called upon to lay down a rule upon the subject, I should think myself bound to proceed upon the latest decision. But attention to general principles will be sufficient for the present case. I should think it wrong to lay it down that a mere reference by the defendant to a deed, where it was clear that the plaintiff had no interest in it, would be a ground to compel its production. On the other hand, I would not say that no case could arise in which a mere reference might not have that effect. But I think where a party relies on documents in a case like the present, and refers to a schedule of them, and prays that the schedule may be taken as part of his

answer, they are, in effect, part of the answer. Suppose this cause were heard on bill and answer; the defendant might say he had not made the deeds part of the answer by incorporating them in the body of the answer, but, for brevity's sake, had placed them in the schedule. Would he not have a right to read them? He would be entitled to that benefit; and, if so, it follows that the plaintiff, before he decides upon hearing the case on bill and answer, must have the inspection of the deeds in the answer. I admit that a defendant may be called upon to answer whether he has such and such deeds in his power, and may say that he has them and is not bound to produce them. In such case, if there is no fraud, and if none is alleged in the bill, and the defendant alleges that he holds by proper deeds and conveyances, he is not bound to produce them, even if he puts them in a schedule. But here the defendant makes them part of his answer. This is the case of account, and part of the defendant's case is, that he asks for credit for a sum of 436l., which he says will appear to be due to him by a book, which he prays may be taken as part of his answer. I take that as conceded by the defendant. But it is part of the account, and matters of account are [702] of importance to both parties. The deeds and documents must come into the Master's office by some means or other. I shall therefore make the order. I think the defendant is bound to produce them.

Order as prayed.

Jan. 30th, 1840.—A motion was now made to discharge the last-mentioned order, so far as related to the production of the eighteen leaves and the deeds relating to the Pudsey estate.

The motion was supported by the affidavits of the defendant and his son, Henry Gwyn Hutchinson, his solicitor. As to the eighteen leaves, the defendant swore that, since they were extracted, they had never been in his possession, nor had he ever seen or heard of them or any parts of them; that his son, William Hutchinson, died on the 8th of June last, whereupon all his papers went into the hands of H. G. Hutchinson, as his executor; that, since putting in his answer, the deponent had applied for them to Henry Gwyn Hutchinson, who was unable to find them.

Henry Gwyn Hutchinson swore that upon his brother's death his papers came into his, the deponent's, hands, but that he had been unable to find the eighteen leaves amongst them, and he believed that his brother had destroyed them. He had, however, in his possession a copy of the eighteen leaves (which was now produced), certified to be a true copy, and signed "William Hutchinson, H. G. Hutchinson."

As to the Pudsey estate, the defendant swore that, in September last, he had mortgaged that estate to Messrs. Beckett, bankers at Leeds, in whose possession those deeds now were.

In opposition to the motion, the affidavit (*a*) of Hugh Maltby, the co-trustee of the defendant, was read. The [703] deponent stated that he had some time since written to the defendant for an account of the testator's trust monies; that no answer was returned to this letter, but that, in answer to a second letter, the defendant sent to the deponent an account, which he stated to have been copied from the cash-book.

In what particulars the account so sent to Maltby differed from entries in the cash-book, as it now existed, will appear from the judgment.

Mr. Elmsley, for the motion.

Mr. Simpkinson and Mr. Dixon, contrà.

THE LORD CHIEF BARON. With respect to the deeds, I am unwilling to use compulsion if it can be avoided. The order for their production was not made till November; and if, in fact, the mortgage was granted in September, the defendant may have inadvertently mentioned them in his schedule, as being in his possession, while, in fact, they were in the hands of the attorney of the mortgagees. Upon this point, the motion may stand over, as, perhaps, there will be no difficulty in obtaining the production of those deeds, if necessary.

As to the other part of the motion—on what ground does it stand? I admit the principle that the defendant is not bound to produce documents which, by his answer, he does not admit the possession of. If a defendant says he has not got them, it could never be endured that a plaintiff should come here with affidavits to compel him to produce them. The general principle is quite correct, and I am anxious to

(*a*) The reading of this affidavit was objected to, but the objection not persisted in.

give full weight to it. But suppose a defendant says that he has several books in his possession relating to the testator's estate, among which is a cash-book; and, upon inspection, that book bears evident marks of mutilation, and the plaintiff files a bill to make [704] him account for it, and he in his answer sets forth that he has not got the omitted leaves, but does not swear in such a manner as to shew that they are not in his power, custody, or possession, I am of opinion that he admits the possession of them, and is bound to produce them. It was on that principle I made the order, as being, indeed, more lenient to the defendant than other proceedings would have been. It was because, on the face of his answer, he did not purge himself from the charge of having the possession or power of those leaves. I own I think that order was founded on a right principle; but, however, he now comes to set it aside.

Now, in deciding this motion, I cannot look at his affidavit only, but at the whole case. Now, it has been truly said by the plaintiff's counsel that the defendant does not say that he has no knowledge of the existence of these leaves. He says they were taken away, and that he has not seen them since, and that his son has not been able to find them; but he does not swear that he does not know where they are. His son too fails (if I may use the expression) to hit the bird in the eye; for he says that they were not among his brother's papers; that he cannot find them; and that he believes his brother destroyed them, though for what reason does not appear. It appears to me that these statements are quite consistent with the existence of these documents, and with the defendant's knowledge as to where they are.

Again, without dwelling on the contradictory statement of the father and the son as to the part of the books from which these leaves were taken, it is manifest from inspection that they were taken from the beginning of the book—that is oculis subjectum fidelibus—there is no mistaking it. Then come the entries relating to the testator's estate, beginning with February 24th. These consist of a long string of items, occupying a page and a half, all in the same ink, and in the same handwriting; then [705] follow other entries, beginning at a subsequent date, written in the same manner. Now, as to the abstracted leaves, both father and son say that they contained entries relating to William Hutchinson's private affairs, and, therefore, they were taken out; and yet they take the pains to take a copy of these entries, and certify it to be a true copy. Why was this done? Of what earthly use could that be when they had the original entries? I do not like to pronounce imperatively upon this matter; but I think the natural supposition is that they foresaw the difficulty which would arise in this case, and made this alleged copy to meet it, in order to give a false colouring to the whole transaction. I can see no other imaginable motive for such conduct.

It is further remarkable that all the entries in the book commence in 1828, and yet, in the account sent to Maltby, there are dates preceding that date, and other dates differing from those contained in the book. Now, Maltby says he sent a letter to the defendant requesting a copy of the account, to which no answer was returned; but that in answer to a second letter he received the account which he now produces. Now, there are a variety of items in this account which differ from those in the book. It is said, however, that this difference is accounted for by the items in one account being made up of smaller sums than in the other account; but that is only true in part, and besides, it is under the defendant's own handwriting that the account sent to Maltby was a copy of the cash-book. But these entries are not in the cash-book. Not to judge only by the circumstances of the case, one must be blind not to see that there were previous entries relating to the testator's affairs. Upon the whole, I think, not only that there is no satisfactory evidence of the eighteen leaves not being in existence, or that the defendant does not know where they are, but evidence that [706] the alleged copy produced by the defendant was not, in truth, a copy of those leaves which have been abstracted from the early part of the book.

Motion, as to the leaves, refused.

Nov. 27th, 1839.—In this case, upon a motion that the defendant Hutchinson might pay a sum of money into Court, one question was whether a letter, which the bill stated to have been written by him to his co-trustee, informing the co-trustee that he had called in a mortgage of the testator's, but which letter was neither admitted nor denied by the defendant's answer, should be verified by affidavit, in support of the motion.

Mr. Simpkinson, for the motion, said that there was no distinction between this case and those where the plaintiff shews cause against dissolving an injunction, or moves for the production of documents, in both which cases he may rely on affidavits in proof of facts and documents disclosed by the bill, and not denied by the answer: *Taggart* v. *Hewlett* (1 Mer. 499), *Addis* v. *Campbell* (1 Beav. 258).

Mr. Elmsley, contrà. There is no authority in favour of the present application, and *Black* v. *Creighton* (2 Molloy, 554) is an authority against it. There it is laid down that, on a motion of this nature, the answer only can be relied on, and that no affidavit can be received, except that of an accountant, who casts up the account in the schedule.

THE LORD CHIEF BARON. That case is very clear. No affidavit of new matter can be produced in support of **[707]** a motion of this sort. But this is matter disclosed by the bill, and not denied by the answer, and, therefore, not new matter. As the defendant does not deny it, I think, for the purposes of this motion, he must be taken to have admitted it.

HALL *v.* CONNELL. Jan. 21st, 1840.—Upon a bill filed against the public officer of a Joint Stock Banking Company by one of the shareholders, charging insolvency in the company, and praying for a dissolution of the company and an account, the defendant in answer to the usual charge as to the possession of papers and documents stated that the company had been dissolved, and that he had no documents &c. in his possession, but he admitted that some were in the possession of the directors, and others in the possession of the solicitors of the company, and he enumerated them in the schedule to his answer: Held, that for the purposes of this suit he still represented the company notwithstanding its dissolution, and that he was bound to produce the documents mentioned in the schedule.—A covenant entered into with a Joint Stock Company by a shareholder to the effect that the shareholder shall not be at liberty to inspect the books of the company is no bar to the production of the books in a suit brought by the shareholder against the company.

[S. C. 9 L. J. Ex. Eq. 25.]

The original bill was filed by the defendant, Connell, against the plaintiff, as the registered public officer of the Northern and Central Banking Company, to establish in favour of the company a charge on the real estate of the plaintiff, who was himself a member of the company. A bill was then filed by the plaintiff against Connell, and also against Henry Moult, who was chairman, and one of the directors and shareholders of the company, for an injunction to restrain proceedings at law against the plaintiff, and for discovery of matter of defence to the original cause. A supplemental bill was subsequently filed to this second bill, charging the company to be insolvent, and praying for a dissolution and account. The substance of the plaintiff's defence to the original cause was that he was not chargeable in respect of all the shares standing in his name; and that, in fact, a transfer had been made of some of his shares to Moult, which, although it was not attended with all the strict formalities required by the deed of settlement, was, nevertheless, under the circumstances, valid as between the plaintiff and the company.

The defendant, Connell, by his answer to a charge contained in the plaintiff's bill, respecting the possession **[708]** of deeds and documents, stated that the company had been dissolved, and that, since its dissolution, he had not had in his individual possession any deeds, books, papers, &c., belonging to the company, though he believed that some of such documents were in the possession of the directors, and others in that of the solicitors to the company. In a schedule to his answer he set forth a list of such documents comprising the company's private journal, stock-ledger, stock-journal, &c., and an account of the shares held by the plaintiff and the defendant, Moult, and certificates relating to those shares. He submitted, however, that the books, being in constant use, ought not to be produced; and, further, that the plaintiff had debarred himself from all right to the production of any of the deeds and documents relating to the matters mentioned in the bill, inasmuch as he, as a member of the company, had executed the deed of settlement, by which it was provided that no proprietor, not being a director, or other officer, or one of his or her executors,

administrators, assigns, legatees, assignees, or creditors, or being a person claiming by, from, through, or under him, her, or them, or any of them, should be entitled to inspect any deeds, books, or other documents of the company, except such as might be ordered to be produced for that purpose by the board of directors at any half-yearly general meeting, and except the usual deeds of covenant executed by each member on joining the company.

A motion (headed in all three causes) was now made for the production of the documents mentioned in the schedule to the defendant Connell's answer, and that the same might be used in evidence on the execution of the commission for the examination of witnesses in the cause of *Connell* v. *Hall*.

Mr. O. Anderdon and Mr. Geldart, for the motion, referred to the stat. 7 Geo. 4, c. 46, which enables joint-**[709]**-stock banking companies, carrying on business sixty-five miles from London, to sue and be sued by their public officer, and, in particular, they mentioned the 11th section of that act, which makes all decrees and orders in equity against the public officer of the same effect as if all the members of the company had been parties to the suit. They also contended that this suit, being a cross suit to that of *Connell* v. *Hall*, was, for all practical purposes, to be considered as one with that cause, and, therefore, that the motion that the documents might be used in evidence in that cause was regular.

Mr. Simpkinson and Mr. Bacon, contrà. Admitting that the plaintiff is entitled to move for the production of these documents in one cause, he has no right to move in another cause in which he is not entitled. He is only entitled to move in the cause in which the party admitting the possession is a defendant. It is said, however, that this is a cross cause. But the bill does not pray that it may be considered as a cross cause; nor is it a cause between the same parties, for Moult was not a party to the original cause, but is made a defendant to this, in regard of an alleged contract, for the purchase of some of the plaintiff's shares. The first cause was simply by the registered officer against Hall for an account, and to enforce a security given by Hall for 15,000l. The second cause, including the supplemental suit, is totally different; insisting that the company is insolvent, and ought to be dissolved. Upon these grounds, therefore, the second part of the motion, at least, cannot stand.

Then, as to the first part of the motion, it is submitted that the company no longer existing, the public officer cannot be sued. That objection applies very strongly when we consider the shape of the defendant's admission. He does not admit that any of the documents are in his individual possession; on the contrary, he denies that; **[710]** but says that part are in the possession of the directors, and part in that of the solicitors. That is a sufficient answer, supposing the motion to be regular. You cannot enforce the order against the company, it not being in existence; and certainly you cannot enforce the order individually against Connell.

Besides, by the terms of the deed of settlement, which he has executed, the plaintiff has debarred himself from insisting on the production of these documents. In *Stubbs* v. *Lister* (*a*) a bill was filed by the sub-officer of this bank against the public officer of the Liverpool Joint-Stock Bank, alleging that certain shares in the Liverpool Bank, of which this bank claimed to be the assignees, were forfeited, and praying that those shares might be sold. The Liverpool Bank was sued in respect of certain alleged transactions between them and the shareholder, and evidence, as to this point, was sought from the books of the Liverpool Bank. But the public officer of that bank stated, by his answer, that the shareholder was bound, by his contract with the bank, not to inspect the books, and, upon a motion by the plaintiff in that cause for the production of those books, the objection prevailed, and the Vice-Chancellor refused the motion.

Mr. Anderdon, in reply. That was the original bill of a shareholder seeking to contravene the contract which he had entered into. Here the plaintiff is a defendant to the original bill, though, in aid of the original bill, he comes into equity by a cross-bill. As a cross-plaintiff, he is not bound to shew any equity. With deference, however, to the judgment of the Vice-Chancellor, the decision in *Stubbs* v. *Lister*, as it has been stated on the other side, is very questionable. It is clear that the covenant must have been entered into diverso intuitu, **[711]** and could not be a bar to that suit. Such a covenant could not oust the jurisdiction of courts of law or equity, and

(*a*) Not reported.

might have been rejected in the same way as the Courts reject the arbitration clause in articles of partnership. The reasonable construction of the covenant is, that it was intended to prevent captious shareholders from inspecting the books. With respect to the objection that the books are not in the defendant's possession, it is merely trifling with the Court to say that the want of a present personal possession is to operate against the production of these deeds. If he cannot produce them, he must make some other statement in his answer.

THE LORD CHIEF BARON. I think that this bill cannot be treated as a cross-bill; and, therefore, I shall consider the motion simply as a motion for the production of deeds and documents in an original suit, on the ordinary ground of possession admitted by the answer; certain objections, however, being raised by the answer to their production.

Considering the motion in this light, the first objection is that the defendant, having been merely the registered officer of a company, which is now dissolved, he is a nominal defendant only, and that he does not admit that the books are in his own possession, but that some are in the hands of the directors, and some in the hands of the company's solicitors. Now, the act which enables these companies to sue and be sued by means of their public officer requires that public officer to be a member of the company (sect. 4), and, first, gives him power to sue in behalf of the company, and, secondly, renders him liable to be sued by those for whom they do business, in order to enable them to enforce their joint demands against the company (sect. 9). But the legislature has thrown a guard round them in appointing in what way they shall deal with the public **[712]** officer. First, as I have already said, he must be a member of the company; and, secondly, no cause shall be abated by reason of a change of officers or of directors; but another officer shall be sued in his place. The act applies in this way to common law judgments, that if the plaintiff chooses, he need not go against any individual officer, but against any member; and if that member cannot pay, he may make application to the Court to be allowed to proceed against any person who was a member when the contract was made. At law, it has been decided by all the Courts, after considerable doubts as to the way of carrying into effect this anomalous act of Parliament, that if the party do not choose to proceed to take out execution in the meantime, he may have scire facias against any of the others, in order to have execution against them; and if that fail by reason of insolvency or other difficulties, then scire facias against those who were members when the contract was made with the party who so sues. The intention of the legislature was that the party to be sued should represent the whole body, and that he should remain in that character.

Now, the act likewise contains a clause (sect. 11) to the purport that every decree or order of a Court of equity against any public officer of the company shall have the same effect as if all the members were parties to the suit. It appears, therefore, that for the purposes both of law and of equity, the act of Parliament considers the nominal officer as representing the whole body, and that he may be made the single defendant or single plaintiff, so as to prevent the necessity of having a hundred persons before the Court. But in every case the effect is the same on all as if all had been parties. I must consider this case, therefore, as if every member had been a defendant on the record. Supposing all had been parties, I must have made an order that they should produce these documents, **[713]** and I must presume that the papers found in the custody of their solicitor are in their custody. The objection, therefore, arising from this gentleman being but a nominal officer is removed.

But, secondly, it is said that the company are dissolved, and consequently that his connexion with the company is at an end. That is not so. Suppose all the members had been parties to the original suit, the dissolution they have come to can be no answer to an action or suit brought against them for matters previous to the dissolution. It would be no answer to the plaintiff in the case of a commercial partnership, and why should it be so in this? That objection, therefore, rests on no solid foundation. The members are still liable individually and by means of their clerk or officer, though their partnership be dissolved.

The third objection is of more importance, because it is said to be supported by a decision of the Vice-Chancellor. If I could be sure that the present case was similar in all its circumstances to that before his Honour, I should feel bound, out of the respect which I owe to that learned person, to take time for consideration before I

ventured to overrule his decision. But at the same time I think Mr. Anderdon has given the true solution to the difficulty, if any, in this case. The effect of the clause in the deed of settlement to which reference has been made is the same as if the partners had agreed not to go to law or equity, but to submit their differences to arbitration; and such a clause, we all know, is no bar to any proceedings at law or in equity between the partners. Besides, I can well understand why, in the case of a great body of persons like the present, of whom many might be actuated by mere idle motives of curiosity, and many might be more interested in litigation than in the prosperity of the company, it would be much more reasonable to adopt a clause of this nature, than in the case of a common partnership. But this does not stop the course **[714]** of proceedings in courts of justice. Suppose a subpœna duces tecum issued to a party to produce books, could he say, I can produce them, but I am not bound because the plaintiff has entered into an agreement for their non-production—could it be said that the books were no evidence in such a case? But there is a circumstance which distinguishes this case from that before the Vice-Chancellor, because here there is another cause, and in fact this bill recites another cause brought by the company, out of which the present proceedings have arisen. This bill is filed for the purpose of seeking evidence to rebut the charge made against the plaintiff by the company; and that evidence being in their books, I think he has a right to have it notwithstanding the agreement which is said to form part of the foundation of the society. That being so, it follows that this is a mere case for relief and production of documents, and here the documents are as much the plaintiff's own as the other party's. He has an equal interest in them. Suppose he had no original interest in them as a member, and a bill for an amount had been filed against him, and he had filed a cross-bill to obtain evidence, he would have had a right to their production. A fortiori, has he that right when he himself is a member, and has in that character an interest in the books.

The last question is whether I can order the production of these books in another suit. It appears that an order has been made for a commission to examine witnesses in that other suit. But that is simply an order. I cannot tell that there really is a commission. I think, therefore, that that must be the subject of a separate application. All that I can now order is that they be produced and left with the defendant's clerk in Court.

Order accordingly.

[715] REEVES *v.* CRESWICK. Dec. 29th, 1839.—Principles on which the Court will direct the apportionment of the expenses of the renewal of leases for lives as between tenant for life and remaindermen.

The testatrix in this cause devised certain freehold and copyhold property, held on two leases for lives under the Dean and Chapter of the Cathedral Church at Wells, to the plaintiffs, in trust for the defendant Eleanor Jane Creswick, the wife of the defendant George Creswick, for her life, with remainder to her children absolutely.

The testatrix was herself one of the cestui que vies in each of the leases. Upon her decease there remained only one cestui que vie surviving in each lease, such cestui que vies being much more advanced in life than Eleanor Jane Creswick. It became necessary, therefore, in order to give the children of Mrs. Creswick any chance of deriving benefit from the limitations in their favour, that the leases in question should be renewed. There being, however, no funds provided for this purpose by the testator's will, the only means of meeting the expenses of the renewal was by raising the required amount on mortgage of the renewed leases themselves. The children of Mrs. Creswick being all infants, the bill was consequently filed by the trustees to obtain the sanction of the Court to a mortgage of the property, and its direction as to the apportionments of the charges between the tenant for life and the persons entitled in remainder.

The cause coming on for further directions upon the Master's report, the scheme of raising the required sum upon mortgage of the property was approved of, and it being declared that the charge ought to be apportioned between the tenant for life and the individuals entitled in remainder, in proportion to the benefits they would respectively derive from the renewal of the leases, the following arrangement, which

had been submitted to be approved by the Master, was directed to be carried into effect.

[716] The period of enjoyment of the property by the tenant for life, under each of the old leases, being the joint duration of her own life and that of the then surviving cestui que vie named in such lease, and the period of her enjoyment of the property under each corresponding renewed lease being in like manner the joint duration of her life and those of the new cestui que vies, or the longest liver of them—the difference between the values of the estates for these two periods, gave the benefit derived by the tenant for life from the renewals in question. The residue of the increased value of the property necessarily expressed the benefit derived from the renewals by Mrs. Creswick's children. Calculations were accordingly made by the actuary of an insurance office, upon the above principles, of the benefit derived by the respective parties from the renewal of each lease; and the fines and expenses of renewal being divided in the proportions so ascertained, the total amount which (in conformity with the declaration before mentioned) thereupon appeared to fall to the share of the tenant for life, was directed to be insured upon her own life, for the purpose of providing, upon her decease, for the payment of a corresponding part of the principal of the mortgage-debt to be raised upon the property. The policy of insurance was ordered to be assigned to the mortgagee, and directions were given for paying the premiums on the policy, and for keeping down the interest on the entire mortgage-debt out of the annual rents and profits of the estates.

The costs of the suit were also apportioned between the parties, in proportion to the benefits so calculated to be derived by them from the renewals.

Mr. Thomas Turner, for the plaintiffs.

Mr. Messiter, for the defendants.

ALDERSON, B., adjudicante.

[717] WILLIAMSON *v.* SEABER. Dec. 5th, 1839.—Form of decree against a trustee purchasing the trust estate at an alleged undervalue, and making permanent improvements thereon.

The bill was filed by the plaintiff against the trustees under a deed executed by the plaintiff's father, by which he conveyed all his property, real and personal, to the trustees, in trust for certain creditors named in the schedule to the deed. The bill charged gross misconduct on the part of the trustees, in putting the property up to sale, and purchasing the lots at an undervalue; and also in mismanaging the estate; and it prayed for an account, and that the deed might be carried into execution.

It appeared that Booty, one of the trustees, had died insolvent, and that no administration had been taken out to his estate. The bill was therefore sought to be enforced against the defendant, John Seaber, as surviving trustee, and also against the assignees of James Seaber, the brother and solicitor of John Seaber, who, it was stated, had assisted him in certain acts of fraud and mismanagement.

It appeared that James Seaber had purchased two of the lots, and, as the plaintiff alleged, at an undervalue; and that he had afterwards conveyed them to his brother, the defendant, who, for many years, had been in possession of them, and also of several of the other lots, converting them to his own use, cutting down timber, &c., and also making considerable improvements upon them by building.

The Court having directed an account to be taken, and several inquiries to be made, among which was an inquiry as to the alleged under price, a question was now raised as to the manner in which the decree should be framed, so as to carry the sale into execution at the proper value, and at the same time to give the defendant the benefit of an allowance for permanent improvements made by him.

[718] Mr. Wray, for the plaintiff, said that the defendant ought to be declared a purchaser at the improved value, with a reservation as to whether he was to be allowed anything for permanent improvement.

Mr. Simpkinson, contrà, admitted that, on the authority of *Robinson* v. *Ridley* (6 Madd. 2), the defendant must be held to his bargain, and that if the estate were put up for re-sale it must be at the improved value; but he said that the case referred to was also an authority to shew that the defendant was entitled to an allowance for all improvements made by him.

It is ordered that the trustee shall be declared purchaser of the premises at the

present value; which is not to be less than the price of the original purchase, with the permanent improvements. But if the Court shall ultimately decide that he ought to be allowed the value of the improvements, or any part thereof, then so much of the purchase-money as relates to the improvements is to be allowed as already paid by him.

CRAWFORTH *v.* HOLDER. Jan. 30th, 1840.—Plaintiff, while in contempt for non-payment of the costs of a demurrer, cannot, under colour of amending a former bill, proceed against the demurring party for the same matter; and in order to judge of this, the Court will look into the amended bill to see whether it contains the same matter as the bill demurred to.

The original bill was filed against John Holder and Catherine his wife, as representatives of John Barrett, for **[719]** payment of a legacy of 350l. out of his personal assets, and if those should be insufficient, out of his real assets. In Trinity Term, 1838, a bill of revivor and supplement was filed against William Holder and other parties; and in Michaelmas Term, 1838, a supplemental bill was filed against Peter Hunsley and Mary Ann his wife, praying that the plaintiffs might have the benefit of the original suit as against them. To this bill the Hunsleys demurred, and the demurrer was allowed, and the bill ordered to be dismissed as against them with costs, to be paid by the plaintiffs.

While the plaintiffs were in contempt for non-payment of these costs they obtained the common order to amend the bill of Trinity Term, 1838, and under that order the last-mentioned bill was amended by substituting a new party for one of the plaintiffs, and adding the Hunsleys and others as defendants, and introducing into that bill much of the same matter as had been demurred to. In consequence of this amendment an order was obtained in June last that the bill so amended might be taken off the file, as against the defendants the Hunsleys, for irregularity, with costs.

Mr. Temple, for the plaintiffs, now moved to discharge that order.

Mr. Simpkinson and Mr. Mylne, for the defendants, the Hunsleys, contended that the plaintiffs being in contempt for non-payment of the costs of the demurrer could not make this motion, for in substance this was the same bill as had been demurred to. The conduct of the plaintiffs in amending the bill in the manner they had was a sort of fraud upon the Court.

THE LORD CHIEF BARON said that plaintiffs were not to be permitted to persecute defendants in this manner. It **[720]** was, in fact, bringing a new bill for the same matter. His Lordship therefore refused to allow the motion to be made till the taxed costs of the demurrer were paid.

Motion dismissed.

CAMPBELL *v.* DICKENS. Dec. 5th, 1839.—Depositions suppressed upon the ground of being wrongly described as having been taken under a commission issuing out of the Court of Chancery, and no counsel's name being affixed to the interrogatories.

[S. C. 9 L. J. Ex. Eq. 33. See *Brydges* v. *Branfill*, 1841, 12 Sim. 337.]

The Commissioners for the examination of witnesses in this cause having returned the commission with the depositions and interrogatories annexed, it appeared that the depositions purported to have been taken by virtue of a commission issuing out of the High Court of Chancery, and that no counsel's name was attached to the engrossment of the interrogatories.

The Court, on motion, ordered the depositions to be suppressed.

Mr. Temple, for the plaintiff.

Mr. Simpkinson, Mr. James Russell, and Mr. Webster, for the several defendants.

PARKER *v.* MOORLEY. Dec. 16th, 1839.—After report settled, though not signed, in a creditors' suit, a creditor cannot be let in to prove his debt without a special application to the Court.

[S. C. 9 L. J. Ex. Eq. 16.]

This was a creditors' suit. After the Master had settled the report, and a warrant to sign it had been taken out, the Master admitted the proof of an additional debt. The cause coming on to be heard on exceptions and further directions,

Mr. Simpkinson and Mr. Sutton Sharpe, for the exceptions, objected to the Master's admission of this evidence, observing that there must be some limit to the [721] bringing in charges before the Master: *Thompson* v. *Lambe* (7 Ves. 587).

Mr. Spence and Mr. Hood, contrà, said that though a party might be shut out by not bringing in his evidence before the Master in proper time, yet a creditor was never shut out; there being no issue joined between him and the party. They referred to *Gillespie* v. *Alexander* (3 Russ. 130), and *Berrington* v. *Evans* (1 Younge, 276), Fowler, Pr. vol. ii. p. 274.

ALDERSON, B. Where a time is fixed for settling the Master's report, a party is bound. Creditors are exempted from that rule in certain cases upon special cause being shewn. But a creditor, in order to be let in to prove his debt after the time has expired, must make a special application for that purpose, and must submit to be visited with the costs, and pay the usual penalty for default.

Exception allowed.

EX PARTE ISSAUCHAUD; IN THE MATTER OF THE EASTERN COUNTIES RAILWAY ACT. 1839.—Semble, that where money is paid into Court, under the usual provision in a Railway Act for payment into Court of the purchase-money for lands held by disputed titles, the respective interests of the parties claiming title to the money so paid into Court may be adjusted on a petition presented in the matter of the Act.

The petitioners were leaseholders of certain houses and lands for a long term of years, and had underlet them to a person who had been expelled for breach of covenant, and who had given up the lease, but had executed no deed of surrender.

The company, having agreed to purchase the premises of the petitioners, the under-lessee disputed their title to sell without taking a legal surrender, and claimed, at all events, an equitable apportionment of the value of the lease. The purchase-money was, therefore, paid into Court under the 45th section of the stat. 6 & 7 Will. [722] 4, c. cvi., by which the company is established. By that section, in case of disputed titles, the purchase-money must be paid into Court, and such payment shall effectually vest the land, or the interest, or the several interests in the land, for or in respect of which the same shall be paid, in the company, their executors and assigns, absolutely free from all estates, titles, charges, and incumbrances whatsoever.

The petitioners now applied to have the money paid out of Court.

Mr. Stinton and Mr. Ogle, for the petition.

Mr. Parry, for the under-lessee.

The Court was of opinion that, under the terms of the 45th section, the whole interest in the premises vested in the company, notwithstanding the defective surrender; but an issue was directed to determine the question whether, when the contract was made with the company, the under-lessee had any interest in the premises; and if so, what was the proportionate value of such interest.

GREEN *v.* THE BANK OF ENGLAND. Jan. 13th, 1840.—Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court, on a bill filed by the assignees against the Bank of England, ordered the bank to erase from their books the fictitious name, and insert that of the bankrupt.

The bill was filed by the assignees of Bernard Angle against the Bank of England for the purpose of having the benefit of a sum of stock, which belonged to the bankrupt, but which, for the purpose of defrauding his creditors, he had caused to be entered in the bank books in the fictitious name of Thomas Rowe, of Portland Place, Regent's Park. It appeared that the stock had been purchased of a person named Mitchell.

[723] Mr. Bethell (with whom was Mr. Wood), for the plaintiffs. No relief can be had in this case under any of the acts of Parliament. The stat. 11 Geo. 4 & 1 Will. 4, c. 60, which approaches most nearly to it, does not completely meet it. By

the tenth section of that statute it is enacted, that where any person in whose name, as trustee or executor, any stock shall be standing, shall be out of the jurisdiction of the Court, "or it shall be uncertain whether such person be living or dead," then the Court may appoint a new trustee. But that clearly does not apply to the case of a fictitious person. It is submitted that the name of Rowe should be considered as an alias for that of Angle, and that a declaration should be made to that effect. [The Lord Chief Baron. I think the proper mode is to state the truth; that the money was fraudulently invested in the name of Thomas Rowe, and that it belongs to the bankrupt.]

Mr. Loftus Wigram, for the bank. If Rowe could be considered as the name of the bankrupt, the stat. 6 Geo. 4, c. 16, s. 80,(*a*) would clearly apply to the present case; but the stock cannot be considered as standing in the bankrupt's "own name," within the meaning of that section. Suppose a person of the name of Thomas Rowe were to appear, and make application at the bank for this stock, the question would be, whether he could not sue the bank for the stock as having been transferred without competent authority: *Davis* v. *Bank of England* (9 Moore, 747; 2 Bing. 392). It is submitted that the Court ought to direct the cancel-**[724]**-ment of the transfer made by Mitchell, and order him to make a new transfer; upon the principle that where a conveyance is made to a non-existing person, the Court, on payment of the purchase-money, directs the cancelment of that conveyance, and the execution of a new one to the purchaser.

THE LORD CHIEF BARON. I fear there is no decree which I can make which can save the bank from improper applications. The evidence, however, in this case is very clear, and I cannot but think that the best mode of proceeding is to state in the decree the real facts of the case.

Declare that the sum of l. stock standing in the bank books is the property of the bankrupt, and ought to have been invested in his name, but that it was invested in the name of Thomas Rowe, who was a fictitious person; and let the name of Thomas Rowe be erased, and that of Bernard Angle be inserted.

WHITELOCK *v.* FINCH. Dec. 24th, 1839.—The Court refused to appoint certain persons to be guardians without a reference, although one of the persons was the executor of the father of the infants, and the other had been appointed guardian by an order in Chancery.

Mr. Joliffe moved for the appointment, without a reference, of two specified persons as guardians to the infants. It appeared that one of the proposed guardians was the executor of the father of the infants, who died in March last, and the other had lately been appointed guardian of their persons and fortunes by an order of the Court of Chancery.

The Court refused to appoint these persons guardians without a reference, but directed the Master to inquire as to the propriety of the proposed appointment.

(*a*) By which it is enacted, "that if any bankrupt shall have any Government stock, funds, or annuities, or any of the stock of any public company either in England, Scotland, or Ireland, standing in his name in his own right, it shall be lawful for the Commissioners, by writing under their hands, to order all persons, whose act or consent is thereto necessary, to transfer the same into the name of the assignees, and to pay all dividends upon the same to such assignees."

REPORTS of CASES ARGUED and DETERMINED in the COURT of EXCHEQUER in EQUITY; from Hilary Term, 3 VICT., to Trinity Vacation, 4 and 5 VICT., both inclusive. By EDWARD YOUNGE, Esq., of the Middle Temple, Barrister-at-Law, and JOHN COLLYER, Esq., of Lincoln's Inn, Barrister-at-Law. Vol. IV. London, 1846.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER IN EQUITY.

HAWORTH *v.* BOSTOCK. Dec. 5th, 21st, 1839; Feb. 26th, 27th, 1840.—On the separation of A. and B., husband and wife, in April, 1797, an annuity was settled by the husband on the wife determinable on payment of £1000. In November, 1797, at which time B. was living in adultery with C., a bond and warrant of attorney was given by the husband to C. to secure £1400. Judgment was entered up on the bond, and in 1801 proceedings were taken to enforce it, but were stopped by injunction. Afterwards another bond for £537 was given by the husband to C., which was satisfied in 1803. Upon a bill filed in 1833, by B. against A.'s executrix, for payment of the arrears of the annuity, the plaintiff being unable to prove that any payment had been made on account of the annuity since 1803, and the defendant producing the bond for £1400, the warrant of attorney to enter up judgment thereon and the bond for £537, with a receipt for that amount indorsed: Held that, considering the lapse of time, and the situation of the parties, it might be presumed that the bond for £1400 was given in discharge of the £1000, and the subsequent bond for £537 in full discharge of payment of the whole debt; and that both these discharges or payments were made with the approbation and for the use of the plaintiff.—In a Court of Equity every reasonable intendment is made against stale demands, and therefore, after a long lapse of years, it is not an unreasonable intendment to conclude that an arrangement by a husband with a party living in adultery with his wife, and which, from circumstances, appeared to have been in discharge of an undertaking previously given by the husband for the benefit of the wife on separation, was made by her approbation and for her use.—Quære, whether it is essential to the validity of a deed of separation that it should contain a covenant by the trustee to indemnify the husband against his wife's debts? Where a party is a defendant in one suit and plaintiff in another, and the same matter is involved in both suits, the answer of a co-defendant in the former suit cannot be read against the plaintiff in the latter suit.

The original bill which was filed by Sarah Haworth on behalf of herself and all other the creditors of John Haworth deceased, against Fanny Bostock, an executrix and sole devisee of John Haworth, prayed an account of and payment of what was due to the plaintiff for the arrears of an annuity, secured to her by a separation deed, executed by her and her late husband; and in case the defendant [2] should not

admit assets for that purpose, then that the usual accounts might be taken of the real and personal estates of the testator.

The defendant Sarah Bostock having, by her answer, stated there were other devisees of the real estate, and other necessary parties, the bill was amended by adding further parties.

The bill so amended stated that in 1794 a marriage took place between John Haworth and the plaintiff: that they, some time afterwards, separated; and that subsequent to their separation a deed of separation and bond was executed by Haworth, dated the 22nd April, 1797: that the bond was lost; but that the deed was made and executed between John Haworth and Sarah his wife of the one part, and expressed to be made, but not in fact executed, by George Fielder the elder of the other part; whereby, after reciting that differences had arisen between Haworth and his wife, and that they had separated, and had mutually agreed to live apart for the future, and that John Haworth had agreed to allow the said Sarah Haworth an annuity of 160l. 16s. for maintenance, but subject to the provisions thereinafter mentioned: and that, in pursuance of the said agreement, he the said John Haworth, by a bond or obligation in writing under his hand and seal, had become bound to the said George Fielder in the penal sum of £2000, with condition thereunder written for making void the same upon payment by the said John Haworth, his executors &c., to the said Sarah Haworth, for her separate use, of the annual sum of 160l. 16s. on the days and times in the said bond and in the covenant thereinafter contained for payment thereof mentioned: It was by the said indenture witnessed that, in further pursuance of the said agreement, he the said John Haworth, for himself, his heirs, executors, and administrators, did thereby promise and agree to and with the said George Fielder, his executors &c., in manner following:—That she, the said **[3]** Sarah Haworth, might at all times thereafter live separate from her husband, the said John Haworth, and be out of his control &c., and reside wherever it might seem meet to her; and that he would not disturb or injure her in person or manner of living, or her estate or effects then or thereafter acquired &c., or endeavour to compel restitution of conjugal rights &c.: and, further, that he the said John Haworth, his executors and administrators, would, upon demand, pay to the solicitor of Sarah Haworth, the sum of £400, to be paid in or towards satisfaction of the debts of Sarah Haworth, which she had contracted while living separate from her husband; and that he, the said John Haworth, would yearly and every year well and truly pay or cause to be paid into the proper hands of the said Sarah Haworth, for her own use and benefit, or to such person or persons as she, notwithstanding her coverture, should direct, one clear yearly sum or annuity of 160l. 16s., to be paid by quarterly payments of &c.; the first payment to be made, &c., subject nevertheless to the provisions and agreements thereinafter mentioned; her receipts to be effectual discharges for the same: Provided always, and it was thereby agreed between the said John Haworth and Sarah Haworth his wife, that in case the said John Haworth, his heirs, executors, or administrators, should at any time thereafter well and truly pay or cause to be paid to the said Sarah Haworth for her separate use the sum of £1000 of lawful money of Great Britain, then, upon payment of all arrears of the said annuity, the said annuity or yearly sum of 160l. 16s. should cease and determine; anything therein contained to the contrary notwithstanding: Provided also, and it was thereby further agreed, that it should be lawful for the said John Haworth, his executors, administrators, and assigns, and he and they were thereby authorized to pay out of the said annuity or yearly sum of 160l. 16s. all such debts as the said Sarah Haworth had then contracted, or might thereafter contract, for washing, **[4]** diet, lodging, &c., over and above the debts for payment of which provision had thereinbefore been made, and for which the said John Haworth should be liable: Provided also, that if the said Sarah Haworth should at any time thereafter, by any ecclesiastical suit or otherwise, endeavour to compel payment of any further or other annuity than that which had been thereby secured to her, or directly or indirectly molest the said John Haworth or his family, or claim dower out of his estate, then the said annuity and the said indenture and bond should become void.

The bill further stated that the annuity was paid down to 1803; but that it was admitted by the defendant that since that period no payment had been made on account of it.

The bill further stated that on the 13th November, 1797, Haworth executed a

bond to George Fielder the younger, the son of George Fielder the elder, for securing to him payment of a sum of £1400, with interest, on the 7th July, 1799, and that George Fielder the younger died in 1799, having made his will, by which he appointed his father his executor.

The bill then, with a view of shewing that payment of the annuity had been stopped by means of some collusion between Haworth and Fielder the elder, stated that in 1800 a bill was filed in Chancery by Haworth against Fielder the elder and the plaintiff, to which the plaintiff had not answered, stating the separation deed, and that the bond for £1400 had been given by Haworth to Fielder the younger, in payment and satisfaction of the £1000 on payment of which the annnity was determinable, and of the arrears then due, and of certain other sums due from Haworth to Fielder the younger; that the sum of £1400 had been paid by Haworth to one Spragg on behalf of Fielder the younger and Mrs. Haworth; and that the bond for £1400, upon which judgment had been entered up, had been obtained from Haworth by fraud and impo-**[5]**-sition, and praying for the delivery up and cancelment of the bond for £1400, and an injunction to restrain proceedings thereon. The present bill then stated that an injunction, for want of answer, had been obtained in that suit against Fielder on the 16th January, 1801, and that that injunction had never been dissolved.

The bill then stated the death of Fielder the elder, in 1805, intestate, and the death of Haworth in November, 1831, after having made his will, dated the 22nd April, 1824, whereby, after directing all his just debts and funeral and testamentary expenses to be paid, he gave to his cousin, the defendant Fanny Bostock, her heirs, executors, and assigns, all his real and personal estate, and appointed her his executrix, and that he afterwards by codicil gave a certain portion of his real estate to the defendants Mr. and Mrs. Wilder.

To this bill the defendant Fanny Bostock put in a general demurrer for want of equity, and the demurrer was allowed by Lord Lyndhurst, C. B.; but his lordship afterwards, for some reason which did not satisfactorily appear, gave the plaintiff liberty to amend her bill, which she did by charging as a reason for her not having taken earlier proceedings, the several circumstances adverted to in the judgment on the hearing (see post, p. 13), more especially the repeated refusal of Haworth to pay the annuity by reason of his embarrassed circumstances, the death of Fielder the elder, insolvent; and that no administration was taken out to his estate.

For the purposes of the present suit, administration was taken out by one Hume, who was brought before the Court by supplemental bill.

The cause now came on for hearing, and the substance of the defence set up by the answer of the defendant Fanny Bostock (who admitted the plaintiff's marriage) **[6]** was—First, that the deed of separation was void, because at the time it was executed the plaintiff was living in adultery with George Fielder the younger, and that the testator was ignorant of that circumstance when he executed the deed; consequently that the plaintiff had no claim to the annuity. Secondly, that if the deed was not void the annuity was redeemed by the bond given to George Fielder the younger, in November, 1797, and that that bond was satisfied by the payment of £1400 to Spraggs. Thirdly, that the plaintiff was barred by lapse of time. As the first point was excluded from the judgment, it will be unnecessary to state in the body of this report the arguments upon it.(*a*)

(*a*) The plaintiff's counsel contended that, even supposing the adultery proved, and that the husband was not aware of it at the time, it would be no answer to the claim; and for this they cited *Sidney* v. *Sidney*, 3 P. W. 269; *Buchanan* v. *Buchanan*, 1 Ball & B. 203; which were cases of marriage articles; and *Seagrave* v. *Seagrave*, 13 Ves. 439; *Field* v. *Selby*, 1 N. R. 121; *Jee* v. *Thurlow*, 2 B. & C. 547; *Baynon* v. *Batley*, 8 Bing. 256; Roper, Husb. and Wife, ed. Jacob, vol. 2, p. 134. They also contended that the absence of a covenant by the trustee to indemnify the husband against the wife's debts did not invalidate her claim: *Ross* v. *Willoughby*, 10 Price, 2; *Anon.*, cor. V. C. 21st July, 1839, in which last-mentioned case the bill was filed by the executors and devisees of the husband against the widow and her trustee, under a separation deed, and the question was whether in the absence of such a clause the deed could be enforced, and the Vice-Chancellor held that it could; his Honor taking a distinction between the case where the wife claimed in competition with

[7] In reference to the other facts of the case, the plaintiff's counsel relied on the deed of separation and an admission in the answer that no payment was made after July, 1803, which they contended amounted to an admission of payment up to that time. They also gave in evidence, by proof of office copies, the bill of 1800 and writ of injunction thereon, and they proved by evidence of search the want of administration to the estate of George Fielder the elder. They also gave parol evidence that, in December, 1826, the plaintiff's solicitor applied to Wilson, Haworth's solicitor, for payment of the arrears of the annuity, and that Wilson informed him he would pay him a stated sum, provided he would assist him in obtaining a divorce. They also proved that, for some years after 1812, the plaintiff was not in circumstances to institute proceedings for the recovery of the annuity.

The defendant's counsel gave in evidence a bond for £1400, dated the 13th November, 1797, executed by Haworth to George Fielder the younger, a warrant of attorney of even date, and written instructions to enter up satisfaction on the judgment; also a bond for 537l. 10s., dated the 7th April, 1803, executed by Haworth to Fielder the elder, with receipts indorsed for the amount. These documents were found in an old bureau of Haworth. They also gave the parol evidence of a Mr. Rice, that the bond of 1797 was given in lieu of the £1000, which Hayworth had an option to pay in discharge of the annuity. They likewise attempted to give evidence upon this point, from the answer of Fielder the elder in the former suit, but

Mr. Simpkinson, for the plaintiff, objected to this evidence, and cited *Montague* v. *Hill* (4 Russ. 128) and *Imperial Gas Company* v. *Clarke* (1 Younge, 582).

[8] ALDERSON, B., allowed the objection.

Mr. Simpkinson, Mr. Girdlestone, and Mr. Teed, for the plaintiff. It will be contended on the other side that, by the bond for £1400 given to George Fielder the younger, in 1797, the annuity secured by the deed of separation was redeemed. But how could a bond given to a stranger be a redemption, when, by the terms of the annuity deed, it was only made redeemable on payment to Mrs. Haworth, personally, of £1000 in hard money? It was redeemable on a totally different consideration. The bond for £1400 was not given with the concurrence of the plaintiff or with her consent. The plaintiff had nothing to do with any consideration moving from George Fielder the younger. If the bond had been satisfied, it would be no answer to the plaintiff's demand, unless you could connect her by clear evidence with that bond. As to that, we are told it has been satisfied, not by payment to George Fielder the younger, the obligee, but by payment to one Spraggs—a person of no character, who, if he received the money, never handed it over to the obligee, but converted it to his own use. The statements in the answer are most inconsistent; for Haworth, after he is represented to have paid the bond, files a bill in Chancery in the year 1800, impeaching this very bond, and the judgment entered up, and praying to restrain proceedings at law. The injunction remains in force. The inference is that the injunction was the result of a collusion between Haworth and Fielder the elder. Mrs. Haworth would not be affected by these proceedings, unless she was a party to the substitution of the bond for £1400; but how, as a married woman, she could be so, the deed giving her powers as a feme sole only to a certain extent, is unaccountable.

Then as to the objection on the ground of lapse of time. In the first place, the time, if it ever began to run, was **[9]** stopped at the death of Haworth; for he by his will clearly charges all his real estate with his debts; *Clifford* v. *Lewes* (6 Madd. 33),

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creditors and where she claimed in competition with devisees or legatees; and his Honor said that he could not assent to the doctrine of the Lord Chief Justice and Lord Chief Baron in *Jones* v. *Waite*, 6 Scott, 317.

The defendant's counsel contended that the deed of separation was void for want of consideration, which distinguished this case from *Sidney* v. *Sidney*, and others of that class, and that in fact that this was a mere attempt to make a contract between husband and wife, which is invalid both at law and in equity: Co. Litt. 187 b., *St. John* v. *St. John*, 11 Ves. 532. And they insisted on the authority of Holroyd, J., in *Jee* v. *Thurlow*, that a covenant of indemnity by the trustee to the husband is essential to the consideration of such a deed. And they also referred to the judgments of Lord Denman and Lord Abinger in *Jones* v. *Waite*.

Mirehouse v. *Scaife* (2 Myl. & C. 695, 707), *Graves* v. *Graves* (8 Sim. 43), *Ball* v. *Harris* (8 Sim. 485), *Shaw* v. *Borrer* (1 Keen, 559). Besides, it may be doubted whether a demand for an annuity, which is a sum accruing de anno in annum, can be said to be barred by the Statute of Limitations. The statute of James (21 Jac. 1, c. 16) is totally silent on such a claim, and the new statute (3 & 4 Will. 4, c. 27) is expressly confined in its operation to actions or suits which shall be commenced after the 31st December, 1833. Before that statute a bill could be filed in equity to recover the arrears of an annuity for any length of time, and the only answer to such a bill would be presumption of payment: *Cupit* v. *Jackson* (M'Clel. 495, 13 Pr. 721), *Cook* v. *Castello* (2 Younge), *Aston* v. *Aston* (1 Ves. sen. 267), *Collins* v. *Goodall* (2 Vern. 235), *Higgins* v. *Crawfurd* (2 Ves. jun. 571), *Stackhouse* v. *Barnston* (10 Ves. 463). At law there is no bar by lapse of time to an action on a covenant for payment of the arrears of an annuity. If it be contended that she might have sued as a feme sole, and neglected to do so, the answer is that the circumstance of her having a provision for her separate use does not enable her to sue alone. She must do so by a next friend, who will take upon himself the costs of the suit. It is in evidence that she was not in circumstances to sue between the year 1812 and Haworth's death.

Mr. Temple and Mr. G. Richards, for the defendant Fanny Bostock. The annuity is secured by the general covenant given by Haworth, and is not a charge on any **[10]** particular estate, so as to bring it within any rule absolving rent-charges from the effect of the Statute of Limitations. The case of *Cupit* v. *Jackson*, therefore, and others of that class, is not applicable, except that in those cases the very distinction is taken between annuities secured by general covenants and rent-charges. Then, if so, what is there in this case to oust the Statute of Limitations? There is not evidence of a single payment since 1803. It may be doubted whether the annuity deed, coming out of the custody of Mrs. Haworth herself, and not any other person representing her trustee, is properly in evidence; but even if it be, what effect can it have, when the plaintiff is unable to shew that it has been acted upon, and is unable to produce the accompanying bond? But her possession of the annuity deed is strong evidence to shew that the annuity was satisfied by the subsequent bond for £1400. That deed would be avoided by her adultery, and therefore she would be anxious to get into her possession that instrument, and rely upon the bond and warrant of attorney as a better security. But independently of this inference, there is positive evidence of this that the annuity was satisfied by the bond for £1400; and as evidence that the bond was paid or compromised we produce the bond itself, and likewise the subsequent bond for £537, with the receipts indorsed. In addition to this there is reasonable evidence of satisfaction having been entered on the judgment, and the strong fact that the injunction of 1801 continues to this day. To say nothing of the extraordinary circumstances under which the plaintiff seeks relief in equity, what right has she to come here, when the injunction against her trustee is still pending? Upon the ground, however, of lapse of time alone, the plaintiff is not entitled. There is no evidence of application for payment as alleged. The bond for £1400 must therefore be presumed to be satisfied or barred by length **[11]** of time: *Foster* v. *Hodgson* (19 Ves. 185); *Grenfell* v. *Girdlestone* (19 Ves. 185); *Smith* v. *Clay* (ante, vol. 2, p. 662); *Pearson* v. *Belchier* (3 Bro. C. C. 640; Ambl. 645); *Hercy* v. *Dinwoody* (2 Ves. jun. 87); *Pickering* v. *Lord Stamford* (2 Ves. jun. 272); *Jones* v. *Turberville* (id. 11); *Campbell* v. *Graham* (1 Russ. & Myl. 453). It may be doubted whether the wife has a right to file this bill. In *Winter* v. *Blount* (2 P. W. 276, n.) the Court could not have given relief, even in regard to her jointure, if she had been plaintiff.

Mr. Elderton, for Hume.

Mr. Matthews, for Mr. and Mrs. Wilder, the other devisees of the real estate. All the evidence was taken in the suit before these defendants were made parties; it is, therefore, at least doubtful whether the annuity deed can be produced against them. But even if it can, the mere production is not sufficient. It should be shewn to come out of the proper custody, namely, that of Fielder; but this comes out of the plaintiff's custody. That circumstance of itself is suspicious; for there was a collateral bond, and the proper custody of the bond would be also that of the deed: but the bond is neither produced nor satisfactorily accounted for. He relied also on two other points: 1st, that it was not stated by the bill that no assets descended to the heir-at-law, and yet the heir was not made a defendant; 2nd, lapse of time.

Mr. Ellison, for other parties interested in the real estate.

Mr. Simpkinson, in reply. It is said that this bill is filed by the wife, and that she ought to have taken out repre-**[12]**-sentation to the trustee, and cannot file a bill merely as cestui que trust. The authorities, however, are against such a proposition: *Seagrave* v. *Seagrave*, *Fitzer* v. *Fitzer* (2 Atk. 511), *Guth* v. *Guth* (3 Bro. C. C. 614), *Buchanan* v. *Buchanan* (1 Ball. & B. 203). It is true that in some cases the Court merely directed the trustee to allow the wife to use his name at law, and in other cases the Court gave relief. But in the cases where relief was refused except at law, the bill was filed against the husband himself; and the Court said it was a mere legal demand, and that all it could do was to remove legal impediments, as in the case of a cestui que trust of a bond. But this is not a mere legal demand, but a legal demand against the assets of a testator. If our trustee had thought fit to file a bill, such a bill would have been maintainable. He then contended that, by the terms of the annuity deed, it could only be discharged by the payment of monies numbered; and not by a mere personal bond not given to the trustee. He also insisted that the plaintiff could not be barred by mere lapse of time, inasmuch as, throughout the whole period during which laches was imputed to her, she was not sui juris; and that if the case depended on presumption, such presumption was clearly rebutted by the evidence.

Feb. 27th.—ALDERSON, B. This was a suit instituted by Sarah Haworth, widow of John Haworth, against his representatives and devisees, claiming the arrears of an annuity settled on her for her separate maintenance, so long ago as the year 1797, and the payment in future of such annuity.

It appears from these proceedings that the marriage took place in 1794, and the separation in 1797. Now, by the deed under which that separation took place, an annuity of three guineas a week was secured to the plaintiff **[13]** with a clause by which it was provided that on payment of £1000 by the husband to the wife, or for her own use, all such provision should cease. The last payment was in 1803, and this bill was filed in 1833. To the bill, as originally filed, there was a demurrer, which was argued before Lord Lyndhurst. His Lordship, being of opinion that upon the facts stated by the plaintiff herself the Court ought to presume that the annuity had been satisfied by the payment provided for in the deed granting it, allowed that demurrer. But the plaintiff afterwards applied for leave to amend her bill and, having obtained it, the cause has since proceeded, and now, having been fully argued before me, stands for the decision of the Court.

Under these circumstances, I feel that I am bound (independently of the merits of that decision, in which I however must entirely agree) by Lord Lyndhurst's judgment already pronounced; and therefore the only question which remains for the Court to consider is whether the case as it now stands in the pleadings has been established in fact; and whether, if established, it entitles the plaintiff to a decree?

The alterations in the bill, made subsequently to Lord Lyndhurst's judgment, consist principally in the statements that Fielder the elder died in embarrassed circumstances, and that no personal representative on his part has in consequence existed since his death in 1805: that no payment of £1000 or redemption of the annuity has taken place; and that the defendant knows and has admitted this; and that the annuity still subsists. It then states admissions by the testator to the same effect—his embarrassments for many years, and till a late period of his life—applications to him, and excuses for his non-payment made until 1826, when he finally set the plaintiff at defiance; and then charges the destitute condition of the plaintiff herself as a reason for her not suing at an earlier period.

[14] Now the plaintiff has thought fit to read from the defendant's answer three parts only, which shew her admission of the marriage of the plaintiff with Mr. Haworth in 1794 and his death in 1831; the will and codicils as stated in the plaintiff's bill, and the probate thereof taken out by the defendant Bostock as his executrix; that he left real estates which were devised to the defendants, and the statement that they admit that no payment of the annuity has been made since 1803. But with respect to these facts which are the subject of the amendments made after Lord Lyndhurst's judgment, no admissions have been read; and, of course, none have been made by the answer, except with explanations which make the plaintiff not willing to accept them. The only additional proofs are the production of the deed, the fact of Fielder senior's death, and the absence ever since of any personal representative

of Fielder. As to the application to Haworth, the testator, there is no satisfactory proof at all. Mr. Richardson, one of the deponents, states, indeed, that he made applications to Mr. Wilson, Mr. Haworth's solicitor, and that on one occasion he received from Mr. Wilson an answer having some relation to this transaction; but Mr. Wilson who has been examined can speak to no communication at all with the testator; and therefore this part of the case fails altogether.

Mr. Richardson makes some attempt to prove the inability of Mrs. Haworth from poverty to sue: but this, if material, is not well proved; for, though he undertakes to say this inability existed from 1813 to 1833, it is clear from his own statement that Mrs. Haworth in 1819 was able to employ Mr. Hague, an attorney, to act on her behalf in this matter.

The only remaining part of the plaintiff's proof is the bill filed by Haworth in 1800 for an injunction to prevent George Fielder from suing as the representative of his son upon a bond for £1400 granted by Haworth in 1797. **[15]** Upon this an injunction was granted in 1801; and it does not appear ever to have been dissolved. The present plaintiff was a defendant in that suit but put in no answer. The annuity seems at this time to have been in force, if the admission in the answer that no payment has been made since 1803 be taken to amount to an admission that it was paid till 1803.

This is the case on the part of the plaintiff, and it is manifest that it is left very much in the same situation as it was when Lord Lyndhurst's judgment was pronounced. But then we must see what the nature of the issues are which are raised by the defendant's answer, which was, of course, not before this Court at that period.

Now the answer states that the plaintiff was carrying on, unknown to her husband, an adulterous intercourse with Fielder the younger; that the annuity was granted in ignorance of it. It then sets out the provision that on payment of £1000 to the plaintiff for her own use the annuity should cease, and then proceeds to state how that has been in substance carried into effect. She states that in 1797 Haworth, in lieu and satisfaction of the annuity, executed with the concurrence and approbation of the plaintiff a bond for £2800, conditioned for payment of the sum of £1400, which sum was composed of two sums; first, the sum of £1000, the redemption money of the annuity; and, secondly, of £400, which was the aggregate of certain other debts for which Haworth had made himself responsible. And then the answer proceeds to account for the payment and discharge of this sum of £1400, the last payment of which being made in 1803, the annuity ceased from that period.

Now a good deal of this has been very fairly proved in evidence.

It is pretty clear that the plaintiff and Fielder, jun., were living in adultery together, and that a bond for £1400 was given by the husband to him in 1797. That bond has **[16]** been proved by the defendant. It is clear that judgment was entered up on that bond; that Fielder the elder was proceeding to enforce it till stopped by the injunction in 1801; that some compromise took place; and that a bond for 537l. 10s. was given afterwards on the 7th April, 1803, to Fielder, sen., which was ultimately paid on the 7th January, 1804, and which was delivered up to Haworth, and has been produced by the defendant.

All these circumstances are made out by reasonable evidence; but then two other points must be made out: first, that the bond of £1400 was given in discharge of the £1000, and with the approbation of the plaintiff as a payment to her or for her use; and, secondly, that the ultimate payment of the bond for 537l. 10s. and interest was a payment in full, and was for the plaintiff's use.

Now I think I may well consider the lapse of time from 1803, when this last payment was made by the bond for 537l. 10s. with interest, until 1833, the commencement of these proceedings, as establishing both these facts Every reasonable intendment ought to be made against stale demands like the present, and it is no unreasonable intendment to conclude that an arrangement made with Fielder, with whom the plaintiff was then living as wife, should be with her approbation and for her use; and inasmuch as there is no other debt due to Fielder shewn to have existed, that it should have included the demands under the annuity deed and the redemption money of the annuity. I think it also very reasonable to conclude that the proceedings on the part of Fielder, and the suit in 1800, ended in a final confirmation and full discharge of this bond by the payment in 1804.

Upon the whole, I have come to the same conclusion as Lord Lyndhurst, that this

annuity has been redeemed according to the provision contained in the deed, and this makes it unnecessary to determine the other points made by the defendants.

The bill must be dismissed with costs.

[17] CAMPBELL *v.* DICKENS. January 15th, 1840.—The assignee of a legatee is a necessary party to a suit brought by the legatee for the recovery of the legacy, where the assignment took place before the institution of the suit.—Where a defendant insists on an objection for want of parties, but does not swear positively to the circumstances on which the objection rests, the costs of the day, on the cause coming on for hearing and the objection being allowed, will be reserved.

The bill was filed by the legatees under the will of Matthew Campbell, against Dickens and Furnival, the executors and trustees under the will for the administration of the testator's estate. The testator bequeathed £500 to each of his children, except Edward, and he charged those legacies on his real estate in aid of his personalty. He likewise left £100 to Edward, on condition of his living apart from his wife.

The defendant Dickens, who was the acting executor, stated by his answer that he had received notice that one of the plaintiffs, Isabella Campbell, had assigned her legacy to a Mr. Spence; and he insisted that Spence and also Edward Campbell (the latter having abandoned his wife) were necessary parties to the suit.

Upon the cause coming on for hearing,

Mr. J. Russell and Mr. Webster, for the defendant Dickens, relied on the objection raised by the answer, observing that the real estate could not be discharged without the legatees being parties. They also insisted that the plaintiff must pay the costs of the day.(*a*)

Mr. Simpkinson, for the defendant Furnival.

Mr. Temple, for the plaintiff. The bequest of £100 is not charged expressly on the real estate. The other legacies are charged on the real estate, but only in aid of the personalty. Edward Campbell is not a necessary party until the Master reports the personal estate insufficient. Besides, it is admitted by the answer that the real estate **[18]** has been sold. [The Lord Chief Baron. Then the reason of his being a party ceases.] As to the other objection, it is not necessary to make both the assignor and assignee parties; but only the owner of the legal estate under the will. The Court will not deal with that interest without notice to the assignee.

Mr. Russell, in reply. Where the assignment is after suit commenced the assignee comes in by petition: *Bishop of Winchester* v. *Paine* (11 Ves. 194); but where a party before suit instituted creates an incumbrance on the interest, in respect of which he afterwards sues, he must have the assignee before the Court. As to the other objection, Edward Campbell is not in the nature of a legatee but of a cestui que trust of real estate.

THE LORD CHIEF BARON. I cannot take the defendant's statement as to the assignment to be final. It is not on his own oath. There must be an opportunity of contesting the fact. The oath only is that he has had notice of an incumbrance. Let the cause stand over with liberty to amend by adding parties; and let the costs of the day be reserved.

KATER *v.* ROGET. January 15th, 1840.—Appointment by will (professedly in execution of a power in a marriage settlement) to A. for life, or until he should incumber, and upon his death or incumbering to the wife of A. for life for her separate use, and after her death to A.'s children; and if A. should die without wife or children, to B., who was A.'s brother. A. and B. took other benefits under the will. The appointment to the wife and children of A. being an excessive execution of the power: Held, that A. was bound to elect, but that B. might release to A. all his interest under the appointment.

By the marriage settlement of Mr. and Mrs. Kater, certain trust-funds were vested in trustees upon trust for Mr. and Mrs. Kater for life, with remainder to their children

(*a*) See *Hill* v. *Kirwan*, Jac. 165; *Bierdermann* v. *Seymour*, 1 Beav. 594; *Lowry* v. *Fulton*, 9 Sim. 114.

as they or the survivor should appoint, and in default of appointment to the children equally.

[19] The marriage took effect. The trust-funds were invested. A joint appointment was made but was revoked, and no subsequent joint appointment was made.

In February, 1833, Mrs. Kater died, leaving her husband and two children only of the marriage, namely, the plaintiffs Edward Kater and Henry Herman Kater, surviving her.

By his will, dated the 24th May, 1833, Mr. Kater appointed all the trust-funds, except the two sums of £3333 Consols and £2000 Reduced Bank Annuities to his son Edward Kater. The two sums of stock he appointed to Henry Herman Kater for his life, or until he should charge, incumber, or assign the same; and upon his death, or in the event of his incumbering or assigning those funds, he appointed the same to Edward. He gave certain books and a microscope to Henry Herman; and the residue of his property to Edward.

By a codicil dated the 27th May, 1833, the testator revoked the appointment of the two sums of stock to Edward on the death of Henry Herman or his assignment of the stock as mentioned in the will, and instead thereof he gave that stock in the events before mentioned to the wife of Henry Herman for her separate use for her life, with remainder to the children of Henry Herman, and if he left no wife or children then to Edward.

The testator died in April, 1835. Henry Herman took the books and microscope, and Edward the residuary estate.

The bill was filed by the two sons of the testator against the trustees of the settlement, who were also executors of Mr. Kater's will, for the purpose of obtaining the sanction of the Court to the payment by the trustees of the whole of the two sums of stock to Henry Herman Kater; the bill suggesting that the appointment to the wife and children of Henry Herman Kater was void as being an excessive execution of the power, and stating that Edward had released to his brother all his interest in the two sums.

[20] The trustees by their answer submitted to the Court, first, whether Edward could release his interest, or whether having taken under the will, he was not bound to confirm the appointment to his brother's wife and children. Secondly, whether Henry Herman was not bound to confirm the appointment, having taken the books and microscope.

Mr. Sutton Sharpe and Mr. Adams, for the plaintiffs. First, Edward takes under the appointment contained in the codicil. That appointment is a revocation of the appointment in the will, though so much of it as relates to the wife and children is void: *Roper* v. *Constable* (2 Eq. Abr. 359), *Rooper* v. *Radcliffe* (5 Bro. P. C. 360), and the circumstance of that part of it being void will not affect the appointment as it relates to him: *Crompe* v. *Barrow* (4 Ves. 681), *Brudenell* v. *Elwes* (7 Ves. 382), *Hewitt* v. *Lord Dacre* (2 Keen, 622). Therefore Edward's interest not being in opposition to the appointment, he is not put to his election; but even if he took under the will the result would be the same, as he takes under the instrument and not against it: *Carver* v. *Bowles* (2 Russ. & M. 308), *Whistler* v. *Webster* (2 Ves. jun. 367), *Kampf* v. *Jones* (2 Keen, 761). He is, therefore, competent to release his interest under the appointment to his brother. Secondly, if Henry Herman cannot take the unappointed interest, and also the benefit given him by the will, as may be contended upon the authority of *Whistler* v. *Webster*, he is entitled to take under the appointment, upon giving up the articles which he has received under the will. For it is requisite to election that the party should have the knowledge of his right: *Parry* v. *De Bouverie* (3 P. W. 315), *Wake* v. *Wake* (3 Bro. C. C. 255; 1 Ves. jun. 335), *Dillon* v. *Parker* (1 Swanst. 359).

[21] Mr. Simpkinson and Mr. Bazelgette, for the trustees, submitted to act as the Court should direct.

THE LORD CHIEF BARON at first expressed some doubts as to the power of Edward to release his interest under the appointment; it being a mere contingent interest. His Lordship, however, ultimately decreed for the plaintiffs.

Decree the funds in question to be transferred to the plaintiff H. H. Kater, he accounting for and paying to the executors of the testator the value of the books and the microscope.

BEDFORD *v.* GATES. January 18th, 1840.—Bill to enforce the trusts of a creditors' deed containing an ultimate trust for the debtors must, in order to avoid the necessity of making the debtors parties, contain a distinct allegation as to the amount of fund to be distributed, and that there will be no surplus. If it pray for the administration of the whole estate without making the debtors parties it will be demurrable.—Bill by a creditor on behalf of himself and all others, parties to a trust-deed, must shew that they have all a common interest; therefore it cannot be brought to enforce an equity for payment of a larger amount of debt than that for which the plaintiff has signed, or to rescind a sale (however inequitable) which has been sanctioned by a great body of the creditors.

The bill was filed by William Bedford, on behalf of himself and all other the creditors of John Keeting and W. Jones, against the defendants, as trustees of a certain deed of trust, which had been executed to them by Keeting and Jones; and the object of the bill was to have the trust-deed carried into execution.

The bill stated that John Keeting and W. Jones, coal-merchants, being embarrassed in their circumstances, executed a certain indenture, dated in March, 1837, and made between themselves of the first part, the defendants Gates and Henty of the second part, and the several persons named in the schedule, who had signed and sealed the indenture, and who were all respectively creditors of Keeting & Jones of the third part. The deed was a conveyance of all the real and personal property of Keeting & Jones to the defendants, in trust, in the first place, to pay **[22]** and satisfy all costs attending the execution of the indenture; then to discharge all incumbrances on the property; then to pay rateably and proportionably, and without any priority to the parties thereto of the third part, the several sums set to their names in the schedule, and to pay the residue, if any, to Keeting & Jones. The deed contained an authority to Keeting & Jones to continue the trade at a salary, and an indemnity to the trustees. The trustees were to adjust debts and defend actions at the expense of the trust estate.

The bill then stated that there was due to the plaintiff from Keeting & Jones the sum of 507l. 1s. 4d. independent of a sum of £195, which the plaintiff was entitled to prove against their estate, in respect of a bill of exchange which he had accepted for them. That the amount of these two sums was justly due and owing to the plaintiff at the time of the execution of the deed; but that by mistake he only signed for the round sum of £500. That he afterwards discovered his mistake, and swore before a Master in Chancery to the real amount; whereupon it was agreed at a meeting of the creditors that the plaintiff should be allowed to sign the deed for the additional sum of £195.

The bill then stated that at the second meeting of the creditors the defendant Gates, the other defendant being in the chair, offered to purchase a large portion of the trust property, consisting of a house, brewhouse, plant, &c., at Brighton; that the meeting was adjourned in order to consider of the proposal; that at the adjourned meeting it was moved and carried that Gates's proposal be rejected; that he subsequently offered £100 more for the property, and that his offer was accepted.

The bill further stated that in pursuance of the agreement a conveyance was prepared; but that Gates wishing to take an improper advantage of his situation, had not executed it; and that at a subsequent meeting which was held for auditing the accounts, a clerk attended on behalf of Gates and proposed a reduction in the purchase-**[23]**-money, by reason of some alleged defect in the house, or otherwise that Gates might be allowed to relinquish part of the purchase: but that this offer was rejected.

The bill then alleged that the plaintiff and the other creditors were formerly willing that the purchase of the plant, and the house, &c., at Brighton should be carried into effect; but that they found that all the creditors must concur in the arrangement, and that the plaintiffs being advised that Gates as a trustee could not purchase the premises without the consent of the whole body of creditors, he and the other creditors for that and other reasons was desirous that the sale should be set aside.

The bill then contained charges of general negligence on the part of the defendants; and, in particular, that besides the property at Brighton, of which Gates had entered

into possession, the defendants had possessed themselves of much other property under the trust-deed, and by the sale thereof and the collection of debts, had possessed themselves of monies to a large amount; namely, to an amount sufficient at least to pay the creditors 18s. in the pound. That the plaintiff being entitled to receive an equal dividend with the other creditors on the said two sums of 507l. 1s. 4d. and £195 had applied to the defendants to pay such dividend, and to come to a just and fair account of all monies received and paid by virtue of the said trust. That the defendants refused &c., and sometimes pretended that the plaintiff was not entitled to a dividend; whereas the plaintiff charged the contrary, and that he was equally entitled to a dividend in respect of both sums; and that he and the other creditors were entitled to have the price of the house, plant, &c. divided amongst them, but that Gates would not complete the sale or relinquish the purchase. That the sale to Gates was null and void, and ought to be rescinded. Then followed the usual charge, as to books, papers, and documents.

The bill prayed that the indenture of March, 1837, **[24]** might be established, and the trusts thereof carried into execution; that the plaintiffs and the other creditors might be declared entitled to and might receive an equal dividend in respect of their said debts; for an account of all the real and personal estate of Keeting & Jones, possessed by the defendants, or which, but for their wilful default, might have been received; for an injunction, receiver, &c.; an account of the profits of the brewery; and that the sale to Gates might be set aside.

To this bill the defendants demurred for want of equity, and also for want of parties, the cestui que trusts and creditors not being made defendants.

Mr. Stuart and Mr. Wilcock, for the demurrer. First, the plaintiff cannot enforce the trust in the absence of the parties who executed the trust-deed. The ultimate trust is for Keeting & Jones. They must clearly be parties to the account of the fund to be distributed. The bill does not pray a partial administration, namely, so far only as the creditors are concerned; but the administration of the whole fund. If the bill had shewn that the sums distributable were fixed, and that there was a clear deficiency, they need not, perhaps, have been made parties; but the conclusion here is different; for the bill states that besides the property at Brighton the defendants have possessed themselves of much other property; namely, sufficient at least to pay 18s. in the pound.

Secondly, the plaintiff, suing on behalf of himself and all other the creditors, must shew that they have all a common cause. If there is any adverse interest there is obviously a misjoinder. He cannot join another man with him as plaintiff who sets up an adverse interest. Now he states on his bill that several large meetings of creditors took place, and that a conclusive bargain was made with Gates for the sale to him of the property at Brighton; yet he now endeavours to set aside that sale, which, by his own shewing, was made with the concurrence of a great body of **[25]** creditors. He does, indeed, in a loose and general manner, allege that all the creditors now wish to rescind what was done by particular creditors; but he makes no specific statement as to this. Besides, he shews a dispute between himself and the trustees as to the amount of his own debt. The bill does not say that he has signed for the whole amount. He is making out an equity to be admitted to sign for the whole. If so, he should shew that case against the parties interested in contesting it. The effect of his being allowed to sign for £195 more is to take from the co-plaintiffs a rateable proportion. Upon this branch of the demurrer *Newton* v. *Earl of Egmont* (4 Sim. 584, 5 Sim. 137) is in point.

Mr. Simpkinson, for the bill, declined arguing the second ground of demurrer; but contended that enough appeared on the bill to shew that there was no surplus, and that consequently Keeting & Jones were not necessary parties.

THE LORD CHIEF BARON. I am of opinion that the fact of there being no surplus should appear on the bill distinctly. There is not a sufficient statement to shew that Keeting & Jones could by no possibility have an interest in the account. The demurrer therefore must be allowed; but with liberty to amend by adding parties.

CUDDEN *v.* CARTWRIGHT. January 29th, 1840.—Where a manor was advertised for sale, and described in the particulars and conditions of sale as a manor of which the fines were arbitrary, and it appeared that the fines were arbitrary only on alienation, and that certain fixed payments, in the nature of reliefs, were made on descents: Held, that specific performance might be decreed with compensation; the conditions of sale allowing compensation for error in the description of the property.

[S. C. 9 L. J. Ex. Eq. 21: reversed 1842, 8 Cl. & F. 766.]

The defendants Cartwright and White were devisees in trust for the sale of the manor of Tarling and other property in Sussex, which belonged to the late Lord Selsey. The property being put up for sale by auction in lots was **[26]** described in the heading of the particulars and conditions of sale, as a "valuable property, comprising the manor of Tarling, in which the fines are arbitrary." In the body of the particulars, the manor was described as follows:—"Lot 1. The manor of Tarling, with the quit-rents, fines, courts baron, waste lands, and all other profits and privileges; the profits amounting on an average to £150 a year." At the auction the plaintiff was declared the highest bidder for lot 1, at the sum of £2580, and the same day paid his deposit and signed the contract for sale.

It appeared that, previous to the plaintiff's purchase, he wrote to the vendors' solicitors, desiring to know whether the purchaser of lot 1 would be entitled to the court books, and requesting a copy of the last rental, the quantity of copyhold lands in the manor, the number of tenants, and the time of admission of each. An answer was returned, referring him for further information to Marshall, the steward of the manor, with whom the plaintiff had two conversations on the subject of the manor generally; but it did not appear that at these conversations anything was said as to the fines. After the purchase, the plaintiff found that the fines were not arbitrary; but that on the admission of heirs and widows, certain fixed sums, amounting to one year's quit-rent, were paid.

The plaintiff now brought his bill for specific performance of the contract, with compensation; relying on the 9th condition of sale, which was to the effect that, if any of the lots were improperly described, or any error or mistake were made in that particular, such error should not vitiate the sale, but should be the subject of compensation.

The defendant White by his answer stated that he was advised that the tenants of the manor of Tarling hold to them and their heirs, in ancient fee, and not at the will of the lord, but only according to the custom of the manor; and that, by the custom of the manor, if any tenant dies, his next heir ought to be admitted to the lands of which the **[27]** tenant died seised, upon payment of a relief only; and that no fine is payable upon his admittance, and that the relict of any tenant so dying ought to be admitted to her free bench freely, without any fine to be paid. He also stated that the sum called a relief amounted to one year's quit-rent.

The plaintiff, in order to rebut the case made by the answer, and also to shew that the defendant White was aware that the fines were not arbitrary, put in evidence a letter from Marshall, the steward, to White (which had been discovered upon motion to produce documents), in which the following passage occurred:—"The customs of this manor are rather singular and unusual; but perhaps it would be better to let the purchaser find them out. On admission of an heir at law, no fine is due to the lord, and only a heriot of five shillings on alienation. The fines in general are at the lord's will."

Upon examination of the court books, it appeared that previous to 1780 the sums payable on the admission of heirs were not distinctly treated as reliefs, the entry being generally, "dat domino de relievio in nomine finis;" but that since that period they were treated only as fines.

Evidence was given on the part of the defendant that one Duke, who was well acquainted with the customs of the manor, had offered £2540 for the manor, which was £40 only less than the price offered by the plaintiff.

Mr. Simpkinson and Mr. Lloyd, for the plaintiff. The defendant White says he was ignorant of the customs of the manor. But his ignorance would not excuse his

offering the manor for sale as a manor with fines arbitrary. Ignorant however as he was, he antecedently to the sale entered into correspondence with Marshall, the steward, in the course of which he learned that the fines were not arbitrary. Some of the fines indeed are called reliefs, but reliefs can only be paid for freeholds. The sum paid by the heir for copyholds is strictly a fine: Coke's Complete **[28]** Copyholder, sect. 25. In Gilbert's Tenures, p. 330, it is laid down that "copyholders pay no relief; for that is a service only due from freeholders." Under the circumstances we have a right to specific performance with compensation. Even if the representation was by mistake, and the vendor was ignorant of what constitutes the mistake, that will not affect our right. All that we have to prove with reference to compensation is that the actual subject-matter falls short of what the contract represented to be the subject of purchase.

Mr. Teed and Mr. Bethell, for the defendants. The defendants had no personal acquaintance with the customs of the manor; and it is in evidence that White's object and intention was to give the purchaser the fullest information. If that be so, the Court will look to the substantial part of the contract, which was the sale of certain profits, and not regard a mere error in the description of those profits. We do not admit, however, that there is any essential error in the description of the profits, for reliefs are payable by copyholders by special custom: Scriv. Cop. vol. 2, p. 436. [The Lord Chief Baron. You seem to me to be in this dilemma: either you made a mistake in representing the fines to be arbitrary, or you concealed the fact that the fines were not payable: primâ facie they were payable.] The substantial representation was that the profit amounts to £150 per annum; what the defendants contracted to sell was the manorial rights, be they what they might, amounting to that value. But even supposing the description erroneous, and that the vendors could not compel performance of the contract, it does not, therefore, follow that the purchaser can compel them to make a different contract: *Thomas* v. *Dering* (1 Keen, 729). Nothing has been done under the agreement; and Duke offers, without compensation, the same price, within £40, as the plaintiff. The plaintiff must be left to his remedy at law.

[29] Considering this case on the ground of mistake and not of fraud, the plaintiff ought to shew: 1st, that there was a clear misrepresentation of a material fact, which relieved the purchaser from the obligation of any inquiry; 2ndly, that he relied on the representation and did not inquire; 3rdly, that the description of the estate was such as necessarily led him to give, and that he did give, a larger sum than he would otherwise have done; 4thly, that granting compensation would not have the effect of making a new contract. This case is wanting in all these four requisites.

First, there is no such statement as necessarily misleads. The material part is the quantum of profits. You must take the whole of the representation. The fines, whether arbitrary or not, affect the interest only as regards the income. The representation never could entitle the purchaser to come to the conclusion that fines were payable for every alienation. Even the statement that they were arbitrary left him bound to inquire as to the customs of the manor, and to see on what occasions the fines were payable. In cases where a vendor has represented that the covenants in a lease were usual, and the lease when produced was found to contain unusual covenants, it has been held that the purchaser was bound to complete the purchase without compensation. Why was that? Because he was bound to inspect the lease.

Secondly, has the purchaser in fact relied on the representations? When representations made before a contract are followed by a written agreement, the purchaser entering into such agreement, supported by a positive statement, is precluded from relying on the loose and general representations. Now here the plaintiff shewed by his conduct that he regarded the particulars as nothing. Every thing he said and did shews that he did not rely on the particulars only. He told the vendors that the particulars gave him no information, and he was referred to the stew-**[30]**-ard: was he not then bound to make further inquiry? [The Lord Chief Baron. No; he is not bound to go to the steward. He may say, "I will take your contract as I find it on your paper."] With submission, where a representation is qualified, you are bound to inquire. The qualification relieved the vendors from being bound by their representation. [The Lord Chief Baron. The plaintiff's inquiries were on other points. Why should he go to know whether the fines were arbitrary? He did not address the agent with any inquiries as to the points on which the particulars were full.] In *Dyer* v. *Hargrave* (10 Ves. 505) an estate was described to be within a ring-fence. It was

not so; yet, as it was proved that the purchaser lived in the neighbourhood and knew the state of the property, he was held to be entitled to no compensation.

Thirdly, was the misrepresentation such as induced the purchaser to bid a higher sum? Courts of equity do not give compensation where no loss is sustained. But he does not even allege a loss. Where there is a difference in the quantity of an estate contracted for, as where there are charges, it is clear that a purchaser must have given a higher price than he would otherwise have done. *Brown* v. *Fenton* (14 Ves. 144) is material upon that point. There the words "small fine" were held sufficient to put the purchaser on inquiry. In *Barraud* v. *Archer* (2 Sim. 433) the purchaser was held bound in the same manner, although there the representation was true to the letter.

Lastly, the compensation must be given upon principles derived from the contract itself, and the Court will not make a new contract for the plaintiff. It is a general rule that a Court of equity will not carry into effect an agreement to sell at a valuation: *Agar* v. *Macklew* (2 Sim. & Stu. 418). The principle of that case applies here. You cannot derive from the contract itself any rule for estimating the compensation. **[31]** The contract must contain within itself such elements as will shew the nature of the abatement. If you substitute a different price, to be furnished by other data, you alter the contract: *Benet College* v. *Carey* (3 Bro. C. C. 390).

Mr. Simpkinson, in reply, having commented on the cases cited for the defendants, was stopped by the Court.

THE LORD CHIEF BARON. If I had to take into consideration the real value of the property, in giving my judgment, I should be inclined to say that the plaintiff had made a good bargain. But if a man buys an estate at an auction upon a certain representation made, and gives such price as he thinks fit for it, shall it be said that, if the contract gives him compensation on failure of the representation, the other party may on such failure turn round and say, Oh! it is a good bargain, and therefore you shall have no compensation? I am much inclined to think that, if that be so according to any cases in equity, I should differ from those cases. It would be no answer at law. If a man brought an action to recover damages for breach of the contract, the jury would say, and the Court would so direct them, that he had made his bargain and ought to have it, and not that he had got as good a bargain or better. In this case a manor was advertised to be sold, of which it was represented in the particulars and conditions of sale that the fines were arbitrary. Any one acquainted with copyhold property knows that there is a great difference in value to the lord when the fines are certain and when arbitrary. If the fines are certain, you may calculate them with the utmost certainty; they are in the nature of a fixed annuity. But if they are arbitrary, the fines increase with the increasing value of the land, and any man may fairly calculate on the increasing value. It is two years of the improved value of the land. Look at the difference in value in the cases of fines arbitrary and fines certain. Sup-**[32]**-pose the value of the copyholds to be £800 a-year; in eight years, suppose the value of the fines to be £100 a-year (putting the quit-rents out of the question), on that supposition one-eighth of the value of the whole rental would fall into the hands of the lord each year. Suppose the fines are arbitrary, the purchaser would calculate that if in the next eight years the land increased in value, he would have in proportion of one-eighth of the increased value. But if it turn out that one-half of the manor pays no fine or only a fixed fine, he has then only one-half of what he calculated upon.

Therefore I think that the representation that the fines are arbitrary is a very material representation, not capable of misconception or ambiguity. I have taken one-half for the amount of each description of fine for this reason, that the whole of the copyholds are held by six persons; I conjecture that there are more deaths than alienations—they will be equal at least; so that one-half of what the purchaser calculated upon will be lost to him. But suppose it is not so. It is argued that all the payments made on alienation are fines arbitrary; but that the others which are made upon the admission of the heir or widow are customary payments merely, and not fines. But the evidence is that they are fines, and the law is that they are fines. The lord takes a fine for the admission of an heir or widow. It may be arbitrary or constant, but it is still a fine; and the records of the manor so call it. It is said to be a relief nomine finis. What is that but a fine? Besides, if by any custom it were a relief, that would not alter the question. I believe that fines upon the admittance

of the heir or widow are almost universal. I think, therefore, that this is a distinct allegation that all the fines are arbitrary including the fines upon the admittance of heirs. If so, it is a mis-statement (I will not say a fraudulent mis-statement), but a mis-statement of the nature of the property. Well, then, by the terms of the contract, as stated in the conditions of sale, if there is error in the description of the **[33]** property it shall not vitiate the contract but shall be the subject of compensation; and I believe that if a contract is brought before a Court of equity for specific performance with compensation, it is the practice to refer it to the Master to see what amount of compensation shall be dealt to the party. Now, what are the grounds of opposition to this course? It is said that the party did not rely upon the representation, but was referred elsewhere for further information. If it had been proved before me that he had said to White, "I don't like to rely on your statement as to the fine—you must give me further information," and White had said, "I cannot inform you; but you must go to Marshall," I should have been ready to admit the whole force of Mr. Bethell's argument that it was a clear case of his not acting upon the particulars. But supposing he had gone to Marshall for further information, and Marshall had said he had none to give, he must then have fallen back upon the information he had already from the particulars. But it does not appear, when he wrote to the solicitor, that he made any inquiry as to the fines. His view at that time was not confined to the manor alone; but he wanted to look at the land. It is true he asked the steward for further information; but about what? Why, what he had before inquired about. All the information which he required was about a totally different thing. He desires an account of the copyhold lands, the number of the tenants, and the time of their admission. Why was this information asked? Why, for the sake of the chance of the fines falling in. That was important to his calculations, with reference to the truth of the assertion that all the fines were arbitrary.

But then it is said that a Court of equity will not enforce a decree for specific performance with compensation, unless some rule can be furnished from the contract by which to estimate the compensation; or otherwise it would be making a new contract under colour of en-**[34]**-forcing an existing one. To make that observation applicable, we must suppose a different state of things. Suppose a man had contracted by mistake to sell a manor which did not belong to him, the Court would not compel him to sell another manor which did belong to him, and which he did not agree to sell. But here it is part of the contract that, in case of error, compensation shall be given, and it is the same subject-matter; and the only question is, the amount of price; and the Court is called upon to enforce the contract of the parties, "that if there is error, it shall be the subject of abatement." When it is said that the next highest bidder at the auction offered to take the bargain off Cudden's hands, that is evidence before the Master, but not here. When it is considered that it is the property of cestui que trust, and the trustees are the vendors, I do not know that Cudden is entirely safe in his present purchase, or whether they may not file a bill to get compensation from him: but I give no opinion on that. I think he has got a good bargain; but such as ought to be decreed in a Court of equity.

Decree accordingly.

IVES *v.* IVES. Feb. 13th, 1840.—Devise and bequest of real and personal estate to a person for life, with limitations over. By a codicil, reciting the devise and bequest, and also the limitations over, the devises and bequest were revoked, "so far as related to the tenant for life;" but "estates," both real and personal, out of which the interest of the tenant for life was carved, were directed to sink into the residue: Held, that this was a revocation of the interest of the tenant for life only.

[S. C. 4 Jur. 265.]

James Ives, by his will, after devising certain freehold estates at Southwark and Stockwell to his daughter, Mary Sharpe, on the contingencies of his two sons, Richard Ives and James Ives, dying without leaving issue, gave and bequeathed to Giles Long, Joseph Barnes, and Joshua Coates, and the survivors or survivor of them, and the **[35]** executors and administrators of such survivor, the sum of £2500 4*l.* per cent. Consolidated Bank Annuities, upon trust to pay and dispose of the interest, dividends, and proceeds thereof, from time to time, to his said daughter Mary Sharpe, for her

separate use and benefit; and from and after her decease, the testator gave and bequeathed the said £2500 4l. per cent. Consolidated Bank Annuities unto all and every the child and children of his said daughter Mary Sharpe as should be living at the time of her decease, equally to be divided between them, share and share alike; but if it should happen that his said daughter Mary Sharpe should die without child or children her surviving, then he gave and bequeathed the said sum of £2500 4l. per cent. Consolidated Bank Annuities unto the said Richard Ives and James Ives, or either of them that should be living at the time of the decease of his said daughter Mary Sharpe, their or his executors or administrators, equally, share and share alike. The testator then, after bequeathing several legacies, gave and bequeathed all the rest and residue of his estate and effects to the said trustees, and the survivors or survivor of them &c., upon certain trusts for the benefit of James Ives and Richard Ives, and their children, with an ultimate limitation in default of children of either of them, to his said daughter Mary Sharpe, her executors, administrators, and assigns.

The testator, by a codicil, after reciting that, since his will he had purchased a freehold house at Chelsea, devised the same to the said trustees, and the survivor of them, and his heirs, upon trust, to pay the rents and profits to his said daughter Mary Sharpe for her life, to her separate use; and after her decease, he gave the said messuage unto and amongst her children as tenants in common; but in case it should happen that his said daughter Mary Sharpe should die without leaving any issue her surviving, then he gave and devised the said messuage, or tenement and premises unto his said trustees and the sur-**[36]**-vivors or survivor of them, and the heirs and assigns of such survivor, upon trust for his niece Mary Barnes for her life, for her sole use and benefit; and from and immediately after her decease, he gave and devised the said messuage or tenement and premises unto Elizabeth the daughter of the said Mary Barnes, her heirs and assigns for ever.

The testator made a second codicil to his will, which did not affect the bequests to his daughter.

By a third codicil, the testator, after reciting that he had by his will devised his estates at Southwark and Stockwell to his daughter Mary Sharpe, subject to the contingencies therein mentioned, and had also given to his trustees and executors the sum of £2500 4l. per cent. Consolidated Bank Annuities, upon trust, to pay the dividends thereof to his said daughter for her life, and from and after her decease, then to such child or children as she might have; and had also given to his said daughter the residue of his estate and effects upon the contingencies in the said will mentioned; and after reciting that he had, by a codicil to his said will, given and devised his freehold estate to his said trustees, in trust, to pay the rents to his said daughter for her life, and after her decease, had given and devised the same to his said trustees, in trust, for the use and intents therein mentioned, revoked the bequests to his daughter in the following terms:—"I do hereby revoke and make void all and singular the said devises and bequests in my said will and codicil named, so far as relates to my said daughter, whether the same were devised or bequeathed absolutely or conditionally, or in any manner whatsoever; and instead thereof I do make the following provision for her:—That is to say, I do give and bequeath unto my trustees and executors in my said will named, and the survivors and survivor of them, and the executors and administrators of such survivor, and I desire that such part of my property in the government stocks or funds as may be sufficient may remain **[37]** and be set apart in their names, in trust, for the following intent and purpose:—That is to say, that out of the dividends and produce thereof, they may pay to my said daughter Mary Sharpe, the sum of 1l. 1s. weekly, for and during the term of her natural life, to and for her own use and benefit. And I desire that the same may not be subject to the control, order, debt, or engagement of her present or any future husband. And I declare that the receipt or receipts of her my said daughter Mary Sharpe only shall, notwithstanding her coverture, and whether sole or married, be a full and sufficient discharge for such payments. And I desire that such estates, both real and personal, as I have in my said codicil given to my said daughter, may sink into and become part of the residue of my estate and effects, and to be disposed of in the way in which I have disposed of the residue in my said will."

The testator died, leaving the several legatees named in his will surviving him. The present suit having been instituted for establishing the trusts of the will, a

petition was now presented by the children of James Ives, as residuary legatees of the testator, praying to have the respective interests of the parties declared.

Mr. Bethell and Mr. J. H. Palmer, for the petitioners, contended that by the last codicil not only the life interest of Mary Sharpe, but that the limitations of the £2500 4l. per cent. Consolidated Bank Annuities, and of the Chelsea estate, consequent upon her life interest, were revoked; that the limitation over of the Chelsea estate, being a contingent remainder, was defeated by the destruction of the previous estate for life, and that both that and the limitation over of the £2500 Consolidated Bank Annuities were revoked by that clause in the codicil, which declared that the estates both real and personal given to the testator's daughter Mary were to sink into and become part of the residue; the word "estates" meaning not merely Mary [38] Sharpe's interest, but the estates and funds out of which her interest was carved.

Mr. Boteler, Mr. Simpkinson, and Mr. Ball, for the other parties interested, relied on the words "so far as relates to my said daughter," as shewing the clear intention of the testator that only his daughter's interest under the will and former codicil should be revoked; and they also contended that the word "estates" in the last codicil clearly meant her interest only.

THE LORD CHIEF BARON. The words of the will are so clear that I am surprised that any argument upon them should have been thought necessary. I am called upon by the petitioners to make a will for them, instead of following the plain obvious words of the instrument. If the devise of the real estate had been to the testator's daughter for her life, there might have been some question on the case; but in this case there is no difficulty.

The will first relates to the bequest of certain dividends to the daughter for her life. The money is to be invested, and the trustees are directed to pay the dividends into the daughter's hands, for her separate use, and after her decease the money is to be divided amongst her children. Then, by a codicil, an estate at Chelsea is devised to the trustees upon the same trusts. The testator gives them the legal estate in that property, to hold during the life of his daughter, and after her death he devises it amongst her children. If she dies without children, they are to apply the rents, issues, and profits to this purpose.

The testator afterwards made a second and then a third codicil. Something had occurred to change his mind as to his daughter, and he allows her a guinea a week instead of the benefits under his will. He cites the bequest of the dividends and the devise to her of the Chelsea estate, but not the ultimate de-[39]-vise, which is merely referred to, and then he revokes this devise and bequest so far as relates to his daughter; whereas, I am asked to revoke them altogether. Now, on this devise, one estate does not depend on the other. It is not, properly speaking, a remainder expectant or a life estate. Therefore, considering this, and that by the express terms of the will the revocation is of the daughter's interest and no further, it seems to me that it would be absurd to hold it a revocation of more than that interest. Nothing but the depending of one estate on the other would render such a construction necessary.

But, then, it is said that, by the third codicil, he makes the estates before given to the daughter fall into the residue. The object of that merely was to give the revoked interest to the residuary legatees. He had inserted a residuary clause in his will, but not in the two first codicils; therefore, in the last codicil he thought that such a clause should be inserted.

Petition dismissed.

COOPER *v.* BYRON. Feb. 13th, 1840.—The granting permission to rehear a cause after the expiration of six months from the time of pronouncing the decree, is solely in the discretion of the Court.

Mr. Knight Bruce (with whom was Mr. Bethell), on the part of some of the defendants, presented a petition for rehearing of the cause, notwithstanding the expiration of six months since the decree was pronounced. He produced affidavits accounting for the delay, and stating, amongst other reasons, that the decree had not been drawn up.

THE LORD CHIEF BARON said that a case of *Cooper* v. *Hewson* was about to be

heard which involved the same matters, and, therefore, he was of opinion that this was no case for a rehearing.

Knight Bruce. With all deference this is not a case **[40]** in which a discretion can be exercised. The defendants are different from those in *Cooper* v. *Hewson*, and they have a right to conduct the cause as they please.

Mr. Simpkinson and Mr. O. Anderdon, contrà, said that eight out of the ten defendants had compromised. They referred to *Muskerry* v. *Chinery* (Rep. temp. S. 185) and *Cuff* v. *Platell* (4 Russ. 242).

THE LORD CHIEF BARON said that he could not agree that this was matter of right: that the delay in drawing up the decree was no ground for the application, as it might have been drawn up in a week; but that, at all events, the six months were to be reckoned from the time of pronouncing the decree and not from the time of drawing it up, and he dismissed the petition.

SMYTH *v.* CHAMBERS. Feb. 14th, 1840.—Where a bill was brought to recover the arrears of the annuity, and the grantor was alleged to be, and in fact was out of the jurisdiction: Held, that the cause must stand over till he should be made a party.

Reginald Macdonald was entitled under his father's will to an annuity of £300, till he should attain the age of twenty-seven, when he was to be paid £7000 by the executors, and the annuity was to cease. Upon the security of these bequests, Macdonald granted two annuities of £80 and £75 for his life to one Smell.

Macdonald afterwards went abroad, and was out of the jurisdiction when the present bill was filed. The bill, which was brought by an assignee of Smell, prayed an account of the arrears of the two annuities of £80 and £75, and that the same might be paid by Macdonald; and that the sums due to the plaintiff under the will of the testator, by virtue of the assignment, might be paid by the defendants, the executors.

[41] The bill prayed a subpœna against Macdonald when he should come within the jurisdiction.

It appeared from the answers of the executors that they had notice of this incumbrance, and that two of them subsequently advanced money to Macdonald, upon which occasion a deed was executed by the lenders which recited the former security to Smell.

Mr. Parker having opened the case for the plaintiff,

Mr. Stuart and Mr. Hallett, for the defendant Chambers, insisted that the cause could not proceed in the absence of Macdonald under whom the plaintiff claimed: *Browne* v. *Blount* (2 Russ. & M. 83), *Lowry* v. *Fulton* (9 Sim. 104). If the bill made a case of insolvency on the part of the executors, or charged that they intended to waste or part with the fund, it might be otherwise. In this case Macdonald was not made a defendant, for subpœna was prayed against him only when he should come within the jurisdiction.

Mr. Girdlestone, with whom was Mr. Lewis, for other defendants, executors, referred to a case before the Master of the Rolls, in which an annuity was granted upon the security of real estate, and upon a bill filed against the trustee of the property and the grantor, for payment of the annuity; and it appearing upon the hearing of the cause that the grantor was out of the jurisdiction, the cause was directed to stand over.

Mr. Lovat, for the testator's widow, who was also an executrix.

Mr. Parker, in reply, commented on the circumstance that the executors had notice of the incumbrance, and that two of them had recognised it by deed.

[42] THE LORD CHIEF BARON. I think Mr. Parker is justified in saying that, from what appears on the answers of the executors, it was not to be expected that they should raise this objection; because two of them, by the deed which they themselves have executed, have taken the very title of this man as their security. There is no doubt, however, that, according to the practice of the Court, he ought to be here, and the cause must stand over till the objection is remedied.

I am afraid the defendants must have the costs of the day; but I am glad to find they are limited. The objection has been taken by five counsel where one would have been enough.

Let the cause stand over with liberty to amend by adding parties.

DENYS *v.* SHUCKBURGH. Feb. 15th, 28th, March 5th, 1840.—A. by a voluntary settlement conveyed two shares in certain mines to trustees for ninety-nine years if A. should to long live, in trust for A.'s brother-in-law B. during the said term if he should so long live, with remainder as to one share in trust for A.'s sister C., and as to the other share, in trust, for D. the son of B. and C., to hold to them respectively for the residue of the said term if they should so long respectively live. Upon the death of B., in the lifetime of A., C. and D. entered into possession of their respective shares. A. afterwards, by a deed of gift executed in 1826, conveyed all his remaining interest in the premises to D., and died in 1830. After A.'s death C. continued by mistake in possession of the share which had been settled upon her until her death in 1835. In 1839 D., upon examination of the deed of 1826 which was in his possession, found out the mistake, and he immediately filed his bill against the executors of C. for an account of the rents and profits received by her since the death of A.: Held, that inasmuch as D. had been guilty of laches in not finding out the mistake earlier, by the means which were in his power, he was entitled to an account only for the period allowed by analogy to the Statute of Limitations, which in this case was six years before the filing of the bill, and an additional period during which he was abroad.—Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it; and therefore the statute will run from the time of such receipt, and not from the time of such sale.—A misapprehension of rights under a deed, not arising from the misconstruction of the deed, is a mistake in fact; and consequently relievable in equity.—There can be no ouster between tenants in common in possession; and, therefore, if one takes more than his share of the rents, the only remedy is account; either by action under the statute of Anne or by bill in equity.—In trover the Statute of Limitations runs from the time of conversion, and not from the time of sale.

[S. C. 5 Jur. 21. Not applied, *Ecclesiastical Commissioners* v. *North Eastern Railway*, 1877, 4 Ch. D. 860. Referred to, *Gibbs* v. *Guild*, 1881, 8 Q. B. D. 304; *In re Robinson Maclaren* v. *Public Trustee*, [1911] 1 Ch. 505. And see *Burrell* v. *Earl of Egremont*, 1843, 7 Beav. 205.]

At the time of the marriage of George, Earl of Pomfret, with Miss Brown, he was seised in fee of two undivided **[43]** fourth parts of certain lead mines in Yorkshire, one other fourth part belonging to his brother Thomas William, afterwards Earl of Pomfret, and the remaining fourth part being settled upon his sister, Lady Charlotte Denys, and her husband, Peter Denys.

By indentures of lease and release, dated the 22nd and 23rd August, 1793, being the marriage settlement of George, Earl of Pomfret, certain manors and estates in Northamptonshire, of which he was seised, together with the before-mentioned two shares in the mines, were conveyed to trustees to the use of Earl George, for life, with remainder to trustees for the term of 150 years, to secure a jointure of £2000 a-year to his intended wife, with remainder to the first and other sons of the marriage in tail male, with remainder to Earl George in fee.

The marriage took effect, but there was no issue; and ultimately Earl George and his wife were separated by divorce à mensâ et thoro, and never afterwards lived together.

After the separation, certain indentures of lease and release, dated the 21st and 22nd October, 1813, were executed between George, Earl of Pomfret of the first part, Peter Denys and Lady Charlotte Denys his wife of the second part, the plaintiff George William Denys, the son of the said Lady Charlotte Denys, and Lady E. Denys, his wife of the third part, and W. Baker and W. Manning of the fourth part, whereby, after reciting the marriage settlement of Earl George—the marriage—the fact of no issue—and the separation, and further reciting that Earl George was desirous of settling one moiety of his said two undivided shares of the lead mines, and also the other moiety, so far as he had power to settle the same, to such estates as were thereinafter mentioned; it was witnessed that in pursuance of such his desire, and in consideration of his friendship to Peter Denys, and his affection for his sister Lady

Charlotte Denys and her children, he, Earl [44] George, granted and released all that his one undivided moiety or half-part, or two undivided fourth parts or shares of the said lead mines to the said Baker and Manning, to hold to them, their executors, administrators, and assigns, for the term of ninety-nine years, to commence from the date of the lease, if he the said Earl George should so long live, upon trust, to permit the said Peter Denys and his assigns to receive the rents, issues, and profits thereof for the said term, determinable as aforesaid, if he should so long live; and after the decease of the said Peter Denys, upon trust, as to one of the said two undivided fourths or shares, to permit the said Lady Charlotte Denys and her assigns to receive the rents, issues, and profits thereof for the residue of the said term of years determinable as aforesaid, if she should so long live, and after her decease, if she should die during the said term, in trust for the said Earl George, his executors, administrators, and assigns for the residue of the said term; and as to the other of the said two undivided fourth parts, upon trust to permit the plaintiff Denys and his assigns to receive the rents, issues, and profits thereof during the residue of the said term determinable as aforesaid, if he should so long live, and after his decease, if he should die during the said term, upon trust, for such persons and for such estates as therein mentioned. And by the same indenture of release Earl George granted and released the last-mentioned undivided fourth part, subject to the said indenture of settlement to the use of the said Peter Denys and his assigns during his life, with remainder to the use of trustees, in trust to preserve the contingent remainders, with remainder to the plaintiff for his life, with divers remainders over.

Peter Denys died on the 27th June, 1816. Upon his death Lady Charlotte Denys entered upon her original fourth share; and, also, upon that which had been settled upon her by Earl George. The plaintiff also entered [45] upon the one-fourth share which had been settled upon him upon the decease of his father.

By indentures of lease and release, dated in May, 1826 (being a conveyance by way of gift in consideration of natural affection), Earl George conveyed all his reversionary interest in the share which he had settled upon Lady Charlotte Denys to the plaintiff for his life.

George, Earl of Pomfret, died on the 7th April, 1830, and neither Lady Charlotte Denys nor, as it appeared, the plaintiff having any conception that Lady Charlotte's interest in the share settled upon her by her brother determined on his death, she continued in possession of that share as well as of her original share until her death on the 17th November, 1835.

It appeared that the plaintiff went abroad on or about the 9th August, 1832, and that he remained abroad till the 5th April, 1836.

In 1839 Mr. Martineau, the plaintiff's solicitor, upon examining the deeds relating to the property, discovered that the plaintiff was entitled to the settled share of Lady Charlotte Denys, immediately upon the decease of Earl George. He immediately communicated his discovery to the executors of Lady Charlotte Denys and their solicitors, and upon applying for the whole arrears of profits of that share from the death of Earl George, he received for answer that the executors were willing to account for all profits within the six years preceding the demand, subject to the jointure of the Dowager Countess of Pomfret; but they denied the plaintiff's title to any arrears beyond that period.

The plaintiff, therefore, now brought his bill against the executors of Lady Charlotte Denys and other parties, praying an account and payment of the profits which had been received by Lady Charlotte in respect of the share comprised in the deed of May, 1826, since the death of George, Earl of Pomfret, or at all events since the 9th [46] August, 1830, when the plaintiff went abroad as before stated.

The other defendants to the bill were the widow of Thomas William, Earl of Pomfret (who was the devisee of that Earl's share and his executrix), Dr. Thorpe, her second husband, and George William the present earl. These parties claimed contribution from the mines, in consequence of payments which had been made by Earl Thomas William, in respect of the jointure of the widow of Earl George, out of his personal estate and his estates in Northamptonshire.

The defendants, the executors, by their answer insisted that the produce for which they were accountable to the plaintiff, and for which they offered to account, was liable to contribute to the jointure of the widow of Earl George; but that they did not otherwise refuse to account for the profits, save as to such as accrued beyond six

years before the demand made by the plaintiff, as to which they submitted he was barred by the Statute of Limitations.

It appeared in evidence that the co-tenants in common of the mines employed a common agent, Mr. Littlefair, who received the profits from the occupiers in the shape of royalties, consisting of lead ore. He, from time to time, as he received the lead, conveyed it to a wharf at Richmond, where a division took place of it according to the co-tenant's respective interests. Each allotment of lead was marked in a particular manner; and at the death of Lady Charlotte Denys, 647 pieces of lead so allotted to her were at the wharf. These were afterwards sold by her executors.

Mr. Simpkinson and Mr. L. Wigram, for the plaintiff. The effect of the deeds of October, 1813, was to convey one of the undivided fourth parts to trustees, for a term of 99 years, if Earl George should so long live, upon trust **[47]** for Peter Denys if he should so long live, with remainder to Lady Charlotte Denys if she should so long live. It was therefore an estate for 99 years, pur auter vie, determinable on the death of Earl George. Therefore, upon his death, Lady Charlotte's right to the profits of this share ceased. As to the other fourth part, which is limited to the plaintiff for life, after the death of his father there is no question.

The only point, therefore, which really requires discussion is the time from which the account of the profits of the first-mentioned share is to be taken; whether from the death of Earl George, or from the time the plaintiff left this country. That some account must be decreed is unquestionable. It could only be resisted on the ground that Lady Charlotte's receipt of the profits was a tort which died with her person. But even though an action of tort might not have been maintainable, the plaintiff could have brought his action for money had and received, and consequently may bring his bill. *Hambly* v. *Trot* (Cowp. 371), *Monypenny* v. *Bristow* (2 Russ. & Myl. 117), *Gardiner* v. *Fell* (1 J. & W. 22). The only question, therefore, is to what extent the account will be affected by the Statute of Limitations. [Alderson, B. If the right to sue began before he went abroad, the statute would begin to run.] This is a case of mistake, and until the mistake is discovered a Court of equity will not bar. Fraud will not bar in equity, nor, as it is conceived, at law. In equity mistake is on the same footing as fraud: *Brooksbank* v. *Smith* (ante, vol. 2, p. 58). [Alderson, B. Does not the mistake here arise out of the construction of a deed which is within the plaintiff's knowledge? I doubt whether the case cited applies. If money is paid over under a mistake of fact, it may be recoverable. But it is a very different thing if it is paid over under a mistake of law.] We **[48]** submit that this is a mistake of fact. Both parties knew that the plaintiff was entitled after Lady Charlotte's death. The mistake was as to the duration of her interest. If it had been a question on the deed, how long her interest was to continue, it might be a mistake of law; but not where there was a mere slip or omission to assert an indisputable right, *Naylor* v. *Winch* (1 Sim. & Stu. 555). [Alderson, B. You say it is a mistake of fact as to what is contained in the deed.] It is a mistake as to the duration of her interest. *Brooksbank* v. *Smith* is a stronger case than this; for there the plaintiff was the party to look into the deed; here Lady Charlotte was the party to do so. The omission was her act. The plaintiff was guilty of no laches. *Brooksbank* v. *Smith* is supported by *Randall* v. *Errington* (10 Ves. 423, 426).

Supposing the statute applies, it is to be considered to what produce it applies. It can only apply to the money received by Lady Charlotte antecedently to the 9th August, 1832, when the plaintiff went abroad. All the money received afterwards she was liable to refund. The moment she sold the lead, and not till then, she was liable in an action for money had and received. It is material, therefore, to see what sales took place after the 9th August, 1832. [Alderson, B. The difficulty as to that is, that when taken by Lady Charlotte, the lead was yours. Her disposal of it made her liable in trover. If she sold the lead and received the produce, you might have waived the tort, and brought an action for money had and received. But then the Statute of Limitations runs from the conversion, and not from the time of receiving the money. That has been decided.] In *Collins* v. *Rose* (5 Mee. & W. 194) the Court held that the statute ran from the sale; and yet the party might have maintained trespass on the seizure. Here the conversion was not complete till the sale. Before she sold, **[49]** every thing that was done was the common mistake of all. Littlefair was the common agent of all. [Alderson, B. Did he not sell the lead? If not, it was marked by him. Whenever she received it with her own mark she converted it.]

At all events, Lady Charlotte was in the situation of a tenant in common, taking more than she was entitled to as against the other tenant in common. Before the statutes of William or Anne, tenants in common could not bring actions against their co-tenants. Therefore, the statute of James did not apply to their case.

Mr. Wilcock, for the parties claiming under Earl Thomas William.

Mr. M. A. Shee, for Earl George William, contended that his client had a lien on the rents, now claimed; and referred to *Simond* v. *Hibbert* (1 Russ. & M. 719).

Mr. Stuart and Mr. Parry, for the defendants, the executors of Lady Charlotte Denys. The plaintiff says he is entitled to treat Lady Charlotte as his agent in receiving the rents and profits of this share; and he alleges that both she and himself, in regard to her receipt of these rents, acted under a mistake. In the argument on the other side, it is assumed that he was as ignorant on this point as she; but it is impossible to assume this consistently with the statements in the bill. He states by his bill that he was ignorant of, or imperfectly acquainted with, the provisions of the deed of 1813; but he does not pretend to forget the deed of 1826, which gives him title. That deed is a gift in terms of the rents and profits to the plaintiff, not from the death of Lady Charlotte Denys, but from that of the donor, his uncle. Considering, therefore, that he is a volunteer, the object of the bounty of his uncle, that the **[50]** question is between him and his mother's executors, and that he and his mother have acted on the footing of the arrangement which he now seeks to disturb, it would be going too far to say that such a party, under such circumstances, is entitled to maintain this bill. Supposing, however, such a bill to be maintainable, his laches has been such as to deprive him of any right to an account beyond the time of filing it. *Pulteney* v. *Warren* (6 Ves. 73), *Hambly* v. *Trott* (Cowp. 371), *Pettiward* v. *Prescott* (7 Ves. 541). What right had he to sleep on his possession, with this deed in his drawer? He had the means of knowledge, and could as well have filed his bill in his mother's lifetime. The Court, therefore, will limit the account to the least possible time. *Bowes* v. *East London Water Works* (3 Madd. 384), *Edwards* v. *Morgan* (13 Price, 782), *Atcherley* v. *Roe* (5 Ves. 565). Upon the subject of acquiescence, the stat. 3 & 4 Will. 4, c. 27, s. 27, is in point.

But, in truth, this bill is not sustainable on the footing of agency in Lady Charlotte Denys. If she were alive, would it be any other than the common case of adverse possession? What is the meaning of asking for an account of the rents and profits? If the plaintiff had brought trespass for mesne profits, would the account be different from this? [Alderson, B. One tenant in common cannot hold adversely to another.] Admitting the law to have been so originally, it is cured by the 12th section of stat. 2 & 3 Will. 4, c. 27.(*h*) But it is submitted that, in any view of the case, this is a mere legal claim, and the bill ought to be dismissed. One of several co-tenants can, even after entry, gain an adverse possession; as, for instance, if they come in under an arrangement for a time, and the time expires, and one of the par-**[51]**-ties holds over: *Doe* v. *Prosser* (Cowp. 217). The question is whether Lady Charlotte Denys's possession, after the death of Lord Pomfret, was not an adverse holding. [Alderson, B. It is not a question of possession. It is the case of an estate, of which the rents are in the possession of A. B., an agent, who has given her too much.] Then the plaintiff's remedy is against him for the wrong, and his remedy is at law. But he puts his case, not on that ground, but on the ground of possession by mistake. We say, on the other hand, the possession was adverse, and that he has his remedy at law for mesne profits. [Alderson, B. He can have no action for mesne profits.] If she were alive, he could have brought ejectment. [Alderson, B. Then he could have got mesne profits.] Does it make any difference that she vacates possession by death? [Alderson, B. You may take it as clear that both parties treated the property as hers. You cannot say she took it in order to put the plaintiff out of what he had a right to. The mere fact of her taking the profits is no evidence of adverse possession: you must also shew that she denied the plaintiff's right to them.] Supposing we are wrong on the question of adverse possession, still the Statute of Limitations applies.

Mr. Simpkinson, in reply. The plaintiff has a right to an account, both on grounds of general equity and on the statute of Anne (4 & 5 Anne, c. 17, s. 27). Here it is

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(*h*) But see ante, vol. 3, p. 621.

impossible to say there was any ouster, or any holding equivalent to ouster. [Alderson, B. I do not see how there can be any ouster while the tenants in common are in possession. If one takes more than his share of the rents, that is the subject of account.] Then the only question is as to time; and that is not affected by the stat. 3 & 4 Will. 4, c. 27.

March 5th.—ALDERSON, B. I took time to consider this case, inti-**[52]**-mating, however, at the hearing, that I thought some account must be directed to be taken, and that the only question was, from what period such account should commence.

Upon full consideration, I adhere to that opinion. It seems to me quite clear that Lady Charlotte Denys, against whose personal representatives this bill has been filed, took an interest under the conveyance of 1813, which expired as to one-fourth of the mines in question upon the death of her brother, Earl George; and that she, notwithstanding, continued to receive the profits arising both from that one-fourth which she held in her own right, and the one-fourth the interest in which had thus ceased; while, on the contrary, the plaintiff, Sir George Denys, continued to receive, as before, the profits arising from one-fourth, being all the while entitled to those of the one-fourth which his mother was receiving. All this was done bonâ fide without any fraud, and I think without any arrangement between them, under a misapprehension of their respective rights. It is said that this was an adverse possession of the one-fourth share by Lady Charlotte; but I do not think that it was so, unless it can be contended that every tenant in common receiving more than his share, must be considered as in adverse possession of the surplus so received by him. This cannot be maintained with propriety; and this is only that case. Both Lady Charlotte and the plaintiff had a right to receive, and did during all the time receive, a share in these rents and profits, as tenants in common. Then this seems to me to fall expressly within the statute of Anne, which gives in such cases an action of account against the co-tenant in common who has received more than his share. And I apprehend that where an action of account will lie, a bill for an account may be sustained. I am, therefore, of opinion that the plaintiff is entitled to an account, and I shall now proceed to consider from what time such **[53]** account ought to go. The plaintiff contends that he has established that this receipt has been by mistake of fact, and that this is on the same footing as fraud, and prevents the operation, if made out, of the Statute of Limitations; which in equity is adopted as a guide, but is not at law binding on the Court. I agree in that conclusion, if the circumstances of the case warrant it. But here, it seems to me that the plaintiff had the means, with proper diligence, of removing the misapprehension of fact under which I think he did labour. He had in his power the deed on which the question turns; and, although it is perhaps rather obscurely worded, still I think he has allowed too much time to elapse not to be fairly considered as guilty of some negligence; and a Court of Equity, unless the mistake be clear, and the party be without blame or neglect in not having discovered it earlier, ought, in the exercise of a sound discretion, to adopt the rule given by the statute law as its guide. That is what I shall do here. At law, Sir George Denys would be barred from recovering all sums received more than six years before filing his bill, had he not been absent from England, and within one of the exceptions of the statute. But he went abroad, and so continued from 1832 to the death of Lady Charlotte. I think, therefore, that the account must go as far back as his departure from England, and that the Master should take an account of all sums received after that time by Lady Charlotte.

It appears from the facts of the case that the mode of taking the profits was by assigning certain portions of the lead to the respective tenants in common. From the moment each tenant in common took possession of their respective shares the receipt of the rents seems to me to have taken place. I think it immaterial, therefore, at what time Lady Charlotte actually received the money for the sale of the lead, if she took possession of it by any distinct act before I mention this my opinion, for the assistance **[54]** of the Master, but I do not think it necessary to give any special direction, in my decree, to that effect, unless the parties wish it.

As to the claims of Lord Pomfret the infant, and the executors of Earl Thomas William, for contribution in respect of this share, I mean not at present to decide on them, though I entertain a strong opinion that they cannot be entered into in this suit. It seems to me that these are mere personal claims, and that they will be equally capable of being enforced, whether the representatives of Lady Charlotte retain, or the plaintiff recover, the arrears of the one-fourth of the mines in question. If these

parties think they can make anything of those claims, it will, however, be open for them so to do on further directions.

For that period also I reserve the question of the costs.(*a*)[1]

THE QUEEN *v.* CHAMBERS. 1840.—In equity an equitable mortgagee, though the mortgage be without memorandum, will be allowed his costs as against the assignees of the insolvent mortgagor.

The defendant in this case had taken the benefit of the Insolvent Act, having previously deposited the title deeds of his real estate with his bankers, as a security for monies advanced by them, but no written memorandum had been executed by him. The estates were seized and sold by the Crown under an extent, and the proceeds of the sale were paid into Court.

The Crown having waived all claim to costs, and the residue being considerably more than sufficient to satisfy the debt due to the bankers, a question arose as to the mortgagee's right to have costs allowed against the insolvent's estate.

Mr. Denman Whatley, on behalf of the insolvent's assignees, submitted that, as there was no written memo-**[55]**-randum of deposit, no costs could be allowed by analogy to the rule in bankruptcy.

Mr. Tancred, for the Crown.

THE LORD CHIEF BARON held the mortgages entitled to their costs, stating his unwillingness to extend the rule in bankruptcy to any case to which it had not already been applied.(*a*)[2]

EX PARTE THE CORPORATION OF HYTHE; IN THE MATTER OF THE PUBLIC FORTIFICATION ACTS. 1840.—Where money, the produce of the sale of corporation lands, has been paid into Court under an act of Parliament authorizing the Court to make such order concerning it, for the benefit of the parties interested, as the Court shall think fit, it is not competent for the Court, since the stat. 5 & 6 Will. 4, c. 76, s. 92 (the Municipal Corporation Act), to order the principal money to be paid in discharge of corporation debts accruing since the passing of that act. The dividends only can be applied for that purpose. The trusts of the Municipal Corporation Act are applicable to personal as well as real estate.

Before Parke, B., Alderson, B., and Rolfe, B.

Under the statutes of 43 Geo. 3, c. 55, and 44 Geo. 3, c. 95, his Majesty was enabled, upon giving due compensation, to purchase and take any lands or hereditaments necessary for the erecting of fortifications, batteries, lines, and other military works and buildings necessary for the public service in defence of the realm.

By the 4th section of the latter act, bodies politic or corporate, trustees, tenants for life or in tail, and other incapacitated persons, are enabled to contract with the general officer appointed for that purpose, either for the absolute sale of lands, or for the grant of any lease for the purposes of the act, and to convey or demise to the general officer accordingly. And by subsequent sections provisions are made for ascertaining the amount of compensation through the medium of a jury.

By the 12th section it is, amongst other things, enacted, that where any money or other consideration shall have been or shall be agreed, or shall have been or shall be **[56]** found by the verdict of any jury, to be paid or given for the absolute purchase of any lands or hereditaments taken by virtue of this act, belonging to any such body, or other person or persons under any disability or incapacity, or not having the absolute interest therein, the same shall be paid or transferred by the treasurer, accountant, or other proper officer for the time being of the office or department, for the use of which such lands or hereditaments shall be taken into the hands, or into the name of the deputy remembrancer of his Majesty's Court of Exchequer, for the use and benefit of the owners and proprietors of such lands or hereditaments, who is thereby authorized and required to receive or accept, and to give a discharge for the same; and upon the acceptation or receipt thereof, to sign a certificate to the Barons or

(*a*)[1] See *Duke of Bolton* v. *Deane*, Pre. Ch. 516.
(*a*)[2] See *Connell* v. *Hardie*, ante, vol. 3, p. 582.

Judges of the said Court of Exchequer, under his hand, signifying that such money or other consideration was received by him in pursuance of this act, for the use and benefit of such owners or proprietors who shall be named and described in such certificate, and the said certificate shall be filed or deposited in the said Court of Exchequer, &c.; and the deputy remembrancer is thereby required, upon receipt of any such sum or sums of money as aforesaid, to pay the same into the Bank of England, and immediately upon the filing or depositing of such certificate, the said lands or hereditaments shall be and become vested in the general officer, or other person marking out the same for the public service, to the use of his Majesty, his heirs and successors.

The 13th section empowers the Barons or Judges of the Court of Exchequer, or any two or more of them, in a summary way, upon motion or by petition, for and on behalf of any person or persons interested in or entitled to the benefit of the money so paid to and received by the deputy remembrancer, or the interest or produce thereof, and upon reading the certificate, directed to be signed by the deputy remembrancer, concerning the same as afore-[57]-said, and receiving such further satisfaction as they shall think necessary, to make and pronounce such orders and directions for paying the said money or any part of the same, or for placing out such part thereof as shall be principal in the public funds, or upon Government or real securities, and for payment of the dividends or interest thereof, or any part thereof, to the respective persons entitled to receive the same, or for laying out the principal or any part thereof in the purchase of other lands or hereditaments, to be conveyed and settled to the same uses, trusts, intents, and purposes as the said lands and hereditaments so taken stood settled at the time of the payment of such money as aforesaid, as near as the same can be done, or otherwise concerning the disposing of the said money, and any part thereof, and the interest of the same or any part thereof, for the benefit of the person and persons entitled to and interested in the same respectively, or for appointing any person or persons to be trustee or trustees for all or any of such purposes as the said Court shall think just and reasonable.

Soon after the passing of these acts the Corporation of Hythe sold a part of their lands to the Government for the purpose of erecting Martello towers. The purchase-money was paid into the bank pursuant to the act, and was ultimately invested in the purchase of 834l. 12s. 2d., 3l. per cent. annuities. The Corporation at the same time received a certificate from the deputy remembrancer, dated in 1803, to the effect that the money had been paid into the bank, subject to the orders of the Court, to the intent that it might be laid out in the funds or on land, for the benefit of the parties entitled thereto, as this Court should think fit.

The Corporation from time to time received the dividends of the money so invested; and in 1836, having occasion for certain sums for the payment of debts, they obtained an order dated in June of that year, for the payment to them of a part of the principal money so invested; the order at [58] the same time directing that the dividends of the residue should be paid to the treasurer of the Corporation for the time being.

A petition was afterwards presented by the Corporation praying for the sale of a further part of the stock, for the purpose of enabling them to pay several debts mentioned in the schedule to their petition, which had been incurred since the year 1835, including the mayor's salary. Upon the first presentment of the petition the Court expressed some doubt whether the relief sought could be granted consistently with the provisions of the Municipal Corporation Act,(*a*) which received the Royal

(*a*) By the stat. 5 & 6 Will. 4, c. 76, s. 92, it is enacted, "That after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all monies, dues, chattels, and valuable securities belonging or payable to any body corporate, named in conjunction with the said borough in the said schedules (A) and (B), or to any member or officer thereof, in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough, and all the monies which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act and unredeemed, or of so much thereof as the council of such borough, from time to time, shall be required or shall

assent on the 19th Sept. 1835; and the case was ordered to stand over for further argument.

[59] Mr. Simpkinson and Mr. Cooke, for the petition. At the time of the purchase of the land by the Government, it is clear that the Corporation had a right to sell. They were seised in fee of the lands, and there can be no question that, up to the passing of the Municipal Corporation Act, they had as much a right to sell as individuals have. [Rolfe, B. Why then was the money paid into Court?] Under the clause in the act. [Parke, B. Probably some of the corporations held land in trust.] The question is whether this money is in Court in the character of money or of land. If of money, the Court has an unlimited control over it. [Alderson, B. By the 92nd section of the Municipal Corporation Act the dividends only of the money can be applied to the purposes mentioned in the petition. Rolfe, B. This is like the Liverpool case,(*a*) in which the present Chancellor treated it as clear that the trusts of that act applied as well to personal estate as to real.] That act contains no direction at all as to the capital monies belonging to corporations, but only as to the dividends. Therefore, inasmuch as before the act the Corporation had a clear right to dispose of it, and as the act contains no directions as to the capital, the law remains as before. [Rolfe, B. The 92nd section directs that the **[60]** interest and dividends shall be applied in a certain way; which, by necessary implication, shews that the capital is to be preserved. For antecedent debts you might apply the money, but not for these.] We submit that the stat. 5 & 6 Will. 4, c. 76, only imposes a restraint on the sale of real estate, and not on the disposition of personalty. [Parke, B. I think this case is within the 92nd section.]

Per Curiam. The case is clear.

No order made.

Memoranda.

In February, 1840, George James Turner, Esq., of Lincoln's Inn; Robert Baynes Armstrong, Esq., and David Dundas, Esq., of the Inner Temple; and Richard Bethell, Esq., of the Middle Temple, were appointed her Majesty's Counsel.

About the same time James Manning, Esq., of Lincoln's Inn; John Halcomb, Esq., William Fry Channell, Esq., and William Shee, Esq., of the Inner Temple; and Digby Cayley Wrangham, Esq., of Gray's Inn; were called to the degree of the coif; and gave rings with the motto—"Honos nomenque manebunt."

Serjeants Adams, Andrews, Storks, Ludlow, Bompas, Goulburn, and Talfourd received patents of precedency, conferring upon them the same rank which they held

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deem it expedient to redeem, and to the payment, from time to time, of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings either at law or in equity which have been already instituted, or which may hereafter be instituted, or by virtue of any mortgage or otherwise shall be applied towards the payment of the salary of the mayor and of the recorder and of the police magistrate hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred, from time to time, in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough."

(*a*) *Attorney-General* v. *Corporation of Liverpool*, 1 M. & Cr. 199.

under the warrant of King William the Fourth, which was determined by the Privy Council to be void.

[61] BOOTH *v.* POLLARD. March 3, 1840.—Specific performance of an agreement to let the workings of quarries, and account of monies due for working the quarries in a particular manner refused, the party's remedy being at law.

The bill stated that, previous to November, 1825, the defendant was or pretended to be seised of certain quarries, called the Cliff Quarries, and contracted with the plaintiffs that the latter should work them. That by an agreement, dated the 5th of that month, executed by the defendant of the one part and the plaintiffs of the other part, the defendant agreed to let, and the plaintiffs agreed to take, the bearings, gettings, and workings of the seam of stone under that piece of ground called, &c. And it was thereby agreed that the defendant should pay to the plaintiffs for common flags per ton £ , &c. [then followed a list of prices for different stones]. That the defendant should provide a waggon for carrying, but that the loading should be paid for by the plaintiffs; that the plaintiffs were to work the quarries and to be paid a certain sum monthly; that the stone was to be put on board a vessel monthly, and paid for monthly; and if not taken away by the defendant within a month, the plaintiffs were to draw for the amount on the next monthly day of payment.

The bill then stated that the defendant had made various defaults in payments, and that the plaintiffs had given him notice that unless the payments were made regularly they must decline working the quarry; that there was now due from the defendants to the plaintiffs £400; that the plaintiffs had sent in their account which had not been objected to, and had made repeated applications for payment which had been refused; that in consequence of such refusal the plaintiffs had ceased to work the quarry, and that the defendant had lately commenced an action against them on the plea side of this Court, for breach of the agreement in not continuing their work.

The bill, after charging that the defendant was in embarrassed circumstances, and that it was doubtful whether the plaintiffs had any right of set-off at law, and after [62] charging in the common form as to books, papers, and documents, prayed that the agreement might be specifically performed, for an account and payment to the plaintiffs of what was already due to them, and for an injunction to restrain the action.

The defendant demurred for want of equity.

Mr. Stuart and Mr. Rogers, for the demurrer, said that the Court would not entertain a bill for specific performance of an agreement to work a quarry: *Flint* v. *Brandon* (8 Ves. 159), *Rayner* v. *Stone* (2 Eden, 128).

Mr. Simpkinson and Mr. Dixon, for the bill. This is an equitable agreement by which the defendant agrees to let to the plaintiffs certain stone quarries, and by which he contracts to pay the plaintiffs for working them certain sums at the expiration of each month; and on the part of the plaintiffs it is an agreement to work in a particular way. The agreement is not merely to work, but to let, and therefore the subject of specific performance as much as any other agreement. The plaintiffs are entitled to have the legal estate conveyed to them, and are not bound to rest satisfied with an equitable interest. Again, the defendant has agreed to pay the plaintiffs certain monthly sums, and these are matters of account. That an account has been delivered and not objected to does not alone make it a settled account. Besides, the accounts are mutual, as there may be sums coming due from the plaintiffs to the defendant under the contract. If the £400, which the plaintiffs say is due to them, is to be considered as acquiesced in and settled, it could not be set-off at law against unliquidated damages for non-performance of the contract, and that is the ground of the defendant's action.

[63] Mr. Stuart, in reply, said that *Waters* v. *Taylor* (15 Ves. 10) shewed the difficulty as to specific performance in cases of weekly payments.

ALDERSON, B. This is nothing more or less than an agreement to work in a particular manner. The plaintiffs may have no defence at law, because they may have no defence at all; but their remedy, if any, is at law.

Demurrer allowed.

PRIESTLEY *v.* MANCHESTER AND LEEDS RAILWAY CO. Mar. 5th, 6th, 1840.—A railway company, by the terms of their act, had power to make a certain number of substantial bridges of stone, brick, or iron, over a river, provided the arches were of certain dimensions; and they were required, during the progress of constructing the bridges, to leave an open uninterrupted navigable water-way of at least thirty feet in width and twenty feet in height above the ordinary surface of the water. By two subsequent sections of their act they were prevented from making any other bridges, save as were thereinbefore provided for, or in any manner to obstruct the navigation, save as thereinbefore mentioned. But these sections were followed by a general section, which gave them power for the purposes of the act, and according to its provisions and restrictions, to construct a great variety of works, either temporary or permanent; and, amongst other things, bridges over rivers. The company commenced making a permanent bridge, and for that purpose erected a temporary one, leaving the required water-way; and they used the temporary bridge not only for the purpose for which it was built, but for the additional purpose of carrying earth over to raise an embankment on the opposite side of the river: Held, 1st, that they had a right, upon the construction of their act, to build the temporary bridge for the purpose for which it was intended; and, 2ndly, that they had a right to use it for the additional purpose, provided they did not thereby occasion a greater obstruction to the navigation than they otherwise would have done, or continue using it for that purpose after the permanent bridge was finished.—Acts of Parliament, giving railway companies power to build bridges, must be expounded with reference to the peculiar mode of construction of bridges in railways.

Motion to dissolve an injunction which had been obtained by the undertakers of the Aire and Calder Navigation to restrain the railway company from erecting a temporary bridge over the river Calder, at a place in the river called Broad Reach.

By the 34th section of the stat. 6 & 7 Will. 4, c. 111,(*b*) **[64]** which establishes the

(*b*) The following are several of the leading clauses of the act:—

The 34th section of the act, after reciting that it was intended to carry the railway over the river Calder, at a place called Broad Reach, three several times, and again to cross the river at a place called Fairies' Hill, and other places mentioned in the act, and over the lines of certain cuts and canals intended to be made and excavated by the undertakers of the Aire and Calder Navigation, enacts that the railway company "shall, and they are hereby required at their own expense, under the inspection of the engineer of the said undertaking for the time being, and according to plans to be submitted to, and approved by the respective engineers of the said undertakers, and of the said railway company or their umpire, to make and execute at each of such crossings a good and substantial bridge of stone, brick, or iron, of three arches, over the said river Calder, and the towing-paths thereof respectively, with proper approaches thereto, with perpendicular foundation walls to such bridges, and without any projections under water; the respective towing-paths whereof shall not be less than eight feet in width, and shall be carried under such of the arches of such respective bridges as the engineer of the said undertakers shall direct, and the breast wall of which towing-paths shall be built perpendicularly from the foundation thereof; the under side of the opening at the key-stone of each of the arches of such several bridges not being less than thirty feet in height above the ordinary surface-water level of the said river, at the respective places where such bridges shall be so erected, and the opening or span of each arch of such bridges not being less than fifty feet, and so as that the three arches of each of such bridges shall extend over and include the entire width of the said river, and of the towing-path thereto belonging, at the respective places where such bridges shall be so erected."

By the 38th section it is provided, "That the said company hereby incorporated shall, and they are hereby required, during the progress of constructing the said respective bridges, or of the necessary repairs thereof respectively, or of the erection of any future bridges in lieu thereof respectively, from time to time and at all times to leave an open uninterrupted navigable water-way in the said river Calder of not less than thirty feet in width and twenty feet in height above the ordinary surface-water

railway company, power is given to the company to make three substantial bridges over the [65] river Calder, at Broad Reach. Under this clause the company, in the year 1838, marked out the spot for erect-[66]-ing the Western Bridge, and drove piles for that purpose; but in April, 1839, the undertakers filed a bill against the [67] company, and obtained an injunction against them to restrain them from proceeding in the erection of that bridge. The railway company then made an application to Parliament to authorize them to vary their line; and it was proposed that, instead of building three bridges, as was required by their act, they should erect one only, namely, that which was originally intended to be the Western Bridge; and that the river should be altered in its course by a straight cut. The bill in Parliament, however, was opposed by the undertakers, and after some litigation a compromise was concluded between the parties by an agreement, dated the 13th of May, 1839, which was executed by the railway company of the one part, and certain trustees on the part of the undertakers of the other part.

By this agreement the undertakers consented to withdraw all opposition to the bill, and the railway company conceded that certain clauses should be inserted, according to the wish of the undertakers. The company were to purchase the lands necessary for making the deviation, and the undertakers within a given time to commence and conduct the works at the company's expense. There was likewise an arrangement for the purchase by the company of a certain quantity of the earth coming from the new cut, for the purpose of making embankments. And it was further agreed to end all disputes touching the proposed line; the undertakers thereby consenting to the deviation. It was also further agreed that the Western Bridge, near Broad Reach, should be erected in the situation marked out [68] by the company and the suit in the Exchequer was not to be proceeded in. Certain plans of the proposed line and of the Western Bridge were attached to the agreement and referred to by it; but at the desire of the undertakers certain words were struck out of the agreement, which provided for the building of such temporary bridges as might be necessary for constructing the railway "in or upon the land in the plan annexed hereto."

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thereof, in case the said undertaker shall consider the same necessary, and in the said cut or canal, of not less than thirty feet in width and fifteen feet in height, together with a towing-path thereto respectively; and that the present towing-paths thereof, respectively shall remain undisturbed until the new towing-path wall shall be erected, and the ground made good and properly gravelled, and open for the passage of horses under such respective bridges; and that during the time of constructing the said bridges over the said river Aire, sufficient space shall be left for passing the waters thereof freely, and without flooding the adjoining lands; and in case by reason of any accident, or in the execution of any of the works by this act authorized, or by reason of the bad state of repair of any part of such works, or of the said bridges or either of them, or any of the slopes, banks, or walls of the said railway near the said rivers, cuts, or canals, it shall appear that the said rivers, cuts, or canals, or either of them, or the towing-paths thereof respectively, or any part thereof, shall be so obstructed as that boats, barges, lighters, or other vessels navigating or using the same, shall be impeded in their passage, or shall not be able at all times freely and uninterruptedly to pass along the same, or in case the navigable water-ways or towing-paths hereinbefore required to be preserved during the progress of the works or either of them shall at any time be contracted to a less width than hereinbefore prescribed," then the railway company shall pay to the undertakers certain sums by way of liquidated damages; but such provision is not to deprive the undertakers of their action for any special damage.

By the 42nd section it is provided, "That it shall not be lawful for the said company of proprietors hereby incorporated to make any deviation or extension whatever from the course or direction, or to alter the line or level of the said railway so delineated as aforesaid, and intended to be made and constructed, where the same passes over the said river Calder, cut, or canal, and projected new channel, save so far as may be necessary for crossing the said river Calder and navigation at the heights hereinbefore provided, or where the same passes near a certain cut and reach of the said river Calder, at or near Kirkthorpe, &c., nor to carry the said railway any nearer to the said river Aire, or the said several cuts or canals adjacent thereto, than the

After this agreement had been concluded, the sanction of the legislature to the proposed alteration was obtained by means of the stat. 2 & 3 Vict. c. 55. By the 11th section of that act the same powers are given to the company as are contained in the 94th of the former act. By the 85th section power is given to the railway company to make an alteration in their former line near Kirkthorpe. By the 87th and 88th sections the company are empowered to purchase lands, for making the

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same is now laid down or shewn in the said maps, &c., nor shall the said company be authorized to make any depôt between the said railway and the said river Calder at Wakefield, nor to make, erect, or set up any other bridges over, or tunnels, passages, culverts, drains, or works under or upon the said rivers, cuts, or canals, or either of them, other than such as are hereinbefore required or mentioned and provided for; nor shall it be lawful for the said company to take or use, or in any way damage, the said rivers, cuts, canals, brooks, streams, dams, or weirs, hereinbefore mentioned, or any or either of them, or the locks, towing-paths, bridges, or other works of the said undertakers or any of them, or any part or parts thereof respectively, without the consent of the said undertakers in writing first had and obtained, other than and except in the manner hereinbefore expressly provided for and authorized; nor shall it be lawful for the said company to make such temporary use as is hereinafter mentioned of any lands, the property of the said undertakers or other owners, lying at a greater distance than two hundred and fifty yards from the said railway."

By the 44th section of the act it is further enacted, "That save as hereinbefore mentioned and provided, nothing in this act contained shall diminish, alter, prejudice, affect, or take away any of the rights, privileges, powers, or authorities vested in the said undertakers, or authorize or empower the said company of proprietors hereby incorporated to divert or alter the course or levels of the said rivers Aire and Calder, or either of them, or the course of any of the cuts or canals, which are now or shall at any time hereafter be made or executed by the said undertakers, by virtue of the powers of the said-recited acts, or any or either of them, or the towing or foot paths thereto, or any of them, or any part thereof, or in any manner to obstruct the navigation of the said rivers, cuts, or canals, or any of them."

By the 94th section it is enacted, "That for the purposes of this act, the said company, their deputies, contractors, servants, agents, surveyors, and workmen, and other persons by them authorized, are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, according to the provisions and restrictions of this act, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use, and in or upon such lands, and in or upon any lands adjoining thereto, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise, in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act, and also for the purposes and according to the provisions and restrictions of this act, to make or construct in, under, upon, across, or over the said railway or other works, or in, under, upon, across, or over any lands or any hills, valleys, streets, roads, railways or tram-roads, rivers, canals, brooks, streams, or other waters, such inclined or other planes, tunnels, embankments, bridges, aqueducts, conduits, siphons and drains, either temporary or permanent, roads, ways, passages, weirs, dams, piers, arches, cuttings, and fences, and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engine-houses, and other buildings, machinery, and other apparatus, and other works and conveniences for the purposes of this act as they shall think proper, and also to alter the course of any rivers, canals, brooks, streams, or watercourses, as may be necessary for constructing and maintaining tunnels, bridges, or passages, whether temporary or permanent, under or over the same, and also to divert or alter the course of any rivers, &c., and to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and the other works by this act authorized, they, the said company, their deputies, contractors, agents, servants, and workmen, doing as little damage," &c.

corresponding diversion in the river Calder at Broad Reach; the land when purchased to be conveyed to the trustees of the undertaker, for that purpose, and the diversion to be executed by the undertakers at the expense of the railway company. And the 89th section (*a*) gives the company power to make one bridge (namely the Western) instead of three.

[69] In pursuance of the last-mentioned act, land was purchased by the company and conveyed to the undertakers to make the new cut, and the latter began making excavations. The company also commenced making their bridge, and gave the undertakers notice, pursuant to the 89th section of the last-mentioned act, of their intention to make the temporary erection for that purpose. The notice stated that such erection would only be used during the building of the permanent bridge, and would be so constructed as to leave such water-way as was required by the acts.

The railway company having used the temporary bridge not only for the erection of the permanent bridge, but also for the purpose of carrying the earth from the excavations, over the river, for the purpose of making an embankment on the other side, the undertakers obtained an injunction to restrain them from so doing.

On the present motion to dissolve that injunction, the affidavits of Mr. Bartholomew, the engineer of the undertakers, and that of Mr. Burke, the engineer of the company, were read. The former was to the effect that the deponent believed that the real object of making the temporary bridge was not to erect the permanent bridge, but to carry over earth and other things for the purpose of making the railway; that the temporary bridge was not authorized by the statute; that it was not necessary for erecting the permanent bridge, and not usually adopted for that purpose; that the deponent knew of no instance in which a temporary **[70]** bridge had been made, except where an existing road had been interfered with; that the notice contained no statement as to what was to be carried over, nor as to the intended mode of building the temporary erection; that the temporary stage or bridge would be highly prejudicial to the navigation of the river and the towing-path, and would, in particular, offer a considerable impediment to navigation by compelling all vessels to lower their masts; that the deponent could not say to what extent the temporary bridge might hurt the towing-path, and therefore that irreparable injury might ensue, if the work were not done under the control of the undertakers.

Mr. Burke by his affidavit stated that the permanent bridge could not be erected unless the materials could be carried across for the purpose of making the embankment; but that it was not intended to make the temporary bridge the means of carrying materials across when the permanent bridge was built. He also stated that temporary bridges had been erected for the like purpose in other cases.

Mr. Simpkinson and Mr. Bacon, for the motion, said that the injunction had been obtained on insufficient grounds, there being no affidavit as to irreparable injury to the undertakers. They also contended that the railway company had a right to make all expedient and reasonable erections for effecting and completing the work;

(*a*) 2 & 3 Vict. c. 55, s. 89. "And whereas the said river Calder, at the said place where the same is intended to be crossed, near Broad Reach, pursues a circuitous course: and whereas by making the alteration in the course of the said river hereby authorized the navigable channel of the river will be rendered shorter and more direct, and made so as to avoid being crossed more than once by the said railway and it will not be necessary to erect the two most easterly bridges required by the said first recited act to be erected over the same;" be it therefore enacted, "That in case the course of the said river Calder shall be diverted under the powers hereinbefore contained, so as to prevent the said navigation from being crossed more than once by the said railway, then and in such case the said railway company shall not be required to make and construct more than one bridge over the said river Calder, at the place of crossing the same, near Broad Reach aforesaid, of such dimensions and character as by the said first recited act is required, but shall be at liberty to make the said railway upon an embankment in and across the present channel of the said river; provided always that notice of the commencement of the works hereinbefore, or in the said first recited act authorized to be performed by the said company connected with the said navigation or with the said bridge, shall from time to time be given by the said company to the said undertakers or their engineer, seven days, at least, before the commencement thereof."

and that the restrictions in the 34th and 42nd sections of the first statute applied only to permanent bridges. They relied on the 94th section of the first act, and cited *London and Birmingham Railway Company* v. *Grand Junction Railway Company* (Nichol, Hare, and Carrow, 224), and commented on the reasoning of the Lord Chancellor in that case.

[71] Mr. Boteler, Mr. Stuart, and Mr. Wood, contrà, contended that the railway company had no right to do what was convenient, but only what was necessary for their project; that the purpose to which the temporary bridge was now devoted was not the original purpose, but the result of an after thought; that there was no authority under the acts to obstruct the navigation for any general purpose connected with the concern; that the company had no right to make a temporary bridge at all, either by virtue of the acts, or consistently with the agreement which they had entered into; that the acts, by providing for permanent bridges, excluded temporary ones; that supposing, however, the company had power to build a temporary bridge for one purpose, they could not add to that another purpose inconsistent with the acts; and that if it could be shewn, as it was here, that what they were going to do was unlawful for one purpose, and not indispensable to the other, the injunction must remain. They contended that the 94th section of the first act had nothing to do with the case, and that the rights of the company were comprised in the 34th and 38th sections. They cited *Blakemore* v. *Glamorganshire Canal Company* (1 Myl. & K. 154), *River Dun Navigation Company* v. *North Midland Railway Company* (Nichol, Hare & Carrow, 135), *Lee* v. *Milner* (ante, vol. 2, p. 611), *Kemp* v. *London and Brighton Railway Company* (Nichol, Hare & Carrow, 495), and they relied on the observations of the Lord Chancellor in the case cited on the other side; contending that the very point which his Lordship said was not in dispute in that case, namely the obstruction to the navigation, was the main question here. [Alderson, B., in the course of the argument, said that there was no such irreparable injury proved as would warrant an injunction to restrain the erection of the bridge; and that if an injunction lay at all in such a case, it could only be for restraining **[72]** the use of the bridge in a particular way; that the agreement had nothing to do with the case, as the land there mentioned was only the land between the two extremities of the new cut; and that, under the circumstances, he thought the company, acting bonâ fide, might use the bridge for a double purpose, if there was no further obstruction to the navigation than if they had it used for a single purpose.]

ALDERSON, B. The case has been fully argued; and I have had the opportunity of considering it since the last day of sitting, subject to any alteration of my opinion which might arise from the arguments of to-day. I do not, however, feel it necessary to take time for further consideration; for I must confess I have a strong opinion upon the point in question.

It appears from the act establishing the company that the 3rd section gives them the general powers of carrying the railway into execution. Then the 94th section, which must be taken as incorporated in the subsequent acts, may be adverted to in the first instance for the purpose of seeing the powers which the company had in relation to the works.

Now the 94th section gives them power to enter the lands of all persons, under the provisions and subject to the restrictions of the act, and to make and construct a variety of works, bridges, tunnels, and embankments, either temporary or permanent, as they shall think proper. Therefore they had power (not, to use the language of the Lord Chancellor, an arbitrary or capricious power), but a power to be exercised judiciously by them, as reasonable and skilful men, judging of the necessity of the case, to erect any works for the purpose of the undertaking. And in considering whether such a bridge is built as reasonable and skilful men exercising a proper judgment would build, we must remember that these bridges are built in a railway, and **[73]** it must be considered, with reference to that circumstance, whether it is such as the company, executing their power fairly and discreetly, are competent to build. Now, when one sees a bridge in a railway near an embankment on one side and the other, it is not unreasonable to say that the railway company should have the advantage of erecting the embankment as well as the railway; and we ought not to regard the bridge as erected on the ordinary plan of bridges, but of bridges in railways, the essential qualities of which are, that they should be level and within a certain compass. Now the 94th section gives the company power to erect bridges,

subject to the previous restrictions in the act; and if this bridge is not within the restrictions prescribed by the antecedent parts of the act, the injunction ought to be continued. But subject thereto, the provisions of the 94th section ought to be carried into execution.

Now, what are the restrictions in the act of parliament? The first material one is in the 34th section. According to that section, the company in crossing the river Calder are not to cross it in their discretion in any way convenient for the purpose of the railway, but in such way and under such restrictions as the Railway Act says are not impediments to the navigation: therefore the act of Parliament gives a particular requisition, "that they shall at their own expense, under the inspection of the engineer of the undertaking, and according to plans to be submitted to and approved by the respective engineers of the said undertakers and the said railway company, make and execute at each of the said crossings (over the river Calder) a good and substantial bridge of stone, brick or iron, of three arches, over the said river, and the towing-paths thereof respectively, with proper approaches thereto, with perpendicular foundation walls to such bridges, and without any projections under water" —thereby making the water-way **[74]** complete, perpendicular, and full as it was before, and the towing-path free and accessible.

Now that section enables the party to make a particular sort of bridge. That may be well consistent with the 94th section. Though it is a particular sort of bridge; yet the company in building it may be guided by the provisions of the 94th section, and have the power of uniting it with the embankments on either side, which are to be part of the railway. Therefore the two sections stand together.

But then we find another restriction imposed by the 38th section; because it occurred to the legislature that although, when the bridge was constructed, the Aire and Calder navigation would have three arches, which would give a large water-way; yet the building of them might leave a considerable obstruction to the navigation: therefore the legislature determined that there should be a limited obstruction, even during the period of making the bridge. Now the most ordinary observer must have noticed that bridges cannot be erected without centres, before the key-stone is put in to support the arch. Then, inasmuch as by the 34th section the underside of the opening at the key-stone was described as "not being less than thirty feet above the ordinary level of the water," it occurred to the legislature that it could not be possible during the erection to leave so high a water-way, and that possibly, unless some temporary erection were permitted, the builders might erect piles to support the centres, and bring the centres so low as to materially impede the navigation; and therefore by the 38th section they enacted that the company should, during the construction of the bridges, or the necessary repairs thereof, leave an open, uninterrupted navigable water-way of not less than thirty feet in width and twenty feet in height, above the ordinary surface water, if the undertakers should consider it necessary; and further, they provided that the towing-paths, where convenient, should re-**[75]**-main, and a space should be left during the construction, sufficient to prevent damage to the adjacent lands. That was the 38th clause, and with the exception of the 38th and 34th clauses, there are no clauses material as to the construction of the bridges. The substance of these enactments is that the company may construct bridges in a particular manner over the river, and may obstruct the river (in the progress of their works), provided they leave a sufficient quantity of water.

Then come the 32nd and 44th sections, which protect the rights of the Aire and Calder Navigation Company. By the latter section it is enacted that nothing shall affect the rights of the undertakers, or authorize or empower the railway company to obstruct the navigation of the river, or to divert the waters, "save as hereinbefore provided;" that is to say, except during the time mentioned in the 38th section. Therefore, if the undertakers shew that the temporary bridge is not for the purpose of making a permanent bridge, or that it is so constructed as to encroach on the towing-path, or not to leave a water-way of thirty feet by twenty, or not a sufficient space besides that, so as to carry off the water of the river, it would be an "apparatus," which, though coming under the 94th section, could not, coupling the 94th section with these, be permitted to be erected. But I apprehend it comes within the required conditions; that is to say, that it is for the purpose of erecting a permanent bridge, and that it does leave sufficient water-way within the meaning of these sections; and if all these circumstances concur, then the only question is whether the circumstance

of its being also used for some other purpose, for which alone it would not be competent to use it, is to make any difference in the present case. Now, if that further use made it more inconvenient to the Aire and Calder Navigation Company than if it were only used for one purpose, I think there [76] would be ground for the interference of the Court against the railway company; and taking that to be the principle of the present decision, let us look to the affidavits to see whether they shew any such inconvenience.

From the affidavits, taking them altogether, it appears that the bridge is constructed and used for the purpose of carrying materials from the Fairies' Hill works, to increase the embankment. According to Burke's affidavit, it is to be used both for that purpose and also for making the permanent bridge. This affidavit is material. He says also this is the way in which they have constructed bridges in other places. There was no suggestion of mala fides then, and yet the construction was the same as on the present occasion. I own I think the circumstance of the same plan having been pursued on several occasions is strong to shew that this is a bonâ fide erection.

But it is said there are several circumstances to shew that this was not bonâ fide, and the plaintiffs rely on the negotiation which took place between the parties, which ended in an agreement, into which a clause was sought to be introduced which was struck out; and they say that such clause was for making temporary bridges for embankments. Now treating it as general, for the purpose of making embankments—treating it so, I do not think it competent for the company to erect temporary bridges for the purpose of making embankments if, in carrying over the materials for that purpose, they obstruct the navigation of the Aire and Calder; but that they may do so, if having already a right to obstruct the navigation by building temporary bridges, they do not by using those bridges for raising embankments make any additional obstruction; and in this I think that this case differs from the case before the Lord Chancellor. There his Lordship held that the Birmingham Railway had the power to erect temporary bridges, on the condition that they should not obstruct the navi-[77]-gation. In this case it seems to me that the company have no right to make any bridge for any other purpose than that of carrying into effect the works which they are allowed to make; but that in carrying those works bonâ fide into effect, they may use the bridge for another purpose, if the consequence is no further impediment to the navigation. As to the other question, it seems to me that the clause was very properly struck out, but that this circumstance does not affect the previous question, which goes entirely on whether they can make the temporary bridge, and use it bonâ fide without obstructing the navigation.

I come, therefore, to the conclusion that this bridge was reasonably and bonâ fide erected for the double purpose, and that as the double purpose produces no more inconvenience at present than the single purpose would, the injunction must be dissolved. But if the company keep the temporary bridge after the erection of the other, or in any manner malâ fide, they will be in a situation of difficulty. It appears to me, however, at present that the shorter the time the bridge takes in erecting, the shorter the time the navigation will be obstructed; and that by removing this temporary bridge, the permanent bridge would be longer in erecting.

Injunction dissolved.

[78] IN THE CHANCERY OF THE DUCHY OF LANCASTER.

BEFORE THE RIGHT HON. LORD HOLLAND, CHANCELLOR OF THE DUCHY, MAULE, J., AND ROLFE, B.

SCARISBRICK *v.* LORD SKELMERSDALE. Jan. 9th, 10th, Feb. 4th, May 28th, 1840. —Testator being possessed of three estates, called S., W., and E., devised them to trustees upon trust as to the S. and W. estates, by such assurances as counsel should advise, and as far as would be consistent with the rules of law and the general purport of his will, to convey them to the uses following:—That is to say, as to his S. estate, to the use of his eldest son T. for life, with remainder to T.'s first and other sons successively, in tail male; with like limitations in remainder to the testator's second and third sons W. and C., and every other subsequently born son of the testator, and their issue, with remainder to the first and other

sons of the testator's sons successively in tail, with remainder to the daughters of the testator's sons successively in tail, with remainder to the testator's eldest daughter A. for life, with remainder to her first and other sons in tail male, with remainder to her first and other sons in tail, with remainder to her daughters as tenants in common in tail general, with like limitations in remainder to the testator's other daughters and their sons and daughters: and as to his W. estate, to the use of the testator's second son W. for his life, with remainder to his first and other sons in tail male, with like limitations in remainder to the testator's third son C., and every other subsequently born son of the testator and his issue, with remainder to the use of the testator's eldest son T. for life, with remainder to his second and other sons in tail male, with remainder to his first or only son in tail male, with remainder to the first and other sons of the testator's sons successively in tail, with remainder to the daughters of the testator's sons successively in tail, with remainder to the use of the testator's second, third, and fourth daughters, M., E., and C., and every other subsequent daughter, for their lives, with remainder to the use of their sons and daughters, for such estates and in such order as had been declared concerning the S. estate, with remainder to the testator's eldest daughter A. for life, with remainder to her sons and daughters, &c., with remainder over. As to the E. estate, the testator declared that the trustees should, by sale or mortgage thereof, levy and raise certain sums for the payment of debts, &c., and that in case the value of that estate, after such charges, should not exceed £15,000, the trustees were to stand possessed of the residue in trust for the testator's said son C., or such subsequently born son of the testator as should first attain twenty-one years, and his heirs; and in case the testator should leave only two sons, in trust for the eldest and his heirs; but in case the E. estate, after such charges, should be worth more than £15,000, then it should be and remain to the use of the testator's third son C., and every other subsequently born son of the testator successively during his life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the testator's eldest son T. for his life, with remainder to T.'s first and other sons in tail male, with remainder to the testator's second son W. for life, with remainder to W.'s first and other sons in tail male, with remainder to the first and other sons of the testator's sons in tail, with remainder to the first and other daughters of the testator's sons in tail, with remainder to the testator's third and fourth daughters E. and C., and every other subsequently born daughter of the testator successively for their lives, with remainder respectively to their sons and daughters, in like manner as had been declared concerning the S. estate, with remainder to the testator's first and second daughters A. and M. respectively, for their respective lives, with remainder respectively to their sons and daughters in like manner as had been declared concerning the S. estate, with remainders over. The will contained directions that the persons taking the S. estate should take the name and arms of S., and persons taking the W. estate the name and arms of D. The testator also declared that, in the settlement so proposed to be made, there should be a proviso that, if by virtue of the said settlement the said C., or any of the testator's subsequently born sons, or his said daughters E. and C., or any of his subsequently born daughters, or any issue male of the respective bodies of his said sons or daughters should become actually entitled to the possession or receipts of the rents, issues, and profits of the W. estate, and any younger son or daughter of the testator's body, or their issue, should be then living, then and so often as the same should happen, the uses to be limited in the said settlement of the E. estate to the son or daughter who or whose issue should so become entitled as aforesaid, and to his or her issue should absolutely cease; but in the said proviso for shifting, it should be declared that if by virtue thereof the E. estate should have shifted to any of the testator's other sons or daughters, or their issue, and there should afterwards be a failure of issue of all his sons or daughters who should be younger than the sons or daughters from whom or from whose issue the same should have so shifted, then the said E. estate should return to the uses, and be held in the manner in which the same would have gone and been held if this proviso for shifting were not to be inserted. The testator's son W. died in his lifetime; and accordingly, upon the testator's death, his third son C. took the W. estate. The value of the E. estate, after payment of all charges, was upwards

of £15,000: Held, that C., notwithstanding his accession to the W. estate, was entitled to retain the E. estate as against the eldest son T.; for that when he became entitled to the W. estate, there was not in the usual sense of the word any "younger" son or daughter of the testator's body, or any issue of such then living, and that the Court could not construe the word younger in any other than the usual sense; the principal intention of the testator not being to provide for his children generally, but in the persons of his three sons to create three families who should hold his three estates.—When a real estate is so settled that it must on the death of a parent go to his eldest son, and provision is made by that parent or by any person in loco parentis, whether by settlement in contemplation of marriage, or by will, for the younger children of such parent, Courts of Equity have considered the presumption that it was intended to make provision for all the children so strong as to warrant it in holding that by the word "younger" must have been intended all except the one child who succeeds to the estate. But this does not apply to the case of a will in which the primary intention of the testator appears to have been to found certain families, or to do something beyond merely making a provision for children. And the circumstance that the will is of an executory nature will make no difference.—Semble, that when the Chancellor of the Duchy of Lancaster reverses or varies the decrees of the Vice-Chancellor of the County Palatine, he does so in the exercise of an appellate jurisdiction; but whether that jurisdiction be appellate or otherwise, the party complaining of the decree of the Court below is not barred by lapse of time, if he present his petition to vary it within twenty years after the decree was pronounced.—Statement of the practice of the Court of Chancery as to the time within which petitions for rehearings and bills of review may be filed.

[Affirmed nomine *Wilbraham* v. *Scarisbrick*, 1847, 1 H. L. Cas. 167. Referred to, *Tennison* v. *Moore*, 1858, 13 Ir. Eq. R. 436. Applied, *Maddison* v. *Chapman*, 1859, 3 De G. & J. 542; *Sandeman* v. *Mackenzie*, 1861, 1 J. & H. 628; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 832: affirmed nomine *Law Union and Crown Insurance Company* v. *Hill*, [1902] A. C. 263. Adopted, *Meredith* v. *Treffry*, 1879, 12 Ch. D. 170.]

Thomas Eccleston, by his will, dated the 14th of October, 1806, and duly executed so as to pass freehold es-**[79]**-tates, after reciting that he was seised of or well entitled to several manors, messuages, lands, tenements and hereditaments in the county of Lancaster, for an estate of inheritance in fee simple in possession, subject to certain incumbrances; and also reciting that under the will of his late uncle, William Dicconson, Esquire, he was entitled to the manor of Wrightington, in the said county of Lancaster, and to several messuages, lands, tenements, and hereditaments in Wrightington aforesaid, and in Parbold, or elsewhere in the same county of Lancaster, for an es-**[80]**-tate of inheritance in fee simple in remainder expectant on the decease of Edward Dicconson, Esquire (the brother of the said William Dicconson), and failure of issue male of his body, devised all the manors, messuages, lands, tenements, and hereditaments of or to which he was so seised or entitled (but subject as thereinbefore mentioned), unto and to the use of Edward Wilbraham Bootle, afterwards Lord Skelmersdale, and the Reverend Streynsham Master, their heirs and assigns, upon the trusts following; that is to say, as to his manor of Scarisbrick, and all his messuages, lands, and hereditaments, &c., which he called his Scarisbrick estate; and as to the said manor, messuages, lands, tenements, and hereditaments, late of the said William Dicconson, and to which he was so entitled in remainder as aforesaid, and which he called his Wrightington estates, upon trust that they the said Edward Wilbraham Bootle and Streynsham Master, and the survivor of them, and the heirs and assigns of such survivor, should by such assurances in the law, and in such manner as they or he should think fit, and as counsel should advise, convey and assure the said manors and other hereditaments, so and in such manner as that the same (as far as the rules of law and equity and the circumstances of the case would admit, and as would be consistent with the general purport and meaning of his will) might go, remain, and be to the uses and upon and for the trusts, intents and purposes thereinafter expressed concerning the same; that is to say, as to his said Scarisbrick estate, to the use and intent that his wife Eleanor Eccleston and her assigns might, during her natural life,

receive out of the said estate an annual sum of £600, with the usual powers of distress and entry, and perception of rents and profits for compelling payment thereof, and the same to be in bar of dower; and subject thereto, the said last mentioned estates should by the said intended settlement be settled to the use of the said Edward Wilbraham Bootle and Streynsham Master, their ex-[81]-ecutors, administrators, and assigns, for the term of 1000 years upon the trusts thereinafter expressed, and after the expiration of the said term of 1000 years, and in the mean time subject thereto, to the use of testator's eldest son, Thomas Eccleston (then called Thomas Scarisbrick), and his assigns for his life, and after his decease to the use of the first and every other son of the said Thomas Scarisbrick successively in tail male, and for default of such issue, to the use of testator's second son, William Eccleston, and his assigns for life, and after his decease, to the use of the first and every other son of the said William Eccleston successively in tail male, and, for default of such issue, to the use of testator's third son Charles Eccleston, and every other subsequently born son of testator's body successively in the order of his birth during his life, and after his respective decease, to the use of his respective first and other sons successively in tail male, and for default of such issue, and after the respective decease of each of the testator's said sons, to the use of his first and every other son successively in tail, but so that the respective son or sons of the eldest of testator's said sons, and such their respective issue as aforesaid, should, after his or their respective parent's decease, take before the respective son or sons of the younger of testator's said sons and their respective issue as aforesaid, and for default of such issue, and after the respective decease of each of testator's said sons, to the use of his first and every other daughter successively in tail, but so that the respective daughter or daughters of the eldest of testator's said sons, and such their respective issue as aforesaid, should after her or their respective parent's decease, take before the respective daughter or daughters of the younger of testator's said sons and their respective issue as aforesaid, and for default of such issue to the use of trustees and their heirs, to be named by the said Edward Wilbraham Bootle and Streynsham Master, or the survivor of them, or the heirs or assigns of such survivor, dur-[82]-ing the life of testator's eldest daughter, Ann Eccleston, in trust, to apply the rents of the said last-mentioned estates to the separate use of the said Ann Eccleston during her life, and after her decease, to the use of the first and every other son of the said Ann Eccleston successively in tail male, and for default of such issue, to the use of the first and every other son of the said Ann Eccleston successively in tail, and for default of such issue, to the use of the daughters of the said Ann Eccleston as tenants in common in tail with cross remainders between them in tail; and if all the said daughters of the said Ann Eccleston, except one, should die without issue, or there should be but one such daughter, to the use of such one or only daughter in tail, and for default of such issue, to the use of the same trustees and their heirs during the life of testator's second daughter, Mary Eccleston, &c. [Here followed limitations in favour of Mary Eccleston, and the testator's third daughter, Elizabeth Eccleston, and their issue in precisely the same terms as the limitations in favour of Ann Eccleston and her issue.] And for default of such issue, to the use of the same trustees and their heirs during the respective lives of testator's fourth daughter Catherine Eccleston, and every other successively born daughter of testator's body, in trust to apply the rents of the said estates to the separate use of the said Catherine Eccleston, and every other of testator's subsequently born daughters successively, in order of her birth during her life; but so that after the respective decease of each such daughter, the said estates should remain to the use of her respective first and other sons successively in tail male, and for default of such issue, to the use of her respective first and other sons successively in tail, and for default of such issue, to the use of her respective daughters as tenants in common in tail with cross remainders between them in tail; and if all the said daughters except one should die without issue, or there should be but one such daughter, to the use of such one or [83] only daughter in tail; and for default of such issue to the use of Arthur Aston (a stranger), with remainder to his first and other sons in tail, with other remainders over in strict settlement for the benefit of strangers, with the ultimate remainder to the use of testator's right heirs.

The will then directed that the settlement should contain a proviso that all persons who, by virtue of the limitations to be therein contained, should become entitled to the rents, issues and profits of the Scarisbrick estate, and all persons marrying females

becoming entitled as aforesaid, should take and use the name and arms of Scarisbrick only.

Then followed a declaration of the trusts of the term of 1000 years, which were amongst other purposes for payment of the annual sum of £600 to the testator's wife, Eleanor Eccleston, and of certain annuities of £100 each to the testator's daughters in addition to the portions thereinafter provided for them.

And as to the said Wrightington estate, the testator directed that the said Edward Wilbraham Bootle and Streynsham Master, and the survivor of them, and the heirs and assigns of such survivor, should in such manner as thereinbefore mentioned convey and assure the same to the use of the said Edward Wilbraham Bootle and Streynsham Master, their executors, administrators and assigns for the term of 2000 years, upon the trusts thereinafter expressed concerning the same; and after the expiration of the said term of 2000 years, and in the mean time subject thereto, to the use of testator's second son, William Eccleston and his assigns for life, and after his decease, to the use of the first and every other son of the said William Eccleston successively in tail male; and for default of such issue, to the use of testator's said third son, Charles Eccleston, and every other subsequently born son of testator's body successively in order of his birth, during his life; and after his respective decease to the use of his respective first and **[84]** other sons successively in tail male; and for default of such issue, to the use of testator's said eldest son Thomas Scarisbrick, and his assigns, for life; and after his decease to the use of the second and every other son of the said Thomas Scarisbrick successively in tail male; and for default of such issue, to the use of the first or only son of the said Thomas Scarisbrick in tail male; and after the decease of each of testator's said sons, taking in such order as last thereinbefore is mentioned, to the use of the first and other sons of the said testator's sons successively in tail; but so that the respective son or sons of the eldest of such sons, and such their respective issue as aforesaid, should always, after his or their respective parent's decease, take before the respective son or sons of the younger of such sons and their respective issue as aforesaid, and for default of such issue and after the respective decease of each of testator's said sons taking in such order as aforesaid, to the use of his first and every other daughter successively in tail; but so that the respective daughter or daughters of each of testator's sons, first taking in such order as aforesaid, and such their respective issue as aforesaid, should always, after her or their respective parent's decease, take before the respective daughter or daughters of the son or sons, to take next in such order as aforesaid, and their respective issue as aforesaid; and for default of such issue to the use of trustees and their heirs during the respective lives of testator's said second, third and fourth daughters, Mary Eccleston, Elizabeth Eccleston and Catherine Eccleston, and every other subsequently born daughter of his body; in trust to apply the rents and profits of the said last-mentioned estates to the separate use of the said Mary Eccleston, Elizabeth Eccleston, Catherine Eccleston, and every other subsequently born daughter of his body successively in order of her birth during her life; but so that after the respective decease of each of such daughters taking in such **[85]** order as aforesaid, the last-mentioned estates should remain to the use of her respective sons and daughters in such order and for such estates as thereinbefore expressed in their regard with respect to testator's said Scarisbrick estate; and for default of such issue to the use of the said last-mentioned trustees and their heirs during the life of testator's said eldest daughter, Ann Eccleston, in trust to apply the rents and profits of the said Wrightington estate to the separate use of the said Ann Eccleston during her life; and after her decease, to the use of her sons and daughters in such order and for such estates as thereinbefore expressed in their regard with respect to testator's said Scarisbrick estate; and for default of such issue to the use of Peregrine Townley (a stranger), with remainder to his first and other sons in tail, and with several other remainders over in strict settlement for the benefit of strangers, with the ultimate remainder to the use of testator's right heirs.

The will then provided that, "in the said settlement shall be contained a proviso that if by virtue of the limitations contained therein the said William Eccleston and Charles Eccleston, or any of my subsequently born sons, or my said daughters, Mary Eccleston, Elizabeth Eccleston, and Catherine Eccleston, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters, shall become actually entitled to the possession or to the receipt of the rents, issues

and profits of my said Scarisbrick estate, and any younger son or daughter of my body, or any issue of such younger son or daughter, shall be then living, then and in that case and so often as the same shall happen, as well the uses to be limited in the said settlement in my said Wrightington estate, as the annual sum of £500 hereinafter directed to be made payable to the child who or whose issue shall so become entitled as aforesaid, and to his or her issue, shall absolutely cease; but in the said proviso for shifting it shall be declared [86] that if by virtue thereof my said Wrightington estate shall have shifted to the said Charles Eccleston or any of my subsequently born sons, or to the said Elizabeth Eccleston or Catherine Eccleston, or any of my subsequently born daughters, or any issue of the respective bodies of my said sons or daughters, and there shall afterwards be a failure of issue of all my sons or daughters who shall be younger than the son or daughter from whom or from whose issue the same shall have so shifted as aforesaid, then and in that case my said Wrightington estate shall return, be, and remain to the uses and be held in the manner in which the same would have gone and been held if the proviso for shifting the same were not inserted."

The will then contained a clause that William Eccleston and all persons who, by virtue of the limitations in the settlement, should become entitled to the receipt of the rents and profits of the Wrightington estate, or marry the females so becoming entitled, save and except his eldest son, Thomas Scarisbrick and his issue, should within one year after so becoming entitled or marrying, take the name and arms of Dicconson only.

The will then declared that the term of 2000 years was to be limited to the trustees in the first place for securing by usual ways and means money for the payment of such of the testator's funeral expenses, debts, and legacies as his personal estate and the other funds thereinbefore or thereinafter provided for that purpose would not be sufficient to pay and satisfy, and in the next place as an ulterior or auxiliary security for the payment of the sums of £5000 thereinafter directed to be raised for his daughters, and his fourth and other subsequently born sons out of the estates thereinafter directed to be sold; and in the next place, if no part of the Eccleston estate thereinafter devised should remain after answering the trusts and purposes thereinafter declared concerning the same, or if the part which should [87] remain of the same should be under the value of £10,000 (valuing the same at twenty-five years' purchase on the net rents, exclusively of the land-tax), then as the case might be, in trust, by the usual ways and means to raise the sum of £10,000, or such a sum of money as should make the value of the remaining estate equal to the sum of £10,000, and pay and apply the same to his said son, Charles Eccleston, his executors, administrators, and assigns; but in case his said son, Charles Eccleston, should die under the age of twenty-one years without leaving lawful issue, then to such subsequently born son of the testator's body as should first attain the age of twenty-one years, or die under that age leaving lawful issue, his executors, administrators, or assigns, but without interest in the mean time; and, in the next place, in trust to pay any child of the testator's body or the issue of such child who, under the limitations of the said settlement, should for the time being be entitled to the possession or to the receipts of the rents, issues, and profits of his said Wrightington estate, and who having obtained his or her age of twenty-one years, should be under his or her age of twenty-five years, an annual sum of £500, until he or she should attain his or her age of twenty-five years, or depart this life under that age; the said annual sum of £500 to be paid by equal quarterly payments, and the first quarterly payment of the same to be made at the expiration of three calendar months next after he or she should so become entitled; and in the next place in trust to receive the surplus which should remain of the rents, issues, and profits of the hereditaments and premises comprised in the said term of 2000 years, after answering the trusts and purposes aforesaid, as well during the minority and respective minorities of every person so for the time being entitled as aforesaid, as during such time as any child of the said testator's body, so for the time being entitled as aforesaid, should be under the age of twenty-five years, and to accu-[88]-mulate the same in manner thereinbefore mentioned, and at the end of every or any such period of accumulation to apply the fund so accumulated in or towards the payment of his funeral expenses, debts, and legacies.

And as to all the testator's said manor of Eccleston, and all his messuages, lands, tenements, and hereditaments in Eccleston, &c., which he called his Eccleston estate;

and as to all other the hereditaments thereinbefore devised by him, the trusts of which were not thereinbefore declared, he declared his will and mind to be that the said Edward Wilbraham Bootle and Streynsham Master, and the survivor of them, and the heirs and assigns of such survivor, should, by sale or mortgage of the same, or of a competent part thereof, and by and out of the rents and profits thereof, in the mean time levy and raise such sum or sums of money as they or he should think proper or expedient to levy and raise for the payment of the testator's funeral expenses, debts, or legacies; and should pay and apply the same in or towards the satisfaction of his said funeral expenses, debts, and legacies accordingly; and, in the next place, should raise and pay the sum of £5000 a-piece for the fourth and every subsequently born son of the testator's body, and the like sum of £5000 for each of his daughters, to be interests vested in respect to a son or sons at his or their age or respective ages of twenty-one years, and in respect to a daughter or daughters at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen, but without any right or benefit of survivorship, and not to be attended with interest till the same respectively should be vested. And the testator declared that in case the whole of his said Eccleston estate should not be sold or mortgaged for the purposes aforesaid, and the residue thereof, after the trusts and purposes thereinbefore directed should have been answered, should not exceed the value of £15,000, valuing the same as before mentioned, or in case the whole **[89]** should have been sold or mortgaged for the purposes aforesaid, then if the residue of the monies to arise from such sale and the equity of redemption of the estates so mortgaged, after the trusts and purposes thereinbefore directed, should have been answered, should not exceed the sum of £15,000; the said Edward Wilbraham Bootle and Streynsham Master, and the survivor of them, and the heirs and assigns of such survivor, should stand and be seised, possessed of, and interested in, the residue of such estate or of such monies respectively as the case might be, in trust for the testator's said son, Charles Eccleston, or such subsequently born son of the testator's body as should first attain his age of twenty-one years, or die under that age, leaving lawful issue, his heirs, executors, administrators, and assigns, respectively; and in case the testator should leave only two sons, in trust for the eldest of such sons, his heirs, executors, administrators, and assigns respectively; but in case such residue of his said Eccleston estate, or of such monies respectively, should exceed £15,000, then he directed that such parts of such residue as should consist of money should be laid out by the said trustees, or the survivor of them, or the heirs or assigns of such survivor, in the purchase of freehold or copyhold lands of inheritance in England, and that as well the lands so to be purchased as such part of such residue of his said Eccleston estate as should not have been sold, and the equity of redemption of such part thereof as should have been mortgaged, should thenceforth go and remain to the use of his the testator's said third son Charles Eccleston, and every other subsequently born son of the testator's body successively, in the order of his birth during his life, and after his respective decease to the use of his respective first and other sons successively in tail male; and for default of such issue, to the use of his the testator's eldest son, Thomas Scarisbrick and his assigns, for his life, and after his de-**[90]**-cease to the use of the first and every other son of the said Thomas Scarisbrick successively, in tail male; and for default of such issue, to the use of his the testator's second son, the said William Eccleston, and his assigns, for his life and after his decease, to the use of the first and every other son of the said William Eccleston, successively, in tail male; and for default of such issue, and after the decease of each of the testator's said sons taking in such order as last thereinbefore was mentioned, to the use of his first and other sons successively in tail, but so that the respective son or sons of the eldest of such sons, and such their respective issue as aforesaid, should always after his or their respective parent's decease take before the respective son or sons of the younger of such sons and their respective issue as aforesaid; and for default of such issue, and after the respective decease of testator's said sons, taking in such order as aforesaid, to the use of his first and every other daughter successively in tail, but so that the respective daughter or daughters of each of testator's said sons, first taking in such order as aforesaid, and such their respective issue as aforesaid, should always after her or their respective parent's decease take before the respective daughter or daughters of the son or sons to take next in such order as aforesaid, and their respective issue as aforesaid; and for default of such issue, to the use of the said trustees and their heirs,

during the respective lives of testator's said third and fourth daughters, Elizabeth Eccleston and Catherine Eccleston, and every other subsequently born daughter of testator's body, in trust, to apply the rents and profits of the said hereditaments to the separate use of the said Elizabeth Eccleston, Catherine Eccleston, and every other subsequently born daughter of testator's body successively, in the order of her birth during her life; but so that after the respective decease of each such daughter taking in such order as aforesaid, the said last-mentioned estates should be and remain to the use of her respective **[91]** sons and daughters in such order and for such estates as were therein before expressed in their regard with respect to testator's said Scarisbrick estate; and for default of such issue, to the use of the last-mentioned trustees and their heirs during the respective lives of testator's said first and second daughters, Ann Eccleston and Mary Eccleston, in trust to apply the rents and profits of the said hereditaments to the separate use of the said Ann Eccleston and Mary Eccleston during their respective lives; but so that after the respective decease of each such daughter taking in such order as aforesaid, the said last-mentioned estates should remain, to the use of her respective sons and daughters in such order, and for such estates as were thereinbefore expressed, in their regard with respect to testator's said Scarisbrick estate. With divers remainders over, and with the ultimate remainder to the use of testator's right heirs.

The will then proceeded: "And in the said settlement shall be contained a proviso that if by virtue of the said settlement the said Charles Eccleston, or any of my subsequently born sons, or my said daughters, Elizabeth Eccleston and Catherine Eccleston, or any of my subsequently born daughters, or any issue male of the respective bodies of my said sons or daughters, shall become actually entitled to the possession or to the receipt of the rents, issues, and profits of my said Wrightington estate, and any younger son or daughter of my body, or any issue of such younger son or daughter shall be then living, then and so often as the same shall happen, the uses to be limited in the said settlement in the said hereditaments, at Eccleston, to the son or daughter who or whose issue shall so become entitled as aforesaid, and to his or her issue shall absolutely cease; but in the said proviso for shifting it shall be declared that if by virtue thereof the said hereditaments at Eccleston shall have shifted to any of my other sons or daughters, or any issue of their respective bodies, and there **[92]** shall afterwards be a failure of issue of all my sons or daughters who shall be younger than the son or daughter from whom or from whose issue the same shall have so shifted as aforesaid, then and in that case the said hereditaments at Eccleston shall return, be, and remain to the uses and be held in the manner in which the same would have gone and been held if this proviso for shifting the same were not to be inserted."

The will then contained clauses giving the usual powers of jointuring and charging portions to the respective tenants for life of the Scarisbrick, Wrightington and Eccleston estates. It likewise provided for the appointment of new trustees, and for the indemnity of the trustees under the settlement; and it contained a general clause authorizing the introduction of all ordinary powers and provisoes into the settlement "not inconsistent with the general scope and true intent and meaning" of the will, or such as the executors or their counsel "should think it advisable to insert for the advantage of the persons beneficially interested under the said settlement, or for explaining the same or effectuating the general object and purpose thereof."

The testator's son William died in his father's lifetime, without issue. Shortly after this event, the testator made a codicil to his will, by which he gave to his wife and daughters certain annual sums in addition to what he had given to them by his will, and directed those additional sums to be charged and chargeable in like manner, in all respects, and payable at such times as the annual sums given to them by his will. And the testator, after giving a further legacy of £200 to his wife, thereby confirmed his will in all respects, so far as the same was not altered by the recent death of his son William.

The testator died on the 1st November, 1809, leaving his widow and the several children named in his will, **[93]** except William, surviving him. The order of these children, according to their seniority, was as follows:—Thomas, Ann, Mary, Elizabeth, Catherine, and Charles. William had been the youngest child but one. The testator had never had any other issue.

Thomas Scarisbrick, shortly after his father's decease, obtained the King's license

to use the name and arms of Scarisbrick; and about the same time the like license was obtained for Charles Eccleston, then an infant, to use the name and arms of Dicconson.

In September, 1815, the trustees filed a bill in the Court of Chancery of the Duchy of Lancaster, against the widow and children of the testator, praying that the will might be established, and the trusts thereof carried into execution. In that suit the registrar made his report, by which he found that the clear value, according to the computation directed by the will, of the Eccleston estate, not sold or mortgaged for the purposes specified in the will, and after answering the trusts of the will, exceeded the sum of £15,000. By an order of the Vice-Chancellor of the Duchy, made in the same suit, upon the petition of Thomas Scarisbrick, dated the 9th January, 1823, it was declared that the estates given by the will of the testator to Charles Dicconson and his issue, in the residue of the Eccleston estate, never took effect, the testator's son William having died in the lifetime of the testator; and that the said Thomas Scarisbrick, upon the death of the testator, became entitled for his life to the residue of the Eccleston estate; and also to the leasehold estates, if any, which by the testator's will were directed to be settled in like manner as the Eccleston estate; and the Court decreed the same accordingly.

In July, 1833, Thomas Scarisbrick died without issue, and thereupon Charles Dicconson entered into possession and receipt of the rents and profits of the Scarisbrick **[94]** estate, and obtained a license from the Crown to use the name of Scarisbrick. He also presented the present petition of appeal to the Chancellor of the Duchy, praying that the order of the 9th of January, 1823, so far as is above stated, might be discharged, and that it might be declared that, upon the death of the testator, the petitioner became entitled for his life to the Eccleston estate, and the leaseholds above referred to.(*a*)

The petitioner waived all claim against the estates of Thomas Scarisbrick, and all claim against the trustees for rents permitted by them to be received by Thomas Scarisbrick.

Mr. Tinney, for the petitioner. In the argument of this case in the Court below, the petitioner contended that, in the events which happened, the shifting clause relating to the Eccleston estate did not apply, and that upon the death of the testator the Eccleston estate did not go over to Thomas, there being no younger son of the testator than the petitioner. On the other hand, Thomas contended that the words "younger son" meant posterior in limitation. But in *Scarisbrick* v. *Eccleston* the House of Lords decided that the shifting clause, as to Wrightington, did **[95]** not deprive Charles of that estate; although, upon the death of Thomas without issue, the Scarisbrick estate had come to Charles. The House of Lords were of opinion, as this Court will be, that the word "younger" in the present will must be taken in its primary and natural signification; that is to say, as "younger in age." Undoubtedly there is a class of cases relating to portions in which a contrary construction has been adopted. Thus, in *Bretton* v. *Bretton* (Freem. Ch. C. 158) money was bequeathed to younger children, where there were several daughters, and one son who was heir at law, with a fair inheritance; and it was held that the son, though a younger child by birth, was not a younger child within this devise; but that was not a question of limitation, but a mere question of portions. In *Chadwick* v. *Doleman* (2 Vern. 528) the same construction was made of the word "younger" in regard to portions. But the reason that the Courts of Equity go this length in this particular class of cases is

(*a*) The petition was presented in consequence of the decree of the House of Lords in *Scarisbrick* v. *Eccleston*. See 4 Cl. & Fin. 398. The bill in that case was filed after the death of Thomas, by the testator's daughters, Mary and Elizabeth, against the trustees, praying that a settlement might be executed in pursuance of the will. The bill insisted that the Wrightington estate had shifted from Charles to Mary, and the Eccleston estate from Thomas to Elizabeth. Sir John Leach and Lord Lyndhurst, in affirmance of his Honor's decision, decreed in favour of the plaintiffs. The House of Lords however reversed this decision, upon the ground principally that the testator did not intend the estates to shift from sons to daughters; but Park, J., in delivering the judgment of the House of Lords, further intimated that the decree of the Chancery of Lancaster in favour of the claim of Thomas, as younger in limitation to his brother Charles, was erroneous.

that the question of portions is purely one of equity: *Beale* v. *Beale* (1 P. W. 244), *Butler* v. *Duncombe* (id. 448), *Lord Teynham* v. *Webb* (2 Ves. sen. 198). The case of *Heneage* v. *Hunloke* (2 Atk. 456) proceeded on the express distinction that it was a case of equity and not one of legal limitations. It was a case of executory articles. A Court of Equity does not decide that the word "younger" per se means anything except younger in age; though, from the special wording of an instrument, a different meaning may be attached to it. In *Hall* v. *Luckup* (4 Sim. 5) there were expressions in the will amounting to declaration that the word "younger" was not to have its ordinary sense, and the Vice-Chancellor decreed accordingly. In regard to portions, the general principle is that a younger child means a child not provided for as elder; but **[96]** here Thomas is provided for as elder. No argument can be drawn in favour of Thomas from the circumstance of the property being left to him, if under the value of £15,000. This was only because the testator did not mean to settle at all, if the value was trifling. This appeal is not too late: *Smith* v. *Clay* (Ambl. 645; 3 Bro. C. C. 640).

Sir William Follett, on the same side. The primary object of the testator was to provide for the sons and their issue before the daughters; the secondary object to shift the estate. On those shifting clauses the House of Lords has decided: the question there was what became of the Wrightington and Eccleston estates when Scarisbrick came to Charles. The decision was that "younger son or daughter" meant "younger son" or "younger daughter;" and also that the shifting can only be from son to son, or from daughter to daughter. The argument on the other side in the House of Lords was that "younger" meant posterior in limitation; and it was said such was clearly the meaning in the clause by which the Wrightington estate is settled in the first instance (see ante, p. 84); but the Judges intimated it as their opinion that "younger" must have its natural sense, and that the judgment of the Duchy Court was wrong. The intention might well be that the younger children only should take by the shifting clause. What reason is there to suppose that the testator ever meant that an elder son or daughter, well provided for already, should take by the shifting clause? The House of Lords went mainly on the reverter clauses. The testator thought the Eccleston estate might not be worth £15,000; if under £15,000, and there are only two sons, then the testator gives it to Thomas. The argument on the other side is that he meant Thomas to take (whether under or over £15,000) if there was only one other son. Suppose there had been **[97]** only one son (William), or no son, and the estate to be under £15,000, then there is no disposition of it. This shews that the testator paid little or no regard to it, if under £15,000. As to the meaning of the word younger, see *Driver d. Frank* v. *Frank* (3 M. & S. 29, 56), *Beale* v. *Beale* (1 P. W. 244), Byth. Conv. ed. Jarman (vol. 10, p. 189). The intention of the testator to use the word "younger" not in the ordinary sense is said to be deduced from the limitation of the Wrightington estate. There is evident inaccuracy in limiting that estate to the second son of Thomas before the first. Compare it with the limitations to the daughters, in which there is no such inaccuracy. The construction must be the same in equity and at law. What is there to authorize a Court of Equity to reform the trusts of this will? *Jervoise* v. *Duke of Northumberland* (1 J. & W. 574) is an authority to the contrary.

Mr. L. Wigram, on the same side. The House of Lords decided that both shifting clauses are to be construed distributively. The grounds of the judgment of the Vice-Chancellor of the Duchy do not appear. It might be that he thought the clause ought to be construed collectively, and not distributively; and then his judgment was overruled by the House of Lords. Or he might have thought the word "younger" in the Eccleston clause meant posterior in limitation. But there is no intention on the face of the will to use the word in that sense. The expression, younger son, &c., "of my body," shews that the order of birth was contemplated. In wills, words are generally to be considered as used in their ordinary and popular sense, unless the contrary appears clearly from the context. *Wilkinson* v. *Adam* (1 Ves. & B. 422), *Denn* v. *Roake* (5 B. & C. 720), *Jones* v. **[98]** *Colbeck* (8 Ves. 42). There is no difference between trusts executed and executory, except where the relation of the parties gives rise to a different construction.

Mr. Pemberton, for the executor of Thomas Scarisbrick. This appeal is now made after a lapse of seventeen years. It is very doubtful, indeed, whether it is not rather a re-hearing than an appeal; and if so, the objection as to time will apply with still

greater force. The question in the House of Lords between Mr. Scarisbrick and his sisters cannot affect the present question. The opinion given in the House of Lords as to the present point was extra-judicial. The House of Lords decided there was no shifting between different classes. The question as to the meaning of the word "younger" did not properly arise there. The House of Lords divided the shifting clause into two parts: that is to say, they did violence to the actual expressions of the will in order to carry out the obvious intent. I propose to shew, in the same way, that the obvious intent was to use the word "younger" not in its primary and natural sense. The intent, as to Eccleston, was that it should be settled, if above £15,000; secus, if under that amount. Suppose Charles had died instead of William; Thomas would have taken it. [Rolfe, B. That would have been in the ordinary course of limitation.] The object of a shifting clause is to accelerate ulterior limitations; it has no other object. If there are only two sons, the testator gives the estate (if under £15,000) to Thomas. Why? Because if above £15,000 he would have taken it. The testator made a codicil after the death of William, and confirmed his will, except as it was altered by the death of William; but he made an additional charge on Scarisbrick. Why did he do so, except on the principle that by the death of William, Thomas had **[99]** got accession of Eccleston? No doubt the word "younger" must be taken in its ordinary sense, unless from the context another construction is necessary; 2 Pow. Dev. ed. Jarm. 722. The question here is whether another construction is not necessary. There are many cases upon settlements and wills in which another construction will hold. *Peacocke* v. *Pares* (2 Keen, 698). In order to bear out the ordinary interpretation of words, it is not necessary to shew that they are used inconsistently in the same instrument; it is sufficient to shew that the words could not be rationally so construed. In *Duke* v. *Doidge* (2 Ves. sen. 203, n.), there was no inconsistency: the ground of decision was only the extreme improbability that the words could be used in their ordinary sense. What is there peculiar in the case of portions? *Heneage* v. *Hunloke* was not a case of portions; not even of a parent. Frances Flatman, in that case, was no party to the articles. How could her deed be reformed? What the Court did was to construe the deed, not the articles. *Hall* v. *Luckup* was also a case of freehold estate. The reasoning of the Vice-Chancellor only went to exclude the elder son, not to include the elder daughter. The real ground was that, by fair inference, the Court concluded the words were not used in their natural meaning. Now here it is clear that in the general limitations of the Eccleston estate the words "eldest" and "younger" cannot be taken in their literal sense. And it is immaterial that a different construction is given to the same words in other parts of the will. Words may be read in different senses in the same will if necessary. The Wrightington shifting clause may be expounded by the reverter clause: and so the Eccleston shifting clause may be expounded by its own reverter clause. This is a will on which the trusts, being executory, the Court can carry them into execution according to the apparent intention **[100]** of the testator. There is a clear distinction in this respect between trusts executed and those which are merely executory: *Papillon* v. *Voice* (2 P. W. 471), *Countess of Lincoln* v. *Duke of Newcastle* (12 Ves. 218), *Jervoise* v. *Duke of Northumberland* (1 J. & W. 571), *Douglas* v. *Congreve* (1 Beav. 59). Here the testator has not been his own conveyancer; he has created no estate. His direction in the will to the trustees to make conveyances, and to insert such clauses as should better effectuate the general object and purpose of his will (see ante, p. 92), clearly shews that the trusts were executory. He meant to leave the Court to carry out the intent. *Woolmore* v. *Burrows* (1 Sim. 512).

Mr. Knight Bruce, on the same side. Thomas was left in the enjoyment of this estate all his life, and adapted his expenses accordingly. There is great inconvenience in proceeding after such a lapse of time. The whole might have been accounted for to Thomas. It is a mere accident that any money remains in the hands of the trustees. The question is whether this is a rehearing or an appeal. That depends on whether this is the same Court as that of the Vice-Chancellor of the duchy. I conceive the Courts are the same, and that the practice of this Court conforms to that of the Exchequer, which forbids rehearings after six months: *Townsend* v. *Champernowne* (1 Younge, 344). In Chancery, rehearings of appeals are discouraged; *Mousley* v. *Carr* (3 Myl. & K. 205), *Attorney-General* v. *Ward* (1 Myl. & C. 449). Upon the merits, the question here is not the same as before the House of Lords. There it was decided in favour of a distributive construction of the shifting clauses. Here the real question is,

Was it the object of the testator, by the shifting clauses, to accelerate or disturb the ulterior limitations? **[101]** I apprehend he only intended to accelerate them, and that the Court will put such a construction on the will as will effect this object. There are many cases of marriage articles and executory trusts in wills, in which the Court, in order to give effect to the true intent of the settlor or testator, has construed particular words in a sense different from that which they ordinarily bear; as for instance, by turning "leave" into "have," "payable" into "vested," "executors and administrators" into "next of kin," "first born" into "eldest," and the like: *Woodcock* v. *Duke of Dorset* (3 Bro. C. C. 569), *Howgrave* v. *Cartier* (Coop. 66), *Bradish* v. *Bradish* (2 Ball & B. 479), *Fry* v. *Lord Sherborne* (3 Sim. 243), *Bulmer* v. *Jay* (4 Sim. 48; 3 M. & K. 197), *Langston* v. *Pole* (5 Bing. 228, 2 M. & P. 490), *Lomax* v. *Holmden* (1 Ves. sen. 290), *Doe d. James* v. *Hallett* (1 M. & S. 124).

Mr. Walker, on the same side, referred to *Oddie* v. *Woodford* (3 Myl. & C. 584), and observed that the object of the Eccleston shifting clause was to prevent the union of the Eccleston and Wrightington, and not of the Eccleston and Scarisbrick estates.

Mr. Spence, for the trustees, contended that the appeal was too late. He also referred to *Fenn* v. *Lowndes* (4 Burr. 2250), Com. Dig. Chancery, 3 A, 8.

Mr. Tinney, in reply. Upon the question, whether this proceeding is too late, it is to be considered that this is an appeal, not a rehearing. Plowden, 218; 4 Inst. 204, 206; 33 Hen. 8, c. 39. The Court of the Duchy is only a Court of equity: *Fisher* v. *Patten* (2 Lev. 24), *Addison* v. *Hindmarsh* (1 Vern. 442), 3 Bl. Comm. 78, *Ormerod* v. *Hardman* (5 Ves. 725). The **[102]** Duchy Court has power to review decisions of the Court of the county palatine. This must be by appeal, not rehearing. The record is transmitted from the county palatine to the Duchy Court. An analogy exists with respect to the ecclesiastical Courts. There, the record is transmitted to the appellate Court, and the cause ceases to exist in the Court below. If it is an appeal, there can be no bar from lapse of time. An appeal is as much a right of the subject as the original suit. The only analogy as to time is from the stat. 10 & 11 Will. 3, c. 14. *Smith* v. *Clay*.(*a*) The House of Lords has laid down a rule of five years, but there is no such rule here. Even if this be a rehearing, what difference does it make? It is said the proceedings here follow those of the Court of Exchequer, and not those of Chancery; and that by an order of the Exchequer, made in the year 1831, rehearings can only be heard within six months after decree pronounced. That order does not bind this Court. There are no special circumstances here to oust our right of rehearing in less than twenty years.

On the merits, the question is whether "younger" means "younger in age," or posterior in point of limitation of one particular estate. The Judges in the House of Lords thought it meant younger in age. The respondents rely on this being a case of executory limitations, and therefore that the Court may model them as occasion may require. But here the testator has directed what is to be done. He is his own conveyancer. This is the case of a will, not of marriage articles: *Jervoise* v. *Duke of Northumberland* (1 J. & W. 574). The Court cannot alter the natural meaning of the word "younger," unless the testator clearly used it in a different sense. The respondents next rely on the **[103]** codicil as shewing an intention in favour of Thomas. Because an additional burthen is thrown on Thomas, therefore they say the testator supposed he was the party enriched by the death of William. But the charges are originally thrown on the Eccleston estate; and, by codicil, he makes a slight addition to them. The object of the shifting clause was, not to accelerate the remainders in all events, but only in the particular cases specified. The cases in which "younger" has been held to mean "other than a son taking the inheritance" are confined to cases in equity, where the clear object is to provide for all. Here no such reason exists. Thomas cannot be considered either as younger or unprovided for. There is no authority for giving to the word younger the meaning here contended for. The cases on this head, which have been cited on the other side, involve words which naturally admit of two meanings, as "child," "children," &c. Gifts to a man and his children include all descendants. So "leaving" and "having" are words of flexible consideration. So "survivor" is only held to mean "other," when such construction is necessary.

May 28th.—MAULE, J., now delivered the judgment of the Court. This was a petition of appeal from an order of the Vice-Chancellor of the county palatine of

(*a*) 3 Br. C. C. 640; and see *Fox* v. *Gregg*, Sugd. Pow. App. No. 12.

Lancaster, made so long ago as the 9th of January, 1823. The object of the appeal is to vary so much of that order as declares that on the death of Thomas Eccleston, the testator in the cause, Thomas Scarisbrick, his eldest son, became entitled for his life to the Eccleston estate. The respondents contend, first, that considering the great length of time which has elapsed since the order complained of was made, this Court cannot, or at all events in the exercise of its discretion will not, interfere; and, secondly, that the order complained of is not open to objection.

[104] On the first point, we are of opinion that the petitioners are not barred by lapse of time, and that there is nothing to warrant the Court in refusing to entertain the appeal on that ground.

It was pressed in argument by the respondent that the present proceeding is to be regarded rather as a rehearing than an appeal—as something therefore which the present petitioner is not entitled to ex debito justitiæ, but which he can only obtain as an indulgence to be conceded or withheld at the pleasure of this Court. There is, undoubtedly, some obscurity as to the precise nature of the equitable jurisdiction exercised by the Duchy Court, in reviewing the decrees of the Vice-Chancellors of the county palatine. In *Addison* v. *Hindmarsh* (1 Vern. 443) it is said in a note that an appeal lies by act of Parliament from the Equity Court at Lancaster to the Duchy Court. The act there referred to is probably the act of 1 Edw. 4, printed in the appendix to Ruffhead's statutes, and cited in the case of the duchy, reported in Plowden, p. 218. It was thereby enacted that King Edward IV. should enjoy the duchy of Lancaster to him and his heirs, Kings of England, separate from his other inheritances, and that the county of Lancaster should be a county palatine, and that the King and his heirs should have the said county palatine as parcel of the duchy, and a seal, Chancellor, Judges and officers for the same; and over that another seal, called the seal of the duchy of Lancaster, and a chancellor for the keeping thereof. It is not easy to say from the statute whether when the Chancellor of the duchy reverses or varies the decrees of the Vice-Chancellor of the county palatine, he does so in exercise of a jurisdiction strictly appellate, or merely as rehearing that which has been already heard by another Judge of the same Court. In *Ormerod* v. *Hardman* (5 Ves. 725) it appears that that case, which had been heard and reheard by the **[105]** Vice-Chancellor of the county palatine, was again heard by the Chancellor of the duchy. This would have conclusively shewn the jurisdiction of the Duchy Court to be in the strictest sense appellate, if the doubt suggested by Lord Eldon in *Brown* v. *Higgs* (8 Ves. 566), as to the power of the Lord Chancellor to rehear a cause which had been heard and reheard at the Rolls, was well founded; but it is clear that such is not the case, as appears from the course pursued by Lord Eldon, not only in that case of *Brown* v. *Higgs*, but also in the subsequent case of *Blackburn* v. *Jepson* (2 V. & B. 359); so that nothing can be deduced from the report of *Ormerod* v. *Hardman* which will throw light on the present question. It appears, however, that when a decree of the Vice-Chancellor of the county palatine is brought before the Duchy Court, the whole record is remitted. This is a circumstance strongly indicative of a jurisdiction strictly appellate; and, on the whole, we incline to the opinion that such is the true nature of the functions of the Chancellor of the duchy, when reviewing the decrees or orders of the Vice-Chancellor. The question, however, is certainly not free from doubt; and if it had appeared to us that the decision of this point was important, in order to enable us to do justice in the present case, we might have desired further information before we gave our judgment. But in truth we do not think that a solution of this difficulty is in the present case essential. Whether the proceeding be strictly an appeal, or merely a rehearing, we think in either case the petitioner is entitled to have his case heard, and to have the judgment of this Court on the merits. Where a decree has been pronounced, which contains substantial error on the face of it, the party aggrieved by that error may, if he thinks fit, enrol the decree, and then as a matter of right, unless barred by lapse of time, he may file a bill of review to get the decree rectified. **[106]** Until the decree has been enrolled, he cannot file a bill of review; but he may then obtain a rehearing, and this is a matter of course on the certificate of counsel: *Attorney-General* v. *Brooke* (18 Ves. 325). It seems to follow as the natural, if not the necessary, consequence that the same lapse of time which will deprive a party of his right to file a bill of review will also be a bar to his right of obtaining a rehearing; or at all events that he must have as long a time for obtaining a rehearing of the unenrolled decree, as he would have had for impeaching the enrolled decree by

bill of review; otherwise this inconvenience would ensue, that the party supposing himself aggrieved would be obliged to incur the useless expense of enrolment, merely to obtain by the more costly proceeding of a bill of review, the very same relief which might be obtained readily and cheaply by a rehearing. This, which appears to us to be founded on principle, is, we believe, consistent with the practice of the Court of Chancery, to which, in the absence of express authority to the contrary, this Court must adhere; and, as the time during which a party may bring a bill of review is twenty years from the time of pronouncing the decree complained of, not from the time of enrolment (as was established by the case of *Smith* v. *Clay* (3 Bro. C. C. 639, n.)), so we think that there must be the same time for a rehearing; and, as the present petition was presented within less than seventeen years after the order complained of was pronounced, the objection arising from lapse of time cannot prevail.

It remains, therefore, to consider the question on its merits; that is to say, to consider whether the Vice-Chancellor was right in his construction of the Eccleston shifting-clause. The Eccleston estate is by the will given to Charles, the present appellant, for his life, and afterwards to his issue; and the declaration of the Vice-Chancellor contained in the order of the 9th of January, 1823, is **[107]** founded on the assumption that the effect of the Eccleston shifting-clause was to carry the estate away from Charles, to transfer it to Thomas. By that clause, the testator directed that, if by virtue of the settlement which was to be made pursuant to the trusts of his will, his son Charles should become entitled to the possession of the Wrightington estate, and any younger son of his (the testator's) body should then be living, then the uses and trusts of the Eccleston estate, in favour of Charles and his issue, should cease. Two events were thus to concur in order to make the interest of Charles and his issue in the Eccleston estate cease: namely, first, he was to become possessed of the Wrightington estate; and secondly, at the time of his so becoming possessed there was to be in esse a younger son of the testator, or the issue of such younger son.

The first of these events happened at the testator's death; for William, the second son, having died without issue in the testator's lifetime, Charles, on the death of his father, became entitled at once to the Wrightington estate. The question is whether the second event also happened, that is, whether there was in esse, at the death of the testator, any son of the testator "younger" than Charles, according to the true meaning of the word younger, as used in the Eccleston shifting-clause. If there was, then the order of the Vice-Chancellor is right; if there was not, it is wrong.

Now there certainly was no younger son in esse, taking "younger" in its ordinary acceptation; for the testator left only two sons, namely, Thomas the eldest and Charles the youngest. But the respondents contend that, although there was no younger son properly so called; yet that Thomas, though an eldest son in point of age, was, as to the Eccleston estate, subsequent in limitation to Charles, and so a younger son within the meaning of the shifting-clause. This was the construction put on the will by the **[108]** Vice-Chancellor; but after giving the subject our most anxious attention, we feel bound to say that we cannot concur in that construction. The safe rule of construction in general is to interpret the words of wills as well as of deeds, according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which is sufficient to satisfy the Judge that the person using the words must have used them in some sense different from what would be their ordinary meaning. It does not appear to us that any such absurdity or inconvenience will result from holding that the testator used the word "younger" in this case in its ordinary sense. It appears that he had three estates and three sons. He gave the Scarisbrick, which was the principal estate, to Thomas his eldest son, and his issue; he gave the Wrightington, which was the estate second in point of value, to William his second son, and his issue; and the Eccleston, which was the smallest estate, to Charles his third son, and his issue; and he certainly contemplated the possibility of his having other sons to be afterwards born. The great object of the testator was to found three families in the persons of three sons, and to secure one estate to each family; and the will both in the limitations of the estates and in the shifting clauses was evidently framed principally with a view to that leading object. Construing the word younger in the Eccleston shifting-clause to mean younger in point of age, according to its natural import, that clause is still quite sufficient to carry out the testator's leading intention of founding three families, so long as any three sons, or the issue male of any three sons, should be in existence. By the death of William

without issue, and the death of the testator, without having any after-born son, the leading intention, that of founding three families in the persons of three sons, was defeated. It became impossible to found more than two families; and the limitations, with the Wrightington shifting-clause, [109] were quite well adapted for that purpose, securing the Scarisbrick estate to the principal branch, and the Wrightington estate to the other, now become the second branch. What then is to become of the third estate, originally destined to support a distinct line, the carrying out of which original distinction has become impossible? Is it to remain with the youngest son to whom t was originally given? or is it to go over to the eldest son? There can be no doubt but that, construing the words of the will literally, it will remain (according to the original gift) with the younger son; and we see no reason to justify us in saying that such construction could not have been the testator's meaning. The testator evidently considered the Eccleston estate as being a subject of very inferior importance when compared with his other estates. He might think the son who was to take the Scarisbrick estate was already so amply provided for as to render any shifting-clause in his favour altogether unnecessary; and in such case the word "younger" may have been used intentionally, with the very object of excluding the claim on the part of Thomas, now insisted on by the respondents; or, which is the more probable supposition, the case which has occurred may not have presented itself to the mind of the testator, or of those who framed the will. In either of those cases it would be manifestly unjust to construe the language of the testator in any other than its natural sense; in the former case, because such a course would actually defeat the intention, though expressed in unambiguous language; and in the latter, because the Court would be altering the plain meaning of the words, in order to fix on the testator a meaning which, according to the hypothesis, he never entertained.

It is, however, said that there are circumstances on the face of this will indicating a probable intention, that in the events which happened, Thomas, and not Charles, should take the Eccleston estate. If, it is said, the value of that [110] estate had been less than £15,000, then, as the testator in fact left only two sons surviving him, it would have gone to Thomas, the eldest son, and not to Charles. This is undoubtedly true; that is a case which did present itself to the mind of the testator, and for which he has made express provision. In such a state of things Thomas would have taken, not by any forced interpretation of the word "younger," but by a plain gift in his favour, on the construction of which no doubt could have arisen. On the other hand, if all the three sons had survived the testator, and the Eccleston estate had been under the value of £15,000, Charles would have taken it absolutely; and on the death of William, without issue, would have taken the Wrightington estate, when there would clearly have been no shifting-clause as to the Eccleston estate; so that Charles would have kept both. Very little reliance, therefore, as to intention, can be placed on this gift of the Eccleston estate, in case it had turned out to be below the value of £15,000. In such case, if William died the day before the testator, Thomas would take it; if he died the day after, then Charles would take it. The argument of the respondents is that the testator probably meant that if he left only two sons, the Eccleston estate, if above the value of £15,000, and therefore the subject of settlement, should go to Thomas; because, if it had been under that value, and therefore not the subject of settlement, it would clearly have gone to him; and in order to carry this intention into effect, it is proposed to do violence to the ordinary meaning of the word "younger" in the shifting-clause, by construing it to mean posterior in limitation. The answer is that by similar reasoning it must be presumed that the testator meant, in case he left three sons, and the second son should die without issue immediately after him, that the youngest son should take the Eccleston estate, if above the value of £15,000, because he would in such case certainly have taken it if it had been under that value. And yet, [111] this intention would be entirely defeated by the proposed forced interpretation of the word "younger," and would be perfectly carried out by giving to that word its plain ordinary meaning.

Then it is said that the testator, after the death of William, made a codicil whereby he increased the amount of provision for his wife and daughters, and thus cast an additional burthen on the estate of Thomas; and it is suggested that he must have done this on the supposition that the property given to Thomas would be augmented by the Eccleston estate coming to him in consequence of the death of William; and this is supposed to furnish an argument that he must have intended to use the word

"younger" in the Eccleston shifting-clause, in such a sense as should carry that estate to Thomas. All we can say to this suggestion is that it may be true, but it is mere conjecture. The additional provision for his wife and daughter is just as consistent with the supposition that he thought the former provision inadequate with reference to the then value of the Scarisbrick estate, as that he supposed Thomas would take the Eccleston. And, further, it is to be observed that the testator certainly looked to the probability of Eccleston being of a value under £15,000, in which case Thomas would have taken it in addition to Scarisbrick. At all events, as the testator is entirely silent as to the motive for the additional gift, it is impossible for any Court to fix on a particular state of circumstances as to what must be supposed to have influenced him, and then to put a forced construction on plain words in order to make that state of circumstances exist.

In the very able reasoning on this case, printed in the appellant's case before the House of Lords, several possible contingencies are suggested, in which the provisions of the will, construing the word "younger" in its ordinary sense, will not effectually carry out the testator's probable intentions. It may be admitted that such is the case, and **[112]** such will also be the case, whatever be the construction put on the word "younger." But this only shews that in the complicated limitations of these three estates, which it was the object of the will to establish, cases not very probable indeed, but still possible, may occur, which the ingenuity of the conveyancer has been unable effectually to anticipate and provide against. For effectuating the obvious primary intention of the testator, namely, that of founding three families in the persons of three sons, it is sufficient to construe the language he has used according to its ordinary acceptation; and we do not see any incongruity or absurdity resulting from an adherence to that ordinary meaning, which can justify us in interpreting the word "younger" as meaning anything else than "younger in point of age."

But then it is contended, in support of the order of the Vice-Chancellor, that in construing the word "younger" to mean "posterior in limitation," little or no violence is, in fact, offered to its ordinary interpretation. "Younger," it is said, does not necessarily mean "younger in point of age." It is suggested that a person is said to be a "young member of parliament"—"young at the bar"—"young in office"—and the like. No doubt that is so. The word is in such cases used metaphorically; whereas, in speaking of children, the word, unless controlled by the context or by circumstances, is plainly used in its direct, and not in any figurative sense. We say unless controlled by the context or by circumstances; because there are, undoubtedly, many cases in the books in which the Courts have felt themselves warranted in saying that the word "younger" must receive a construction large enough to include children not strictly younger, but standing in the same situation as younger children properly so called; and the respondents rely much on those cases as authorities for the construction adopted by the Vice-Chancellor in the order now appealed from. We have consulted all those **[113]** cases, but we cannot think they bear out the proposition of the respondents.

When a real estate is so settled as that it must on the death of a parent go to his eldest son, and provision is made by that parent, or by any person standing in loco parentis, whether by settlement in contemplation of marriage or by will, for the younger children of such parent, the Court has considered the presumption that it was intended to make provision for all the children so strong as to warrant it in holding that by the word "younger" must have been intended all except the one child who succeeds to the estate. This was evidently the ground of the decision in the cases cited of *Beale* v. *Beale* (1 P. W. 244) and *Butler* v. *Duncombe* (id. 448). Indeed, in *Teynham* v. *Webb* (2 Ves. sen. 210) Lord Hardwicke clearly states this to be the ground of the doctrine. Carrying out this principle, the Court has felt itself warranted, not only in letting in children not strictly younger, in favour of the manifest intention of including all unprovided for, but also in excluding the child provided for by the family estate, even though such child may be strictly a younger child. This was done in *Mead* v. *Cave* (1 Rep. in Chan. 224), *Bretton* v. *Bretton* (Freem. Ca. in Chan. 158), *Chadwick* v. *Doleman* (2 Vern. 528), and *Duke* v. *Doidge*, reported in a note to *Teynham* v. *Webb* (2 Ves. sen. 203). The case of *Heneage* v. *Hunloke* (2 Atk. 456) proceeds on a similar principle. In that case a father, on the marriage of his daughter, covenanted that his sister would settle certain freehold houses, after the death of herself, to the use of the daughter for her life, and after her death, to the use of the

daughter's younger child or children in tail general; and by indentures of lease and release, dated on the same day as the articles, the sister conveyed the houses to the same uses with the articles. There were two children of the **[114]** marriage; the elder a daughter, the younger a son. After the deaths of the two tenants for life, the question arose, which of the two children was entitled to the houses. It is not stated what provision the son had, but in all probability he derived some estate from his father; at all events, he would be entitled to his father's property as his heir. Lord Hardwicke held that as the legal estate in the houses had been conveyed to the uses of the articles, this would at law carry them to the son as the younger child; but that as the conveyance was framed with the express intention of carrying the articles into effect; and as provisions in marriage articles for younger children must from the nature of things refer not to children strictly younger, but to those who are not by settlement or otherwise to succeed to the family estate, therefore the conveyance had been erroneously framed, and that a Court of equity would rectify it; and he decreed that the son should make the necessary conveyance accordingly. All these cases proceeded on the intelligible principle that, from the nature of the deed or will under which the question arose, it must have been the meaning of the parties to provide for all the children, and in order to carry out this intention it was necessary to understand by the words younger children, all the children other than an eldest or only son: in other words, all the children except the hæres natus or hæres factus. The Court has felt itself warranted in thus putting on the words a construction not strictly according to their literal meaning, in the same way as it does with the words "heirs of the body" in marriage articles. In both cases the nature of the provision intended clearly shews that the words must have been used in a sense different from that which they ordinarily had been; and the Court therefore construes them in the sense in which, from the nature of the instrument, they must have been understood by the parties. What analogy then do these cases furnish towards enabling us to construe the word "younger" in the will **[115]** now before us? What is there in the very nature of the provisions of this will, shewing that the testator must have used the word younger not in its obvious sense? When the intention of founding three distinct families in the persons of three sons became impossible by the death of one son without issue, there is no more incongruity with the presumable intention of the testator in uniting the two mesne estates in the person of the younger son than in giving one of them to the elder. The only guide as to intention in such case must be found in the language of the will itself, and there does not appear to us to be anything in that language to give to the word "younger" any other than its ordinary meaning.

There is one case which was cited in the argument to which we have not referred, namely, the case of *Hall* v. *Luckup* (4 Sim. 5). In that case a testatrix gave real and personal estate to a daughter for her life, and at her death to be equally divided amongst the youngest of her son's children. And in a subsequent part of the will, she provided that if her son should have sons, she did not intend that his eldest son should have any of the above dividends, as he would be entitled to his father's estate. The Vice-Chancellor held that the testatrix by these words had put her own construction on the words "youngest children," and that she meant by it all the children of her son except his eldest son, and that she intended them to take the fee simple of the lands devised. The devise in that case appears to have been a legal devise, and it is not easy to see how the question of construction could properly come before the Court of Chancery; but, at all events, the decision can be no authority except in cases where the testator has, on the face of the will, explained the sense in which he has used the word "younger," and whenever he has done so, there can be no doubt but that his own interpretation **[116]** must prevail. Mr. Pemberton, indeed, contends that the reasons attributed by the report to his Honor cannot have been the real ground of his judgment, inasmuch as the reason given, though it would justify the exclusion of the eldest son, would not go to let in the eldest daughter. Supposing that observation to be well founded, the decision may still be supported as to the personal estate on the principle of the cases already referred to. As to the real estate, supposing the devise to have been a mere legal devise, there is certainly some difficulty not only in seeing how the question could at all come for decision in a Court of equity, but also in reconciling it with the doctrine of Lord Hardwicke in *Heneage* v. *Hunloke*.

It is to be observed that it is only in cases of provision made by parents, or persons standing in loco parentis, that Courts of equity give this forced construction to the

word "younger." In cases of gifts by strangers, Courts of equity, as well as Courts of law, construe the word according to its literal import, as was distinctly laid down by Lord Hardwicke in *Hall* v. *Hewer* (Ambl. 203). This distinction, as to gifts by persons in loco parentis and mere strangers, is founded on the consideration that in the one case the party giving or settling is considered as doing an act which he was under a moral though not a legal obligation to perform, whereas in the latter case, a gift by a mere stranger, no such obligation exists. In the former case, therefore, the Court construes the language used, so as, if possible, to make the thing done amount to a complete discharge of the moral obligation. It therefore construes the younger as including all unprovided for—all for whom the party was under a natural obligation of providing. In the case of a stranger, the gift flows altogether from the will, whether reasonable or capricious, of the giver; and the Court, therefore, looks only to the language actually used.

[117] If we apply these principles to the present case, it seems obvious that no distinction can be made between such a gift when proceeding from a parent and when proceeding from a stranger. It is not every act done by a parent which is to be construed on principles different from those which would have been applied if the same thing had been done by a stranger, but only those acts which the parent does in fulfilment of some natural duty. Now, though it is a natural duty incumbent on a parent to provide for his children, and in doing so to use language which will secure some provision for all, it certainly is no natural duty to cause estates to shift in one course of succession rather than another.

It was pressed at the bar that this is a case of an executory trust, and not a trust executed; and, therefore, it was said the Court will direct a conveyance so as to obviate any omissions or errors on the part of the testator, so as to effectuate the real intention. Undoubtedly it will. But the question still arises, what is the intention? How is that intention to be ascertained? It can only be obtained by looking to the language used, and if we are right in our opinion that there is nothing to shew that the testator meant to use the word "younger" in any other than its ordinary sense, it matters not whether the trust is executed or executory. In either case the ordinary sense must be adhered to.

On the whole, therefore, there does not appear to us, either in the nature of the provisions or the presumable intention of the testator, or in the context of the will, anything which can justify us in saying that the word "younger" in the Eccleston shifting clause means anything else than younger in point of age. It follows that so much of the order of the Vice-Chancellor of the county palatine as declares that, on the death of the testator, Thomas, his eldest son, became entitled to the Eccleston estate, was erroneous, and that it must be varied by declaring that **[118]** Charles, on the death of his father, became entitled to that estate for his life.

We have come to this conclusion, on a full consideration of the case, and without resting on what was said by the late Mr. Justice Park in delivering the opinion of the Judges in the House of Lords in the case of *Scarisbrick* v. *Eccleston*.

We agree with the observation that what was there said as to the present case was extra-judicial, and not necessary with reference to the question then to be decided. At the same time it is satisfactory to us to know that, in reversing an order which has been so long acquiesced in, we have the high sanction of those who concurred in the opinion delivered by Mr. Justice Park.

Before we went into this case, the appellants agreed to waive all claim against the estate of Thomas Scarisbrick, either in this or in any other proceeding, and all claim against the trustees in respect of rents which they have paid to Thomas, or which they permitted him to receive. The order now to be pronounced by the Chancellor will therefore be prefaced by a declaration to that effect; and as it is impossible to foresee whether this proceeding may not affect the trustees in other respects, it must be declared generally that the order is to be without prejudice to any application which the trustees may think fit to make in respect of any act, deed, matter, or thing done or omitted to be done on the faith of the order of the 9th January, 1823.

The costs of all parties must come out of the estate.

Decree accordingly.

[119] GRUGEON *v.* GERRARD. Feb. 4th, May 28th, 1840.—After a first mortgage has been paid off, the second mortgagee may file a bill to have the legal estate conveyed to him without praying to foreclose the mortgage; and it seems he may do this, at the peril of costs, until the day of payment under a decree for redemption obtained against him by the mortgagor.—Until the mortgagee is actually paid off by his own consent or by decree of the Court, he retains the character of mortgagee, with all the rights incident to it, and may therefore file a bill for foreclosure, notwithstanding a notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption.—Quære, whether a second mortgagee, who upon payment of the first mortgage gets in the legal estate, can tack this mortgage to another mortgage, previously executed to him by the same mortgagor, of a different property.—A., being indebted to his bankers, executed a deed purporting to be a mortgage to them for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A.'s bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagees: Held, that this was a good delivery by A. to the mortgagees.—Where, under a bankruptcy, parties have proved their debts on the footing of holding no security, they will not generally be permitted to withdraw their proof and set up a security; but ignorance of the existence of a security may be ground for granting relief to a party who has so proved.—Issue directed to try whether the execution of a certain deed was an act of fraudulent preference in contemplation of bankruptcy.

The bill was filed by the plaintiff Grugeon, as the public officer of the Commercial Bank of England, and by the other plaintiff Hamilton, as a trustee for the bank, against four persons of the names of Gerrard, and against Roger Haydick, Richard Ellison, and Thomas Wylie, who were the assignees of Thomas Griffiths, a bankrupt. The object of the suit was to obtain from the Gerrards an assignment of certain leaseholds for years, which had been mortgaged to them by Griffiths before his bankruptcy, and the money due on which mortgage had been paid off after the bankruptcy.

The case made by the bill was as follows:—On the 21st of June, 1836, Griffiths being indebted to the bank in a sum of 868l. 17s. on two bills of exchange, and being entitled to the leaseholds in question, subject to the Gerrards' mortgage, assigned the same by way of second mortgage to one Langton, who was then the manager of the Commercial Bank, for the purpose of securing payment to the bank of the sum of 468l. 17s., part of the before-mentioned debt of 868l. 17s.

On the 15th of July, 1836, a fiat in bankruptcy issued against Griffiths, under which he was duly found a bankrupt, and the defendants Haydick, Ellison, and Wylie were appointed his assignees.

[120] In the course of the following autumn the assignees agreed to sell to a person of the name of Marshall the chief part of the mortgaged property at the price of £2200. A deed of assignment to Marshall was prepared, whereby the Gerrards, in consideration of £1750, the principal sum due to them, and Langton, in consideration of £450 paid to him, were made to concur with the assignees in assigning to Marshall. This deed bore date the 28th of December, 1836. It was not, however, executed by all the necessary parties until the 22nd of April, 1837; and, previously to its execution, it was discovered that there would not be so large a sum as £450 coming to Langton over and above the money due to the Gerrards, there being an arrear of interest and certain other sums due to the Gerrards, to be deducted out of the £450, which reduced it to 274l. 4s. 10d. In consequence of this, the solicitor of the bank refused to deliver up the deed which had been executed by Langton, until a memorandum had been drawn up and signed by the assignees, stating the circumstance and admitting that the sum of £450 was not, in fact, paid to the bank, but only the sum of 274l. 4s. 10d. This memorandum bore date the 21st of April, 1837.

On the completion of the purchase on the following day (the 22nd), the title-deeds of such part of the property mortgaged to the Gerrards as was not sold to Marshall, were, with the privity and approbation of the assignees, handed over by the solicitor of the Gerrards to the solicitor of the bank.

In the following month of May, 1837, Langton ceased to be the manager of the

bank, and the plaintiff Hamilton was substituted for him. Langton, then, by a deed dated the 24th of May, 1837, assigned to Hamilton all his interest in the unsold part of the leaseholds in trust for the bank. Under these circumstances, the plaintiffs insisted that they were entitled to call on the Gerrards to assign **[121]** to the plaintiff Hamilton the legal interest in the unsold leaseholds; and the bill accordingly prayed that they might be decreed so to do.

The Gerrards, by their answer, admitted that all their claim had been satisfied, and submitted to act as the Court should direct.

The assignees, by their answer, in the first place, disputed the validity of the security given to Langton, on the ground that the deed was improperly delivered, being merely delivered by Griffiths the bankrupt to his attorney Thompson, and retained by Thompson,(*a*) and that in fact the security was given without any privity of the bank, and did not come into the possession of the bank until after the bankruptcy; and, in confirmation of this allegation, they stated that after the bankruptcy a person of the name of Turner, one of the partners in the bank, proved under the commission for the full sum of 868l. 17s., being the whole amount due on the two bills, and by his deposition in support of the proof, swore that the bank held no security except the two bills of exchange. They also stated, in general terms, that the security was a fraudulent preference, and therefore void against the general creditors.

The assignees further contended that, even supposing the security to be good, still the plaintiffs were not entitled to the relief prayed by the bill, because they the defendants had frequently offered to pay to them the full balance of the 468l. 17s., which the plaintiffs refused to accept, claiming not only to hold the mortgaged property remaining unsold as a security for the residue of the 468l. 17s., but also to tack to it the sum of £400, which was not secured by the mortgage in question, but which was secured by a mortgage of other property situate in **[122]** Canning Street, Liverpool, of no value. And the defendants, by their answer, repeated the offer to pay the balance of the 468l. 17s., and submitted that, under those circumstances, the plaintiffs had no right to call for an assignment of the legal estate. After the answers were put in, the plaintiffs amended their bill, by stating that the assignees alleged that they had contracted to sell the unsold part of the mortgaged property to a man of the name of Bruce, who was made a defendant, and duly put in his answer insisting on his contract.

The answers were replied to and witnesses were examined, and the cause was heard before the Vice-Chancellor of the county palatine of Lancaster, and a decree was made on the 16th of August, 1839, whereby it was ordered that the defendants, the Gerrards, should execute to the plaintiff Hamilton an assignment of the unsold part of the mortgaged property, with all necessary directions for that purpose.

From that decree the defendants the assignees appealed to the Chancellor of the duchy; insisting, first, that the plaintiffs made out no case entitling them to any relief at all; and, secondly, that, at all events, the defendants were entitled, before relief was given to the plaintiffs, to have the validity of the mortgage inquired into.

Mr. Girdlestone and Mr. Geldart, for the plaintiffs. The question is, not whether the plaintiffs are entitled to tack, but whether they are entitled to call for the legal estate. The defendants have not proved any of the facts on which they rely to affect the validity of the mortgage to the bank. They are therefore entitled to no inquiry, for no inquiry is given where the substance of defence is not proved. Even if the original mortgage was invalid, the memorandum of the 21st of April would cover all objections. But it cannot be contended that the mortgage to the bank was not duly executed, or that the delivery **[123]** of the deed was not sufficient: *Exton* v. *Scott* (6 Sim. 31), *Doe d. Garnons* v. *Knight* (5 Barn. & Cr. 671). The defendants have gone into evidence, as to the offer to pay the balance of 468l. 17s. before the bill was filed. But the evidence shews no offer to pay after the date of the memorandum. No actual tender has been proved; which is essential to the defendants' case. Even if the Court should think that the question of tacking is open, the mortgagee has a right to tack every thing as against the mortgagor. The questions on this head have arisen between the mortgagee and the purchaser of the equity of redemption: *Shuttle-*

(*a*) The circumstances of the delivery are detailed in the judgment. See post, p. 130.

worth v. *Laywick* (1 Vern. 245), *Mergrave* v. *Le Hooke* (2 Vern. 207), *Pope* v. *Onslow* (2 Vern. 286. See *Ex parte King*, 1 Atk. 300), *Coleman* v. *Winch* (1 P. W. 775), *Jones* v. *Smith* (2 Ves. J. 372), *Ireson* v. *Denne* (2 Cox, 425), *Ex parte Carter* (Amb. 753), *Ex parte Knott* (11 Ves. 609), *Postlethwaite* v. *Blythe* (3 Mad. 242; 2 Swanst. 256). On what ground is the right of tacking here resisted? That we are not legal mortgagees. If so, that is ample ground for the decreeing a conveyance of the legal estate. Suppose the Gerrards had assigned, as they might have done, we should have had a right to tack. It is clear therefore that we are at liberty to get in the legal estate without filing a bill to foreclose. The Gerrards are trustees for some one. If for the plaintiffs, why may they not call in the legal estate? If the question between the plaintiffs and the assignees had been mixed up in this suit, it would have been multifarious. The mortgage to the bank contains a trust for sale. Why may not the bank get in the legal estate in order to proceed to a sale? The case made by the assignees is inconsistent with itself; for they dispute the validity of the mortgage, and yet they offer to pay all that is due on the mortgage.

[124] Mr. G. Richards and Mr. Walker, for the assignees. The Vice-Chancellor would not have made the decree but for the question of tacking. Can a mortgagee file a bill to get in the legal estate after the mortgagor has tendered all that is due to him? It is expressly proved that the assignees offered to pay all that was due. Put aside the question of right to tack, and then there is no pretence for calling for the legal estate, after an offer to pay and a refusal to accept the 468l. 17s. and interest. The bill is framed with a view to get hereafter that right of tacking which the plaintiffs do not now possess. The mortgage of the 21st June, 1836, contains no covenant to procure the legal estate to be conveyed to the bank. The remedy for the plaintiffs was to file a bill to redeem the Gerrards and foreclose the bankrupt. The sale to Marshall makes no difference. The memorandum forms no part of the basis of relief asked by the bill. There is no mention of tacking in the bill, therefore the plaintiffs have no right to go into that question. They could not in fact do so; for tacking is only to be used as a defence, not by way of attack.

Why did the plaintiffs sever the debt into two debts? Having done so, they cannot complain that they are not united. Previously to the 21st April, 1837, the plaintiffs were second mortgagees, and might have redeemed the Gerrards and foreclosed the assignees. The plaintiffs have no legal interest—no right except by the means of a Court of equity. If the assignees had tendered to the Gerrards the money due to them, they would have been bound to re-assign either to the assignees or to their nominee. The only right of the second mortgagee was to redeem the first mortgagee and foreclose the mortgagor. There is no instance of a second mortgagee filing a bill merely to get in a legal estate, and that for a collateral purpose. For these reasons he could not have tacked. In *Jones* v. **[125]** *Smith* (2 Ves. jun. 376) Lord Alvanley says expressly that a mortgagee must have the absolute legal estate, in order to be enabled to tack. Then how does the memorandum of the 21st April, 1837, affect the question? It gave the parties no new rights; it never was intended to do so. If it had given them new rights, then the bill would have been framed on the basis of that instrument. But the bill has no such object. The only object of the bill is to obtain the legal estate in order that the plaintiffs' security may be perfected. The contract between the parties was only that the mortgagor would pay the principal and interest. This the mortgagor is willing to do; but the plaintiffs seek a conveyance of the legal estate for an object quite beside their rights under their mortgage deed. The assignees ask for nothing. They tender principal, interest, and costs; and ask for no conveyance from the plaintiffs. The authorities cited by the plaintiffs were cases of bills to redeem by the heir. In such case the mortgagee may tack a bond to, prevent circuity. The plaintiffs proceed on the fallacy that when a first mortgagee is satisfied he becomes the trustee of the legal estate for the second mortgagee. Why should equity here be active in favour of the plaintiffs? Why should the second mortgagee be held to have equity superior to the mortgagor? He has no right by contract to tack. There is no instance in which a Court of equity has ordered the first mortgagee, on receiving his money, to assign the security to the subsequent mortgagee, except on a bill to redeem and foreclose. In the case of two mortgages, where the money due on one is tendered, we do not say that the mortgagee is bound to receive it; but if he does not, he cannot afterwards file his bill to perfect one security the money due on which has been tendered.

As to the question of fraudulent preference: it is clear **[126]** that the mortgage transaction of the 21st June, 1836, was not in the usual course of business. The deed was retained by Thompson as the solicitor of Griffiths. Notice was given by him to the Gerrards as the solicitor of Griffiths. No notice was given by or on behalf of the bank. An inquiry ought at all events to be instituted as to the validity of the mortgage. The affidavit of Turner on the 2nd August, 1836, Turner being a partner in the bank, strongly confirms the suspicion as to the bona fides of the mortgage. It shews Thompson was acting for the bankrupt and not for the bank. With respect to Turner's proof, it may be remarked that, if a party holding securities proves as if there were no securities, he will lose the benefit of those securities: *Ex parte Solomon* (1 Glyn & J. 25), *Ex parte Downes* (1 Rose, 96), *Ex parte Hornby* (Buck. 351). The proceedings in bankruptcy were not proved in the cause, but it must be assumed that, as proof was made, proof continues on the proceedings.

Mr. Girdlestone, in reply. The plaintiffs are not bound to say why they have not filed a bill to foreclose or redeem. It is sufficient that they have filed a bill asking for relief, to which they are entitled. Even if the question rested on an offer to pay, no such offer is shewn. The answer does not state any distinct offer. The defendant says the plaintiffs' mortgage deed contains no contract to convey the legal estate; but it contains a covenant for further assurance, and therefore when the mortgagor paid off the first mortgage, he was bound to enable the second mortgagee to get in the legal estate. For whom were the Gerrards trustees when their debt was satisfied? Clearly for all parties entitled, according to their interests. When they are satisfied, all parties coming after them had the benefit to which they were entitled. The Gerrards were in fact **[127]** redeemed. It is argued that you cannot file a bill as second mortgagee to redeem the first mortgagee without, at the same time, seeking to foreclose the mortgage: but that does not apply to the circumstances of the present case.

May 28th.—MAULE, J., now delivered the judgment of the Court. After stating the facts his Lordship proceeded as follows:—As the claim of the Gerrards was fully satisfied out of the proceeds of such part of the mortgaged property as was sold to Marshall, it is clear that they became mere trustees of the unsold part, for the benefit of the persons entitled to the equity of the redemption, according to their respective interests in the property; i.e. assuming the validity of the mortgage of the 21st June, 1836, in trust, in the first place, for the plaintiff Hamilton as representing the bank, and subject thereto, in trust for the assignees. Primâ facie, therefore, the plaintiffs would clearly be entitled to perfect their security by getting in the legal estate thus outstanding in the Gerrards. The defendants, however, insist that the plaintiffs no longer possess this right; because they say that on various occasions previous to the filing of the bill they offered the plaintiffs to pay to them the full balance secured by the mortgage of the 21st June, 1836, after deducting the sum of 274l. 4s. 10d. which had been paid on occasion of the settlement with Marshall, in April, 1837; and this offer they repeat in their answer. They contend that the plaintiffs can have no right to hold the property except as a security for the balance of the 468l. 17s., and that they cannot, by refusing to receive that balance, acquire a right to call for an assignment of property, to which, if their claim as mortgagees was satisfied, they could have no title.

We are, however, of opinion that this view of the case is altogether erroneous. Assuming the validity of the deed of the 21st June, 1836, the assignees and the **[128]** plaintiffs stand to each other in the relation of mortgagor and mortgagee. The assignees have no means of putting an end to that relation, except by filing a bill to redeem. The plaintiffs cannot compel the assignees to file such a bill, and remaining as they do, and must continue to do until redeemed, mortgagees of the property in question, they have undoubtedly a right to get in all outstanding legal estates, in order to perfect their security. The statements in the answer of the offers to pay are extremely vague; but even if they had been quite distinct, and even if an actual tender of the supposed balance had been proved, the case would not have been varied. Where the only relation between two parties is that of debtor and creditor, the debtor may for many purposes relieve himself by tendering the money due; but this is not the case as between mortgagor and mortgagee. A mortgagee is not bound to accept the mortgage money when tendered, unless reasonable notice has been given of the intention to pay him off, and even after notice he may refuse to receive the sum tendered, and dispute the account; and the only remedy of the mortgagor will at

last be to file a bill for redemption. If, indeed, on such a bill it should appear that the mortgagor, after giving to the mortgagee six months' notice of his intention to pay off the mortgage, had actually tendered to him the full amount of principal, interest, and costs, and that the mortgagee had obstinately refused to receive it, and so had rendered a suit necessary, the Court would, probably, fix the costs of the suit on the mortgagee. Still, however, he must, until actually paid off, retain the character of mortgagee with all the rights incident to it. The mortgagor, notwithstanding a notice to pay off the mortgage, and even notwithstanding a decree for redemption, may make default when the actual time for payment arrives; and it would therefore be not unjust to let the mortgagee, in the mean time, act in reference to his securities, precisely as if he was for ever to continue **[129]** the owner of the mortgaged property. The mortgagee may, when the mortgagor tenders to him the amount which he admits to be due, dispute the accuracy of the account as calculated by the mortgagor. He may, as the plaintiffs do in this case, claim a right to tack some other debt. Such claims may obviously give rise to questions of great importance, which can only be settled in a suit properly framed for taking all necessary accounts, and in which the mortgagor will be bound to pay what shall be found due on the result of such accounts, or else to stand foreclosed of his right of redemption. It would be most unjust to a mortgagee to permit the question of the amount for which he is entitled to hold his security to be incidentally raised in a suit, not so framed as to bind the mortgagor either to pay the amount due when ascertained, or else to stand foreclosed. The defendants, the assignees, by their answer, offer to pay what is due on the mortgage; but there is no such offer in case the plaintiffs should establish their right to tack the Canning Street mortgage; and the offer would give no power to the Court to decree a foreclosure if, eventually, the parties should make default in paying pursuant to their offer.

This being our view of the case, it is unnecessary to discuss the question so much argued before us, as to whether the plaintiff has or has not a right to tack the Canning Street mortgage to that of the remaining property in Craven Street.

Our judgment proceeds on the ground that the plaintiff (assuming the validity of the deed of 21st June, 1836) is certainly a mortgagee of the property in question; and that as such mortgagee, whether the sum due to him be that for which he contends, or only the smaller sum admitted by the assignees, still he has a right to call for an assignment of the legal estate in that property of which he is to some extent the mortgagee, and of which the **[130]** Gerrards have become mere trustees without any beneficial interest in themselves.

In these remarks we have proceeded on the assumption that the plaintiff's mortgage of the Craven Street property is a good unimpeachable security. But this is disputed by the assignees. They contend, first, that the deed was never a valid instrument, by reason of its never having been properly delivered. Should this be decided against them, they say, secondly, that the bank having by Turner, one of their members, proved the full amount of the mortgage under the commission, has thereby lost its right to resort to the security; and, thirdly, that at all events inquiry ought to be instituted for the purpose of satisfying the Court whether the mortgage is not void, as having been a fraudulent preference in contemplation of bankruptcy.

On the first point—the supposed original invalidity of the deed, by reason of a want of proper delivery, we think there is not, either on principle or authority, any foundation whatever for the arguments of the defendants.

It appears from the evidence of William Morris, who was a clerk of the late Mr. Thompson, that he, by the direction of Mr. Thompson, procured Griffiths to execute, i.e. to sign, seal, and deliver, the deed in question. On the authority of the case of *Doe d. Garnons* v. *Knight* (5 B. & C. 671), and many previous cases there referred to, this was quite sufficient to render the deed operative, even if it had been retained by Griffiths in his own hands. But, in fact, he did not retain it; it was delivered to Thompson without any direction for treating it as an escrow, or any thing to cut down or narrow the full legal effect of a delivery. Thompson retained it from the time of its execution till it was delivered by Morris, soon after the bankruptcy, to Mr. Watson as solicitor for the bank. It is **[131]** true that Thompson was the solicitor of Griffiths, and was not the solicitor of the bank; but there is nothing to shew (even if that were material) that Thompson held the deed as solicitor of Griffiths; nd, on the contrary, the circumstance of his having intentionally (as it should seem)

absented himself at the time of the execution, and having directed his clerk to get it executed, and having then taken possession of the deed, rather leads to a contrary inference. It appears, moreover, probable, from the deposition made by Turner on proving under the commission, as that deposition is stated in the answer of the assignees, that Mr. Thompson had given to the bank a verbal guarantee that Griffiths would pay his debt; and this suggests a very natural and obvious reason why Thompson should, for his own security, be anxious that the mortgage should be executed. And when to all this we add that on the day after the execution Thompson gave formal notice of the deed to the prior mortgagees, it appears to us to be quite impossible to contend that the deed was originally liable to be impeached on the ground of any want of proper delivery.

On the second head of objection also, namely, that arising out of the proof made by Turner, we think the defendants have failed to state anything affecting the plaintiffs' right in this suit.

Whether, on application to the Court of Review, the assignees may be able to make out a case which may induce that Court to order the bank to deliver up their securities, is a matter on which it is not for us to speculate. Great jealousy is properly felt, on the part of those who exercise jurisdiction in bankruptcy, against permitting parties who have proved on the footing of holding no security, afterwards to withdraw their proof and set up a security. But where, as in this case, the proof has obviously been made in ignorance of the existence of the security, it is highly probable that the Court would give relief. At all events, **[132]** this is a matter to be decided directly in bankruptcy, and not incidentally in suits between those setting up the security and third persons.

It remains to consider the third objection insisted on by the defendants as invalidating the plaintiffs' security—namely, that it is void as having been executed in fraud of the bankrupt laws, by way of fraudulent preference, and in contemplation of bankruptcy.

The facts as regards this part of the case are as follows:—

The deed was executed on the 21st June, 1836. The fiat issued on the 15th July following. The deed remained in the custody of Thompson. On the 2nd August Turner proved the debt under the commission, and swore the bank held no security, and soon after this (the precise date is not shewn) the deed was handed by Morris (Thompson's clerk) to Watson as solicitor for the bank. During the autumn of 1836, and the following spring, much negotiation took place between Bawdeswell the solicitor of the assignees, and Watson as the solicitor of the bank, relating principally, if not exclusively, to the right claimed by the bank of tacking another debt to that secured by the deed now in question.

These facts are certainly quite consistent with the case stated by the assignees, that this deed was a fraudulent attempt to defeat the effect of the bankrupt laws. At the same time, they are by no means inconsistent with a contrary hypothesis. There is no clear account of what was the state of Griffiths' affairs at the time when he executed the mortgages to the bank, nor of what ultimately led to his bankruptcy, nor as to whether the mortgages were executed under any pressure on the part of the bank, so as to exclude the notion of their being voluntary. On all those points, and many others essential on this part of the case, the evidence certainly does not enable us to come to a safe and satisfactory conclusion.

[133] Supposing the transaction to have been one of fraudulent preference, we do not think that there has been anything in the subsequent acts of the assignees to prevent them from now raising this point. The memorandum of the 21st April, 1837, after cautiously speaking of the sum of 468*l.* 17*s.*, expressed to be secured, &c., provides that the concurrence of the bank in the sale to Marshall shall not prejudice their claims to recover the residue of the mortgage premises.

This question, therefore, of fraudulent preference, is certainly left in much obscurity. The parties setting it up are, it is to be observed, assignees of a bankrupt, acting not for themselves, but as trustees for the body of the creditors. They do in their answer distinctly object to the validity of the mortgage on this ground, and the evidence in the cause certainly is such as to render it far from improbable that the objection may be well founded. The objection, if made out, in fact defeats the whole of the plaintiff's case.

Under these circumstances, we think that, consistently with the ordinary rules of

Courts of Equity, the assignees ought, if they think fit, to be allowed an opportunity of contesting, on this last ground, the validity of the mortgage.

Narrowed as the question thus is to a single point, the proper mode of testing the validity of the deed will be by directing an issue to try whether the mortgage of the Craven Street houses, dated the 21st June 1836, was executed by Griffiths by way of fraudulent preference, and in contemplation of bankruptcy.

If the assignees think fit to try such an issue, we think the decree must be varied by directing it accordingly; and in such case all ulterior questions will be reserved until after the trial.

The assignees will of course try such a question at their peril as to costs. Unless they think fit to take this course, **[134]** the decree of the Vice-Chancellor, in the propriety of which (except as to the right of the assignees to an issue) we entirely concur, must be affirmed with costs.

The issue was afterwards tried before Rolfe, B., at the Liverpool Summer Assizes for 1840, when a verdict was found for the assignees; thereby establishing the fraudulent preference.

COURT OF EXCHEQUER.

MONYNS *v.* JOAD. 1840.—This Court adopts the rule of the Court of Chancery in regard to costs in suits of partition.

This was a suit for partition. The certificate of the Commissioners had been confirmed.

The question on farther directions was whether the parties should bear their own costs respectively, down to the issuing of the commission, and then be paid according to their respective interests, or whether the whole costs should be thrown into hotchpot, and borne by all parties according to their respective interests.

Mr. Simpkinson and Mr. Messiter, for the plaintiff, mentioned *Agar* v. *Fairfax* (17 Ves. 555) as an authority for the former mode of apportioning the costs, and *Picket* v. *Picket* (in Exchcq. 11th May, 10th Dec. 1801) as an authority for the latter.

Mr. J. Russell, for the other parties.

ALDERSON, B., said he should adopt the rule of the Court of Chancery.

[135] MEMORANDUM.

On the 20th April, 1840, Jeffries Spranger, Esq., one of the Masters of the Court of Exchequer, died; and on the 28th of the same month he was succeeded in his office by the Hon. Robert Campbell Scarlett.

WOOD *v.* WOOD. April 30th, May 18th, 1840.—Where the Court gives leave to amend by adding parties, the power so given is in no case to be considered illusory; and therefore, where it is necessary to read evidence against the new party, the plaintiff, notwithstanding the order is merely to amend, may file a supplemental bill; and he may incorporate in such bill any other matter which might, independently of the order to amend, be the subject of a supplemental bill.

In this case the plaintiffs, in consequence of the order obtained by them on the 27th June, 1839 (ante, vol. 3, p. 580), instead of amending their bill, filed a supplemental bill, praying relief against all the real estates of John Worthington, and a declaration that a particular estate which he had devised to be sold was subject to a lien for part of the purchase-money remaining unpaid. With reference to this last-mentioned relief the official assignee of Isaac Worthington, the son and executor of John Worthington, was made a defendant to the suit. It appeared that Isaac Worthington had an option under his father's will to purchase this estate, and it was alleged that he had contracted to do so, but had left part of the purchase-money unpaid, and afterwards became bankrupt. He had since died, and his representatives were brought before the Court.

The order of the 27th June being that the bill should be amended before the first day of Hilary Term or be dismissed with costs, a motion was now made that the

Master might be directed to tax the costs of the suit pursuant to the order, including the costs of filing the supplemental bill, and that such costs might be paid by the plaintiffs, the plaintiffs not having complied with the order to amend, and that if necessary the supplemental bill might be taken off the file.

[136] Mr. Simpkinson and Mr. Kenyon Parker, for the motion, said that this supplemental bill had been filed on the authority of *Greenwood* v. *Atkinson* (5 Sim. 419), but that if that case was of any authority it only extended to supplemental bills for the purpose of bringing parties before the Court, and not so the introduction of new matter: *Milligan* v. *Mitchell* (1 Myl. & C. 433). The effect of the order was that if not complied with according to the strict terms of it, the cause was out of Court, and a motion to dismiss would not be necessary.

Mr. G. L. Russell, contrà. In *Milligan* v. *Mitchell* the amended bill totally changed the nature of the record, which is not the case here. The plaintiffs, however, do not, in this case, proceed solely on the order to amend. They have a right, independently of that order, and without permission of the Court, to file a supplemental bill. They might have filed two distinct bills on the same day; one an amended bill, by adding parties in compliance with the order; the other a supplemental bill: why, therefore, are they not at liberty to include both in one? The Court, in directing the proper parties to be brought before it, will see that entire justice is done. The order will be nugatory if the plaintiffs are thereby driven to bring parties before the Court in a form in which evidence cannot be read against them. The plaintiffs have clearly a right, without permission, to ask for the additional relief; for it was not till the answer of the executors was put in that they knew that the personal estate was insufficient. Asking for no change of relief, but only ulterior relief, they may file a supplemental bill without the permission of the Court. Mitf. Pl. 61, 62, *Dormer* v. *Fortescue* (3 Atk. 133), *Crompton* v. *Wombwell* (4 Sim. 628). He also relied on two other points, which are noticed but not acted upon in the judgment.

[137] Mr. Simpkinson, in reply. The terms of the order giving liberty only to amend excluded the right to file a supplemental bill. In many of the older cases liberty is given to amend the bill, or file a supplemental bill, which shews that the right to file a supplemental bill does not exist where the new matter to be added is mere matter of amendment. And this corresponds with the opinion of Lord Redesdale (Mitf. Pl. 62). There is clearly no ground for making Abbott a party by supplemental bill, and with respect to the other new matter, there is nothing which the plaintiffs might not have known before they filed their original bill. If under the circumstances they can read no evidence against Abbott they have only themselves to blame. *Colclough* v. *Evans* (4 Sim. 76) is an authority to shew that after an original cause is at issue, the plaintiff cannot file a supplemental bill for the purpose of putting in issue facts which might have been introduced by amendment into the original bill, although the supplemental bill alleges that those facts were not known to the plaintiff till after the original suit was at issue. He also referred to *Mitchel* v. *Lowndes* (2 Cox, 15) and *Tyler* v. *Bell* (2 Myl. & Cr. 89).

May 18th.—ALDERSON, B. In this case the only question is whether the filing of the supplemental bill is a sufficient compliance with the order of the Court made in the month of June last. That order was, that the bill should stand dismissed unless the plaintiffs amended their bill, by adding the official assignee as a party, on or before the first day of last Hilary Term. Instead of doing this, the plaintiff has filed a supplemental bill, in which he has introduced new matter, to which, of course, he has made the former defendants parties; and the point for my consideration is, whether this supplemental bill is a compliance with the condition imposed by the Court, so as to prevent **[138]** the consequence which otherwise would follow, and which it is the object of the present motion to obtain. Now, for this purpose, the plaintiffs rely on the case of *Greenwood* v. *Atkinson* (5 Sim. 419), and I think if that case be well decided, the plaintiffs are entitled to my judgment. The defendants contended that this case was distinct from *Greenwood* v. *Atkinson*, on the ground that, in the case cited, the only object and effect of the supplemental bill there filed was to bring the additional parties before the Court; whereas, here, more has been done by the introduction of new and supplemental matter. I think that distinction is not sufficient. If the party has a right to treat a supplemental bill as a compliance with the order of this Court, I do not think he alters his position by including other matters proper to form part of a supplemental bill in that bill. For this, he does not want

the permission of the Court, but has a right to include those matters in a supplemental bill. Suppose the plaintiffs here had amended their bill in the way in which the defendants suggest they ought to have done, and had also, after doing this, filed a supplemental bill including the new matters, I am not aware that the defendants could have objected to it. If so, it seems to me that they may well consolidate in a supplemental bill, filed under the permission given to amend, the new matter. This would be, in fact, the most convenient and compendious mode of proceeding. After all, therefore, it comes to be considered whether *Greenwood* v. *Atkinson* is well decided; and, upon the whole, I see no ground for differing with that decision. A power to amend given by the permission of the Court (for I think *Bierdermann* v. *Seymour* (1 Beav. 594) shews that such permission is not merely of course) must not be an illusory permission. Lord Redesdale, in his book on pleading, says that, in case of necessity, a supplemental bill may be filed for the purpose of adding par-**[139]**-ties, where the proceedings are in such a state that the original bill cannot be amended so as to accomplish effectually that purpose. Here that is the case; for it is conceded, that an amendment of the original bill here would not do, as the plaintiffs must read evidence against the official assignee, whose addition to the parties before the Court is required. Therefore, unless here the plaintiffs may file a supplemental bill, the powers granted to them of amending, by adding parties, would be illusory. Having, therefore, an authority, that of *Greenwood* v. *Atkinson*, which is in point, and the circumstances of this case requiring, as it seems to me, that such a proceeding should be adopted, I shall act upon that decision upon the present occasion. I think, therefore, that these proceedings are quite regular, and it therefore becomes unnecessary to inquire whether the defendants have waived their right to make this motion by obtaining time to answer, and whether the affidavits on which they move are properly entitled.

Motion refused with costs.

COMBE AND OTHERS *v.* CITY OF LONDON. May 5th, 1840.—The Corporation of London claimed for the Fellowship Porters of that city a prescriptive right of measuring and carrying, for certain fees, all corn landed on either side of the river Thames, between Yantlet and Staines bridge, and carried into or out of the city; and they filed their bill against C. & Co., to establish that right. The defence of C. & Co. was, that the claim was of modern origin; and they filed their bill of discovery against the Corporation, suggesting that the Porters were established in the time of Henry 3rd, for carrying (within the city only) corn landed by persons other than citizens, at Queenhithe, which they alleged was then the only place where corn was permitted to be landed; and they claimed the inspection of certain entries in the Corporation books, which purported to be copies of ancient public orders and proclamations, inquisitions and findings, relating to the landing of corn at Queenhithe, and to the charges for carrying it to certain persons within the city. Upon motion to produce these documents, which by the answer of the Corporation were admitted to be in their possession, but were insisted upon as part of their title, and that of their grantees, the Fellowship Porters: Held, that they were not part of their title, and must be produced.—Principles upon which the Court is guided in ordering the production of deeds and documents.—Production of cases and opinions of counsel refused.

[S. C. in Chancery, 1842, 1 Y. & C. C. C. 631; 6 E. R. 1048 (with note), and see p. 584, post.]

In October, 1835, the Mayor and Commonalty and citizens of London, John Henry Liquorish, and other persons, **[140]** describing themselves as members and rulers of the Fellowship or Brotherhood of the Porters of Billingsgate, in the said city, and William Rushton and John Eayres, describing themselves as members, or shifters, or paymasters of the said fellowship, on behalf of themselves and other members of the said fellowship, filed their bill in this Court against the present plaintiffs, who were partners and brewers in the Savoy in St. Martin's-in-the-Fields, Westminster, which, after alleging that the Mayor, Commonalty, and citizens of London were in possession of divers royal charters, conferring on them great powers and privileges, and that they possessed many valuable rights by prescription, which had been confirmed by charter and acts of Parliament, contained the following statements:—That the portage

and carriage of all coals, corn and grain, and of all salt, and all kinds of apples, pears, plums, and of onions, and of roots to be eaten, and of all merchandizes measurable, arriving or brought into the city of London, upon or by the water, or by the river Thames, and going out of the said port, within the limits therein mentioned, in any ship, boat, barge or vessel, floating, loading, remaining, or being of what side soever of the river Thames, and upon any bank or shore of the same river, which shall happen there to remain, and be delivered or landed, or carried outwards, or from the city, from the bridge of Staines to London Bridge, and from thence to a place called Yendall, now called Yantlet, towards the sea, have time out of mind belonged to, and still do belong to, the said Mayor, etc., or their grantees, and always have been, and now are exercised and used by certain Porters, freemen of the said city, called Corn and Salt Porters, &c.; that the said Mayor, &c., or their grantees, the said Corn and Salt Porters, have had and taken, and ought to have and take certain reasonable rates or wages payable in that behalf; that the said Corn and Salt Porters were an ancient brotherhood or fraternity, **[141]** under the control and regulation of the Court of the Lord Mayor and Aldermen, and afterwards, and now of the Court of Common Council of the said city, and were regulated by an act of the said Common Council, passed in the 18th year of the reign of King James the First; that there is an ancient public office in the said city called the Commissioners' Office, where, and at other convenient and well known places within the said city, the said Porters have from time immemorial, and do still attend for the purpose of receiving orders in respect of the portage of corn and grain, &c., which should arrive or be brought in any ship, boat, barge, or vessel on the river Thames, within the said port of London, and to be unloaded, or carried, or removed out of such barge or vessel; that notice ought to be given to them, &c.; that the rate of wages of such parties has been from time to time varied, and that the present rate for carriage, or porterage of malt in sacks, from any ship, &c., to any wharf or quay above London Bridge, and not carried above thirty yards from the campshott, is one penny for every sack of malt, and for the carriage or porterage of malt, being loose or in bulk, and so carried, one penny-farthing for every sack. The bill then, after alleging that the present plaintiffs had landed by hired workmen, not being members of the said Fellowship, large quantities of malt at their wharf at the Savoy, which they had consumed in the way of their trade, prayed for a declaration that the exclusive right of porterage of all corn and grain, landed from any vessel within the port of London, is vested in the Mayor and Commonalty, and citizens of the city of London, and for an account of the malt so taken.

To this bill the present plaintiffs put in their answer, and likewise filed a cross bill for discovery of documents. The substance of their case, as alleged by their answer and cross bill, was this:—That the right of porterage claimed by the city and their grantees had no legal origin; **[142]** that such claim commenced long since the time of legal memory, and that the exercise of it, so far as it had been exercised, was of modern origin; that in the time of Henry the Third the only port in London at which corn could be landed was Queenhithe, where, under an order of the 9th year of that reign, certain dues were exacted from all foreign vessels (or vessels not belonging to the citizens of London), for the use of the king; that this order did not affect citizens of London; that by charter of the 31st of Henry the Third, Queenhithe was granted to the Mayor and Commonalty of the city of London, and thereupon they employed porters to carry corn and grain landed from foreign vessels; but that prior to this grant the Corporation did not exercise any right of porterage either at Queenhithe or elsewhere: that in the time of Edward IV. Queenhithe, as a place of resort for vessels, was superseded by Billingsgate; that Queenhithe and Billingsgate are public markets; that the right of porterage, if it exists, is incidental to the market, and does not extend beyond the public markets, or to corn not used for sale, but for private consumption; that the customs of Queenhithe and Billingsgate as to carrying corn, grain, &c., are confined to such of those articles as are brought into the city, and do not extend to such as are loaded in Westminster, or any other place without the limits of the city; but that the right of porterage, as far as it extends, is incidental only to the measuring of corn and grain, and that where measuring is not required there is no right of porterage.

The bill of discovery after charging generally that the defendants had in their power divers ancient deeds, charters, inquisitions, or findings upon inquisitions, books, accounts and documents relating to the history of Queenhithe and Billingsgate and

to the ports &c. thereof, and to the times and the means at and by which the same were granted to the Corporation, and the customs, usages, and rights of the said ports, and the several other matters aforesaid, whereby it **[143]** would appear that the claim of porterage made by the bill commenced within legal memory, and that the right thereto (if any) was confined to the limits of the City of London, charged more especially that the defendants had in their possession the several orders made by King Henry III. touching the Port of Queenhithe, and a commission of inquisition held in the 28th year of the same king's reign, touching the customs of Queenhithe and the findings thereon, and also a certain grant or letters patent of the 31st of the same king's reign, by which he granted Queenhithe to the Mayor and Commonalty of the City of London and their successors, and an ordinance or statute of the 3rd year of King Edward IV. respecting the market of Queenhithe and a regulation for the resort of vessels to Queenhithe and Billingsgate, in a certain way or proportion, and also an act of Common Council passed in the 18th year of the reign of King James I. for the incorporation of the said Fellowship of Porters, and also a charter granted to the Corporation of London by King James I. bearing date the 20th September, 1609; which documents the defendants ought to produce, but had refused so to do.

The defendants, the Mayor and Commonalty and citizens of London, by their first answer denied the principal allegations contained in the bill of discovery relative to the claim in question. In answer to the charges as to deeds and documents, they professed to set forth on their information and belief the purport, and in some instances a statement verbatim, of the following documents:—namely, a charter of the 30th October, in the 30 Hen. 3, which in the body of the answer purported to be a covenant between the Earl of Cornwall of the one part, and John De Gysors, Mayor of London, of the other part, whereby the Earl granted to the Mayor and Commonalty, Queenhithe with its liberties and customs in fee farm, rendering the yearly rent therein mentioned; a charter of the 26th February, of the 31 Hen. 3, whereby the **[144]** king confirmed the before-mentioned covenant; a finding on an inquisition of the 29 Edw. 1, before Elias Russell, Mayor of London, relating to the measuring, carriage, and porterage of the corn brought to Queenhithe, stating the sums which the porters of corn were authorized to charge for carrying it to bakers, brewers, and others of the city; an act of Common Council of the 4 Edw. 4, relating to the landing of corn at Queenhithe and Billingsgate; a proclamation of the 9 Eliz., relating to the same matter; a report of certain Aldermen in the 8 Eliz., relating to the same matter; an act of Common Council of the 18 Jac. 1, relating to the Fellowship Porters. But "save as aforesaid," the defendants in substance averred that they did not know and could not set forth as to their information or belief whether the statements in the bill relative to the particular orders, charters, and documents mentioned in the bill were correct, or whether there were any other documents which would bear out those statements. And the defendants admitted the possession of divers royal charters, and divers books belonging to the Corporation, containing copies of or extracts from ancient deeds, charters, &c., together with divers documents, evidences, and writings relating to the history of Queenhithe, [following the words of the bill], but they denied that if the same were produced, it would appear from them, or any of them, that the claim of porterage made by the defendants commenced within legal memory, &c., "on the contrary these defendants say that the said royal charters, and books, and the said documents, evidences, and writings contain and are the title-deeds and documents evidencing and shewing the title of these defendants and their grantees, the said Fellowship Porters, to the exclusive right of porterage of all corn, &c., and are intended to be used by these defendants as evidence in their behalf in the before-mentioned suit. And these defendants say they believe, that by such charters, &c., it does appear that they and their grantees have **[145]** such exclusive right. And these defendants say they have in the schedule to this their answer annexed, and which they pray may be taken as part thereof, set forth a full and true list or particular of all and every the charters, &c., relating to the history of Queenhithe, &c. But these defendants submit and insist that they ought not to be compelled to produce the same or any of them, inasmuch as these defendants say that the said complainants have no interest in the same, or any right to an inspection or production thereof." The schedule to the answer comprised the charter of the 30th October, 30 Hen. 3; that of 26th February, 31 Hen. 3; that of 20th September, 6 Jac. 1; a copy of an entry in the Hundred Rolls deposited in the Chapter House, Westminster,

of the 3 Edw. 1; a copy of an entry in the register of the proceedings in the Privy Council of the 29th January, 1685, kept at Whitehall, and divers repertories and journals, and other Corporation books, marked respectively with the letters A to P inclusive.

The plaintiffs amended their bill by charging that though the defendants, the Mayor and Commonalty and Fellowship Porters, pretended that the several orders of King Henry III. relating to the port of Queenhithe, and the said commission of inquisition of the 28th year of his reign, and the finding thereon, were not nor were any copies thereof in their power, yet they well knew where such documents or copies or abstracts of them might be found; and that the defendants had in their possession some printed or other books, repertories, archives, papers, and evidences in which the aforesaid particulars or documents were set forth in whole or in part, or were recorded or mentioned; and that the plaintiffs being ignorant where such particulars and documents as aforesaid were deposited, the defendants ought to discover the same. The plaintiffs further charged that the finding on the inquisition taken before Elias Russell in the 29 Edw. 1, as **[146]** mentioned in the defendants' answer to the origina bill, contained much more matter than appeared or was stated in such answer; and that what was there stated was not accurately stated; and that the defendants ought to discover and set forth the full particulars of such finding, and to name and describe the documents, archives, and evidences from which they collected the particulars of such finding, as they had stated them. The plaintiffs then charged that the defendants had in their possession the other documents mentioned in their answer, or copies of them; viz. the order 4 Edw. 4, the proclamation 9 Eliz., and the report 8 Eliz.; or that the defendants could state where the same were to be found. The plaintiffs then charged that the defendants, the Mayor, &c., had in their possession divers documents or copies or extracts therefrom, relating to the dues and charges received by the bailiffs of Queenhithe, and also certain written or printed books, and certain repertories, in some of which were entered or to be found divers notices, &c., relating to Queenhithe and Billingsgate, and the measuring and carrying of corn and grain by the meters and porters aforesaid; and divers cases for the opinion of counsel, or copies thereof, and the opinions of counsel thereon, or copies thereof, relating to the right of measuring and carrying corn, grain, and other articles of provision, which several cases were prepared and answered long before the matter now in dispute between them and the plaintiffs was in any way agitated between them; and that the defendants ought to discover and point out the books containing such notices, and to set forth a list or schedule of such cases, &c.

The defendants, by their further answer, stated that, save as thereinafter and in their former answer mentioned, they had no knowledge or belief as to where the alleged commission of inquisition of the 28 Hen. 3, or the finding thereon, or the orders of King Henry III., touching the port of Queenhithe, were to be found; though, if such were in existence, they ought to be enrolled among the **[147]** public documents of the kingdom; but they admitted that they had lately discovered in a book in the possession of the defendants, marked A 2, an entry purporting to relate to an inquiry said to have been directed by King Henry III., in the 28th year of his reign, relative to the customs of Queenhithe, which entry being duly translated, was, as the defendants believed, in the words and figures, &c. But the defendants said that such book did not form any part of the records of the said city, or of any records in the possession of the defendants, and they had no means of proving its accuracy; and moreover, they said that it purported to be a proceeding before the King's Justices in Eyre, and not an inquisition, and as such ought, if it ever took place, to be preserved among the public records of the kingdom. And the defendants further said they had been informed, and believed, that there were amongst the public records of the kingdom two entries of orders of King Henry III., respecting Queenhithe, which being translated into English, were, as the defendants believed, to the following purport and effect, &c.; and the defendants further said that they had lately discovered an entry in a book marked G F, in the possession of the defendants, purporting to be a copy of an inquisition by the Mayor of London, dated the 41 Edw. 1, relative to Queenhithe, which was in the following words, &c.; and save as aforesaid, the defendants denied, to the best of their knowledge, &c., that they had in their possession any printed or other books, repertories, &c., in which the several documents in the amended bill mentioned were set forth, &c.; and they denied that

the finding upon the inquisition of the 29 Edw. 1, set forth in their former answer, was not accurately or fully set forth; and they stated that they took the said finding from the said book marked A 2, and not from any record or authentic document belonging to the defendants; and they had not discovered it in any other book or document. With re-**[148]**-spect to the act of Common Council of the 4 Edw. 4, the proclamation of the 9 Eliz., and the report of the 8 Eliz., they admitted that they had copies of those documents, and that they related to the resort of vessels to Queenhithe and Billingsgate; but they denied that they related to the porterage or carriage of corn, or to any other matters in question between the parties, and they submitted that the plaintiffs were not entitled to inspect them. And the defendants admitted the possession of certain written books and repertories, containing notices, &c., relating to Queenhithe and Billingsgate, and to the measuring and carrying of corn and grain by the persons respectively appointed meters and porters, aforesaid; and they said that such books and repertories contained, from a very early period, the proceedings of the Court of Aldermen and of the Court of Common Council, and other matters and things relating to the rights and privileges of the said city. And the defendants said that they had, in the first schedule, &c., set forth a true list of all and every such books, &c., as contained anything relating to the said ports of Queenhithe and Billingsgate, or to the measuring of corn, &c. landed from the river Thames; but they submitted that the plaintiffs had no right to inspect them, and they denied that the plaintiffs were interested in them. Moreover, they denied that, if produced, they would shew that the right of porterage commenced within legal memory, &c., or would furnish evidence to the plaintiffs in support of their defence in the original suit; on the contrary, the defendants said that such books &c. contained matter which they intended to make use of against the plaintiffs in the before-mentioned suit. And the defendants denied the plaintiffs' right to inspect any book or document relating to metage. And the defendants admitted the possession of divers cases and opinions relative to the right of measuring and carrying corn and grain landed from the Thames; **[149]** all which cases and opinions they had enumerated in the second schedule to that their answer: but they stated that such cases had been prepared with a view to the assertion of the right of metage and porterage, and that the right of porterage to which they referred was the same right, though claimed against other parties, as the right now claimed; that the case marked A was prepared and answered after the matter in dispute had arisen between the defendants and plaintiffs; that it was prepared on behalf of the defendants, in contemplation of actual litigation arising out of such disputes, and that it contained statements of the evidence necessary for the support of the defendants' case. The defendants also alleged that this case was in a great measure transcribed from the cases before mentioned. They submitted that they were not bound to produce these cases.

The Fellowship Porters by their answer admitted that certain persons called shifters, on behalf of the said Fellowship Porters, had for a long series of years last past, but when such practice commenced the defendants did not know, &c., kept books of account, one of which was then in the possession of the defendant John Eyres, and others of which were in the possession of the defendant William Rushton, and which were particularly specified in the schedule to their answer annexed, in which were entered the amounts received by each porter for his labour of porterage in landing and carrying corn and grain, and the name of the merchant or person by or on whose account the same was paid. And the defendants submitted they were not bound to produce these accounts.

A motion was now made that the defendants, the Mayor and Commonalty and Citizens of the City of London, might be ordered to produce, and leave with their clerk in Court, for the usual purposes, the several charters, paper writings, repertories, journals, and Corporation books mentioned in the schedule to their first answer, and also the books **[150]** mentioned in their second answer, to be marked with the letters A 2 and G F, and the paper writings, or copies of documents mentioned in their said second answer to be in their possession, and the several books and repertories, and cases and answers thereto, papers and documents mentioned in the schedule to their second answer; and that the other defendants might in like manner produce the several accounts and books of account mentioned in the schedule to their first answer, and the several cases and opinions mentioned in their second answer.

Mr. Simpkinson and Mr. James, for the motion. The plaintiffs in this suit claim the production and inspection of those books and papers which ex concessis are admitted to relate more or less to the matter in question, and they are resisted by the mere statement in the answer that those books and documents, though they do relate to or contain entries relating to the matter in question, will not tend to prove the defence of the present plaintiffs. But is that any answer to the application? There are one or two instances in which the production of documents is excused. That of title deeds is one: but these books and documents are not title deeds, although the defendants allege that they mean to produce them in evidence. [The Lord Chief Baron. But suppose they are books and papers which form the evidence of usage on behalf of the defendants—are they to be produced for your inspection?] The question is, who is to be the judge whether they form evidence of usage or not. If the defendants admit that the documents relate to the matters in question, it is quite immaterial for them to say that they do not tend to prove the plaintiffs' case. We claim to be entitled to see the books and papers which relate to this custom, in the same manner as we should be entitled to call upon the defendants to set forth the entries in the books relating to it. The case **[151]** of *The City of London* v. *Thomson* (3 Swanst. 265 n.) is a clear authority for the present application. There the defendants obtained an order to inspect the city books, and the Chief Baron said there was nothing extraordinary in the motion, and he referred to the case of the lord of a manor. [The Lord Chief Baron. That is a very short note; and the Chief Baron does not explain the excepted case of the lord of a manor. The reason why the lord of a manor produces his muniments is that they belong to the tenants of the manor as well as to himself, and contain their title.] There are analogous cases in which production of books under similar circumstances has been allowed: *Firkins* v. *Lowe* (M'Clel. 73), *Newton* v. *Beresford* (1 Younge, 377). In the latter case the production was opposed on the ground suggested by your Lordship, that the books to be produced formed the evidence of the party. [The Lord Chief Baron. That was not so put by the answer.] At all events, in both these cases the answer alleged that the plaintiff had no concern in the documents in question, and yet production was granted. *Burrell* v. *Nicholson* (1 Myl. & K. 680) is likewise an authority for the plaintiff. [Lord Chief Baron. That was a question of parochial boundary. A parochial officer is like a public officer in the possession of documents which may prove any man's case.] The claim made by the city comes within the reach of a certain custom. It is like the claim of suit and service by the lord of a manor. [The Lord Chief Baron. The lord of a manor is a public keeper of documents for the benefit of all his tenants.] The City of London are the public keepers of certain documents of a particular character, which are material to be known in order that persons taking up lands within the city may know the duties and penalties to which they are subject. Besides, the plaintiffs are not claiming the inspection of **[152]** documents at hazard, but documents of which the contents are partially admitted by the answer, and which we say are not fully or accurately set forth. The plaintiffs have a clear right to the inspection of the books from which the orders set out by the defendants have been copied, and likewise the inquisition of the 29 Edw. 1.

As to the cases and opinions, it may be conceded that we are not entitled to the inspection of the case marked A'; but the other cases are not alleged to have been made in contemplation of and pending the present litigation, and therefore stand on a different footing.

Mr. G. Richards and Mr. Randell, contrà, for the City of London. It is properly conceded on the other side that the plaintiffs have no right to the inspection of any of the title deeds of the city nor the case A. But we submit that they are not entitled to any of the documents or cases of which they seek the production. We say, first, that they have shewn no common title; and, secondly, that plaintiffs propose to use the documents in question as evidence on their own behalf. With respect to the cases cited on the other side, that of *The City of London* v. *Thomson* is almost unintelligible. The others are clearly distinguishable from the present; for in all of them there was evidence of an interest in the party seeking the production, or of a common interest in both parties, arising from admissions in the answer. Here the party applying is a total stranger to the Corporation, and has no interest in any of the documents in their hands. These books and documents are as much muniments of title as deeds would be. A title deed is not protected because it is on parchment and relates to

land, but because the party holding it shall not be compelled to produce it before the hearing of the cause or action for the purposes of evidence: *Bellwood* v. *Wetherell* (ante, vol. 1, p. 211), *Knight* v. *Marquess of Waterford* (ante, vol. 2, p. 22), **[153]** *Adams* v. *Fisher* (3 Myl. & C. 526). With respect to the cases and opinions, it is obvious that the principle which prevents the production of cases laid before counsel in contemplation of or after the commencement of litigation, equally applies to all the cases and opinions now sought to be produced. But late decisions have excluded the production of all cases and opinions relating to the matter in question, whether old or new. Lord Brougham was disposed to hold this in *Bolton* v. *Corporation of Liverpool*; and although it has been sometimes said that he held the contrary, it has been ascertained that the express point never came before him. [The Lord Chief Baron. I did his Lordship great injustice; I certainly thought that on one occasion he had held the contrary (see ante, vol. 2, p. 31).] The other authorities on this point are *Knight* v. *Marquess of Waterford*, which was decided on great consideration, and *Bushnell* v. *Bushnell* (not reported). They also referred to *Walker* v. *Wildman* (6 Madd. 47), and *Hughes* v. *Biddulph* (4 Russ. 190).

Mr. Spence, for the Fellowship Porters.

Mr. Simpkinson, in reply. The plaintiffs have a right to the production of the copies of the several documents relating to Queenhithe. These documents confirm the plaintiffs' case. The inquisition of the 29 Edw. 1 expressly states the specific sums which the porters are entitled to charge to bakers and brewers of the city, for the carriage and measurage of their corn. There is also an express finding in this inquisition, not merely that there shall be a measurement at Queenhithe, but that none shall measure for a stranger, except by permission of the Bailiff of Queenhithe. Now it is part of the plaintiffs' case that the measuring and porterage are co-extensive. But if a stranger **[154]** cannot trade there, what right have the porters to say they shall measure and carry his corn? It is not a mere finding of the customs of Queenhithe, as between city and citizens, but it applies to strangers. The other documents charged in the bill and admitted by the answer all tend to the same conclusion. They must be judged of from the words of the documents themselves. If on the face of the documents they are or may be material to the plaintiffs' case, on what authority can they be withheld? It is admitted they are public documents, though it is not known where the originals are to be found. Now, whatever be the value of these documents, we have a right to see whether the copies are rightly set forth in the answer; and the Court must draw the necessary inference from them, and not the city.

With respect to the production of cases, it is certain that in *Knight* v. *Marquess of Waterford* some cases were produced; and, in principle, it is difficult to see why any should be protected, but those which are framed in contemplation of or pending a litigation. All others stand on the footing of ordinary admissions in writing, and cannot in principle be considered as confidential communications. Such admissions may be made to a solicitor as well as to any one else.

THE LORD CHIEF BARON. Nothing can be plainer than the principles on which this right of production and discovery depend. Unhappily, each case presents a new application of those principles, on which there appears to be much more difference of opinion than I should have imagined to have existed. But let us see on what the principle does depend. A party has a right to compel the production of a document in which he has an equal interest, though not equal in degree, yet to a certain extent equal with the party who detains it from him. In that case he may file a bill of discovery, in order to have the possession **[155]** of it, and the inspection of it. A party has also a right to file a bill of discovery for the purpose of obtaining such facts as may tend to prove his case; and if those facts are either in possession of the other party, or, if they consist of documents in possession of the other party, in which he either has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery, in order to aid him in law or in equity to exhibit those documents in evidence, or compel a statement of those facts. But does it not rest there? Has he a right, as against the defendant, to discover the defendant's case? Does any case go the length of that? Sometimes the cases trench very much on those limits; but if you take the question as a matter of principle, has a man a right, or is it consistent with common justice that he should file a bill to discover the defendant's case? The ground on which he files his bill is to make the defendant discover what is material to his

(the plaintiff's) case; but he has no right to say to the defendant, "Tell me what your title is—tell me what your case is—tell me how you mean to prove it—tell me the evidence you have to support it—disclose the documents you mean to make use of in support of it—tell me all these things, that I may find a flaw in your title." Surely that is not the principle of a bill of discovery. And if you look at the cases, you will find, however they may occasionally trench on the line of distinction—you will find that is the great line of distinction.

In the present case the Corporation of London, on behalf of the Fellowship Porters, who appear to be a sort of imperfect emanation of the Corporation themselves, file a bill for the purpose of obtaining compensation for the Fellowship Porters, for the loss of certain alleged dues for porterage. I say nothing of the merits of the case, of which I know nothing; probably they may find it difficult to prove it. Then the defendants, the plaintiffs in this cause, file a **[156]** cross bill of discovery, containing various charges as to some of the documents which the Corporation have disclosed; and they desire the production of those documents. They call on them to state the particulars, and so on. Now the title of the Corporation and the Fellowship Porters must depend on charters, if such charters exist, or authorities issuing from the city of London, if the city of London has a right to grant such authorities in writing, or from usage from which such right may be inferred. Those are the only three grounds on which their rights can depend. If they depend on charters, has the plaintiff a right to say, let me see your charters on which you found your right? If they depend on documents, acts of the Common Council, or orders of the Mayor, you may question the authority of the Mayor to make the orders—you may question the authority of the Common Council to pass such acts—but have you a right to ask for the documents themselves? That is not the object of a bill of discovery. Again, have you a right to say, let us see the evidence of your usage; let us see, from documents in your possession, how long it has lasted? You have no right to say that. If you have, they may say, let me look at your case, that I may discover the defects of it to defend myself. That is not the object of a bill of discovery. But there may be a case in which a party, situated as the Corporation of Fellowship Porters are in this case, may have a document in their possession very important to the other party, which is not depending in the suit at all. Put this case: that some action had been brought by the Corporation of Fellowship Porters, or some bill had been filed for the purpose of recovering these very dues of trade, and that the case had been compromised, that the city of London had paid a sum of money for the costs, and there happened to be among their muniments an entry of the sum so paid by their treasurer; the treasurer having paid the money, so that **[157]** they could prove his handwriting to the document. Such a thing would be of the greatest importance to the person against whom they brought their action, and in that case he would have a right to say, you have such a document, which is very important to my case; for it shews that you tried to make good a case against a former defendant, that he defeated your attempt, and you have paid him the costs, and you have the means of proving that. That is no part of the title of the plaintiffs at law, but it is part of the title of the defendant at law; and he may say, as I have not that document, you must produce it. Now that is a case to shew that a party may demand the production of that which in some degree he has an interest in, as evidence to prove his own case or defeat his adversary's; but he does not thereby attempt to examine his adversary's title.

Now apply that to the present case. If I saw plainly in this case that the documents which are admitted to be in possession of the Corporation either had no relation at all to the case of Messrs. Combe and Co., or if I saw they had a clear relation to the Corporation's case, and formed part of their evidence, I should think there was no ground at all for this motion. But there are certain of the documents which, from a very early period of the discussion, I have been looking at to see how they could affect the case. Now the Fellowship Porters cannot claim any right under the orders to establish Queenhithe as the place where foreign corn was to be landed; they have no relation to that at all. So the inquisition taken before the Justices in Eyre: I do not see that that has any relation to their case at all; I cannot imagine how it can be introduced as evidence for them. So, again, the order or the inquisition of the Lord Mayor of the name of Russell, 29 Edw. 1, does not appear to me to touch the case of the Corporation of Fellowship Porters at all. Again, the order of the Common Council in the time of Edward IV., that all ships **[158]** might go to Billingsgate as well as

Queenhithe—and again, the copy of Elizabeth's proclamation—these appear to me not to be documents that are at all relevant to the title which the Fellowship Porters claim. But I will tell you in what way they may affect the claim—I do not say they will do so—but still they may give rise to an argument that at the particular period when those documents existed or first had place, no such claim as that of the Fellowship Porters had any existence, and, therefore, that it is of very modern origin. Valeat quantum, I cannot tell whether that will make the claim bad or good; still, I cannot say it might not be important evidence for the plaintiffs in equity. If it is important evidence for the plaintiffs in equity, and if it does not exist any where but in the muniments of the Corporation, and they cannot avail themselves of it as any part of their title, I see no reason why it should not be produced, subject to all exceptions; one of the exceptions being that it is no evidence in the case. I have no doubt that if they are mere copies of originals that cannot be proved to have existed, they will be no evidence; but still there may be something in the entries of the copies in the Corporation books that may make all of them evidence against the Corporation. For instance, as to the inquisition—it may turn out that the practice of the Corporation was to keep all copies of inquisitions made before the mayor, and that this is so attested, in some way, as to make it evidence against the Corporation, although it would not be evidence against third persons. It appears to me these documents should be produced; but that they should be produced as single documents in the book in which they are contained, and that there is no title to see the remaining contents of that book.

With respect to the Fellowship Porters' book, it is asking the defendants in equity to lay their case before the plaintiffs in equity that they may find out an objection. The constancy of the usage may be a very essential ingredient **[159]** in support of it, and their books must prove the case one way or the other; it is clear therefore that the plaintiffs have no right to see the books to ascertain whether the defendants have charged more or less at different times. That is asking for a discovery of the weakness of their adversaries' title, and not of the strength of their own.

Then with respect to the cases, I am clearly of opinion that they ought not to be produced. I adopt the grounds suggested by Mr. Richards that those cases are stated to be prepared with a view to litigation. No doubt what Mr. Simpkinson says is very just, that in asking for the production of a case, you in effect ask the defendant whether he has not said so and so; a form of inquiry which is constantly adopted in bills, and I hope to live to see the day when it will be a little abridged: but if you have a right to ask the defendant to give you a case which is stated to counsel with a view to litigation, you have a right to ask him to give you the evidence of his whole title; for what is a man to do who states a case for counsel, but to state that case and the evidence to support it? It is clear, therefore, that a party has no right to ask for the production of a case stated with a view to litigation, whether the litigation actually takes place or not.

Ordered, that the plaintiffs have liberty to inspect, at the town clerk's office, the copies of the orders of Hen. 3; the inquisitions of Hen. 3 and Edw. 1, and the findings thereon; the order of the Common Council of Edw. 4; the report and order of 8 Eliz., and the proclamation of 9 Eliz. No order made as to the other documents.

Upon the principal point involved in this case, see Wigram on Discovery, art. 300 et seq., art. 238 et seq. See also Hare on Discovery, p. 228 et seq.

[160] YARNOLD *v.* WALLIS. May 9th, 16th, 1840.—Lands purchased after the date of a will held to pass by a codicil made subsequently to their purchase; the codicil containing no expressions limiting the effect of the devise to lands comprised in the will.

[S. C. 10 L. J. Ex. Eq. 5; 4 Jur. 1156.]

William Yarnold by his will, dated the 5th November, 1823, gave, devised, and bequeathed, to his son William Yarnold, his heirs, executors, and administrators, all his freehold estates and hereditaments, with the appurtenances thereunto respectively belonging, situate and being in the parishes of Finchley and Hendon, in the county of Middlesex, and his leasehold stables and hereditaments in Westminster. But in case

his said son William should die without leaving lawful issue, or leaving such which should happen to die before their attainment of the age or the respective ages of twenty-one years, then the testator gave and devised the same freehold and leasehold estates unto his son Benjamin Yarnold (the plaintiff), his heirs, executors, and administrators, subject to his dying without issue, as thereinafter mentioned. The testator then devised and bequeathed other freehold and leasehold estates to Benjamin Yarnold, his heirs, executors, and administrators; but in case Benjamin should die without leaving lawful issue, &c. [as before], then he devised and bequeathed the last-mentioned estates unto his said son William Yarnold the younger, his heirs, executors, and administrators. But in case of the death of both his said sons without leaving lawful issue, then he devised the said estates to his son Charles, his heirs, executors, administrators, and assigns.

In 1826 the testator purchased other freehold property in the parish of Finchley, which was duly conveyed to him in fee. He afterwards made a codicil to his will, bearing date the 24th March, 1827, which, as to the material part, was as follows:— "A codicil to be taken as part of the last will and testament of me William Yarnold," &c. "I do hereby give and empower my son William Yarnold, when in the possession of the estates given to him by my will, to charge the same or any part thereof, either by deed or **[161]** will, or by any codicil in the nature of a will, with any annual sum or sums of money not exceeding the yearly sum of £200, to his present wife, or to any future wife whom he, my said son, may afterwards marry, for the term of her natural life."

Upon the death of the testator, in 1827, William Yarnold, the son, entered into possession of the estates at Finchley and Hendon, devised to him by the will, and also of the after-purchased premises at Finchley; and by indentures of lease and release, dated the 13th and 14th December, 1832, and by a fine levied in Trinity Term, 1833, in which his wife joined, he conveyed or intended to convey the last-mentioned premises to the defendant Wallis, who thereupon entered into possession of them.

In October, 1834, William Yarnold, the son, died without issue.

The bill was filed by Benjamin Yarnold against Wallis, alleging that no recovery had been suffered by William Yarnold, the son, of any of the premises, and consequently that the plaintiff was tenant in tail, not only of the original, but the after-purchased lands. The bill, after charging that the will was re-published by the codicil so as to include the after-purchased lands, and charging that the legal estate of the after-purchased property was outstanding in Wallis, by reason of William Yarnold having neglected to register the will and codicils, and that the plaintiff could not recover the same at law, and after charging notice to Wallis of the will and codicils, prayed that Wallis might be declared a trustee of the after-purchased land for the plaintiff, and might be decreed to reconvey the premises, and for an account of rents, &c.

The defendant demurred for want of equity.

Mr. Tripp, for the demurrer. Until the case of *Acherley* v. *Vernon* (Com. Rep. 381), it was always held that in order to pass **[162]** lands purchased between the date of the will and the codicil, there must be an express indication of intention in the codicil to that effect. And even since that case the codicil will not be considered as including the after-purchased lands, if it merely refer to the original lands. *Bowes* v. *Bowes* (2 Bos. & P. 500), which decides that point, is very similar to the present case. Here the testator gives power to his son to charge the same lands with an annuity; shewing that the after-purchased lands were not in his mind at the time. In *Monypenny* v. *Bristow* (2 Russ. & Myl. 117) it was held that where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing the will so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. The testator in that case declared in express words that the codicil was to be taken as part of his will. In *Hughes* v. *Turner* (3 Myl. & K. 666) a codicil duly attested, by which the testator revoked an annuity, a devise, and a legacy to a deceased trustee, and appointed a new trustee, was held not to be a republication of the will. There is no authority to shew that where the after-purchased property is not referred to in the codicil, and the property in the will is, the codicil is a republication. The case of a purchase by a stranger from the heir at law is entitled to favour. The cases of *Parker* v. *Biscoe* (3 B. Moore, 24) and *Smith* v. *Dearmer* (3 Y. & J. 278) were also cited.

Mr. Spurrier, for the plaintiff, contrà. If the codicil has the effect of republication, it makes the will speak "of all the estate" as of the date of the codicil. The old rule required some expression of intention, but that doctrine has been long exploded. In *Barnes* v. *Crowe* (1 Ves. jun. 486) Lord Commissioner Eyre says: "If we disentangle ourselves from **[163]** the rule that there shall be no republication without re-execution, the principle that a codicil attested by three witnesses shall be a republication seems intelligible and clear." In *Piggott* v. *Waller* (7 Ves. 98) Sir William Grant thought he was bound by the decision in *Barnes* v. *Crowe*, even though he was of opinion that the old rule was the best. In *Hulme* v. *Heygate* (1 Mer. 285) the codicil specified some of the after-purchased estates; yet it was held to amount to a republication of the will as to all. In *Goodtitle* v. *Meredith* (2 Maule & Sel. 5) it is said that the codicil has an operation per se, except that it is repelled by a contrary intention appearing. In *Rowley* v. *Eyton* (2 Mer. 128) the will charged all the estates with payment of debts; there was an after-purchase of copyholds, and a codicil specifically devising them; yet the codicil was held to be a republication so as to charge the copyholds with the debts. The cases of exception are where the language of the codicil manifests a contrary intention: *Strathmore* v. *Bowes* (7 T. R. 482), *Bowes* v. *Bowes* (2 Bos. & P. 500), *Smith* v. *Dearmer* (3 Y. & J. 278). The decision in *Parker* v. *Biscoe* (8 Taunt. 6) is only that where a will is partially revoked the codicil has not the effect of republishing that part which is revoked. The question is whether any inconsistency would arise from giving the codicil the effect I contend for. The testator by the codicil has given the tenant in tail what he had not before, a power to charge certain estates with an annuity. Over the other estates he has given him no such power. The power of charging is limited, by the instrument creating it, to the "same" estates. But the effect of the codicil in point of interest extends to the after-purchased estates. Here is no inconsistency and no evidence of a contrary intention.

[164] Mr. Tripp, in reply. *Bowes* v. *Bowes* was distinctly put on the ground of intention, and not upon inconsistency. So also was *Hughes* v. *Turner*. The plaintiff wishes to have a partial republication, not as to the charge which the words exclude, but as to the estates.

May 16.—THE LORD CHIEF BARON. The question is whether the codicil amounted to a republication of the will so as to pass the after-purchased estate. The estates devised by the will were estates in the parishes of Finchley and Hendon as described: and the estate purchased afterwards was also an estate situate at Finchley. The testator having by his will devised those estates at Finchley and Hendon to his eldest son in strict settlement, with remainder over to the younger branches of the family, and having afterwards purchased the estate in Finchley, then made a codicil to his will. [His Lordship here read the codicil.] Now, upon the words of this codicil it is said that the case is taken out of the general rule; that a codicil duly made to pass a testator's real estates amounts to a republication of the will, so as to make the will bear date with the codicil, and to affect all the lands the testator had at the time of the making of the codicil. That such is the general rule, I apprehend there is no doubt. It cannot be disputed it is the rule as to personal property, and that it was the rule as to real estate before the Statute of Frauds, and also since that statute, where the codicil has been so attested as to pass real estate. I need not repeat the cases. I believe all of them were cited, and are all well known, from *Acherley* v. *Vernon* downwards to the present day. That being the general rule there appear to be some exceptions to the rule. What are those exceptions founded upon? When the cases on which they depend come to be examined it will be found that those exceptions must be considered, not as overturning the general principle that the making the codicil is a republication of the will; but those exceptions **[165]** are founded on this —that if the testator had actually, at the very time he made his codicil, repeated his will and made it a part of the codicil, there must be new words in one or the other to pass the newly purchased estate. Look at *Bowes* v. *Bowes*, the principal case on the subject. That was a case in which the testator, having made a devise in his will of all his lands and tenements to certain trustees in the will mentioned for certain purposes therein mentioned, and having a few years afterwards purchased other lands, subsequently made a codicil. That codicil revoked his devise in the will and devised the same lands by the use of the words "said lands." He stated that whereas he had devised his lands in his will to such and such trustees for certain purposes, his inten-

tion was to revoke that devise; and then he devised his "said lands" to new trustees for the same uses, and that was the whole of his codicil. Now consider for a moment what the line was which the Court of King's Bench, as well as the House of Lords, afterwards upon appeal, took on this subject. They considered the words in the codicil operated as a revocation, and that the devise related to those lands the testator was possessed of at the time he made his will and no other. What were the "said lands" mentioned in his will? Suppose he had actually repeated the very words of his will, saying that all the lands he was possessed of, at the time of the date of his will, he thereby devised to certain trustees for certain purposes, but said nothing of the other lands; that would have been the case of a republication of the will undoubtedly, but neither the will nor codicil containing any words of devise of new lands, they would have gone to the heir at law. I mention this because it would seem from the argument as if something turned on republication. If a man republish his will, and it does not contain words amounting to a devise of the land newly purchased, it cannot comprise those lands. Suppose a man devises lands by a specific name, and afterwards purchases lands in a dif-**[166]**-ferent county so that they do not correspond, the republication of the will does not devise the new estates; because, though he has actually made his will at the time his codicil is dated, yet, as he has only devised the estate by the name mentioned in the will, but said nothing of the others, they will pass to the heir at law. Therefore the question does not turn on republication; but whether the codicil, taken together with the will, contain any words to devise the new estates. If they do not the new estates are not devised. The case of *Monypenny* v. *Bristow* (2 Russ. & Myl. 117), decided by Lord Brougham, was considered by him a stronger case than *Bowes* v. *Bowes;* and it will be found that there was a revocation of the devise of the "said lands." Whether Lord Eldon and Lord Rosslyn were right in their mode of construing the word "said," or whether Lord Thurlow was right, who took a different view of it, is not the question. It was decided that the word *said* limited the devise as well as the revocation to the lands that had been before devised, as there were no words either in the will or codicil to pass the new lands.

In this case the lands purchased correspond with the lands devised by the will: they are lands at Finchley. It is admitted on general principles that the republication of the will transfers the date of the will to the date of the republication; and if the codicil forms part of the will—if the testator declares it to be so—it must be incorporated within the will; and there is nothing to shew that the lands are not properly described. The description in the will will suit the newly purchased lands, namely, "lands at Hendon and Finchley;" and all that the codicil says about those lands is that the testator gives his son, when in possession of them, power to charge them. The effect of this, I apprehend, is to give him power over all the lands, the new as well as the old. It was doubted **[167]** in argument whether the power was not limited to the lands devised by the will. I should think, however, that it applied to both. Suppose the will had been dated at the time the codicil was dated—it would devise all the testator's estates at Finchley and Hendon, and that would comprise the newly purchased land. Upon the whole, therefore, I think there are sufficient words to pass the newly purchased lands, and the will must be taken to be dated at the date of the codicil and after the newly purchased lands were acquired, and consequently that the whole pass by the will and codicil.

Demurrer overruled.

WALLACE *v.* CAMPBELL. May 27th, 1840.—The Court refused, at the instance of a creditor resident in England, of a deceased trader in Madeira, to restrain the agent of the administratrix in England from sending over the intestate's money and effects to Madeira; the intestate's estate being the subject of a suit in Madeira.

Anthonio Alvarez de Livi, Count of Carravaro, resident in Madeira, executed in that island a deed of conciliation, dated the 12th December, 1837, by which all his property, except 10l. per cent., was assigned to trustees in trust for the creditors who were parties to that deed; and the tenth was reserved, subject to a debt of £200, for the benefit of the debtor. He afterwards mortgaged this tenth to the plaintiff, who was resident in England. The Count afterwards died in Madeira, leaving a

considerable property in England, consisting of ready money at a banker's, wine, &c. The Countess took out administration in Madeira and in England, and the defendant Campbell was her agent in England under a power of attorney, and also a surety in a bond required by the Will Court in Madeira for the due execution of the English property.

The bill was filed by the plaintiff against Campbell, the Countess, and certain persons representing the trustees under the deed of conciliation, to enforce his security. The Countess had not appeared to the bill.

[168] Mr. Wilcock, for the plaintiff, now moved for an injunction to restrain the defendant Campbell from sending any of the intestate's money out of this country, contending that though the foreign assignees might have a prior right to the plaintiff; yet as part of the fund was in England, the Court would not permit it to be carried away, but might adjudicate upon it according to the laws of Madeira. He cited *Stead* v. *Clay* (4 Russ. 550).

Mr. Simpkinson and Mr. Palmer, contrà, said that Campbell was a mere agent, and bound to obey the orders of his principal; and if the Countess had been here, the bill could not have been sustained against her; therefore, how could it be sustained against a mere agent?

Mr. Wilcock, in reply, said that a depositary might be made a party. [The Lord Chief Baron. A depositary with notice of a trust.]

THE LORD CHIEF BARON. I am of opinion that this is not a case for an injunction. If the administratrix were here, could you file a bill against her and obtain an injunction? If not, her absence will make no difference. Campbell is her debtor, and under an obligation to dispose of the fund according to her orders, I must take for granted that the Court in Madeira will do justice as well as the Court here. If they have taken the matter up, I am treading on unsafe ground if I assume jurisdiction. Campbell is not a trustee; he is a debtor. If I could find that he was a trustee, the principle in *Hibbert's case* (ante, vol. 1, p. 265, cited) might apply. But the distinction between that case and this is that there a bill might have been filed against Hibbert. Here the party is a mere agent of an administratrix, who is bound by the law of Madeira to administer the laws there, **[169]** and you ask the Court to bind up that part of the fund which is here, from an apprehension that you will not get justice there. If Campbell thinks himself in danger, he must take his own proceedings. I cannot grant this motion, more especially as the administratrix is under orders from the Court in Madeira. I cannot intercept those orders.

Motion refused.

SLOMAN *v.* KELLY. May 16th, 28th, 1840.—The forfeiture of securities under the stat. 9 Ann. c. 14, s. 1, for monies lent at play, is not a penalty of such a nature as to protect a party from discovering whether the consideration of the security on which he brings his action was not monies lent at play.

This was a bill of discovery in aid of the plaintiff's defence to an action at law brought against him by the defendant, on certain securities, which the plaintiff by his bill alleged to have been given for money lost and money lent at play. The defendant, in the first instance, in answer to the charges in the bill, simply alleged that the securities were given for monies lent (see ante, vol. 3, p. 673). This answer being held insufficient, he put in a further answer, alleging to the same effect, but insisting, with reference to the penalties of the stat. 9 Ann. c. 14, that he was not bound to answer whether the money was lent at play.

To this answer the plaintiff took exceptions.

Mr. Simpkinson and Mr. K. Parker, for the plaintiff.

Mr. Stuart and Mr. Terrell, for the defendant.

The defendant's counsel insisting that the loss of the benefit of the securities under the first section of the statute was a forfeiture, on the ground whereof demurrers had often been allowed to bills of discovery like the present, even though the time for proceeding for penalties un-**[170]**-der the second section had expired, the Lord Chief Baron, after expressing some doubts as to the soundness of that proposition, directed them to search for authorities on that point, and to mention the case again on a future day.

May 28.—The defendant's counsel now cited the following authorities:—*Earl of*

Suffolk v. *Green* (1 Atk. 450), where Lord Hardwicke says, "So far as this, if proved, relates to the loss of the debt, so far it may be called a penalty;" his Lordship evidently contemplating the security being lost: also *Smith* v. *Read* (id. 526), which was the case of a bill to discover whether the party under whose will the defendant claimed was a papist, and where Lord Hardwicke lays it down that "a person shall not be obliged to discover what will subject him to a penalty, or anything in the nature of a penalty;" and that, "under the rule that a man is not obliged to accuse himself is implied that he is not to discover a disability in himself; and there is no difference between a forfeiture of a thing vested and a disability to take inflicted as a penalty." They also referred to *Chauncey* v. *Tabourden* (2 Atk. 392), *Boteler* v. *Allington* (3 Atk. 453), *Honeywood* v. *Selwin* (3 Atk. 276), *Lord Uxbridge* v. *Staveland* (1 Ves. sen. 56), (in which a demurrer was allowed to a bill against the assignee of a lease, to discover whether it had been assigned without a license, the plaintiff not waiving the forfeiture), and *Bullock* v. *Richardson* (11 Ves. 373). [The Lord Chief Baron referred to *Talbot* v. *Smith* (Ridgw. Lapp. & Sc. 360).]

THE LORD CHIEF BARON. The case is this. The plaintiff files his bill against the defendant, charging him with having obtained monies and securities from the plaintiff in **[171]** certain gambling transactions, and alleging these facts as an objection to the defendant's recovering at law against him. He charges monies lent at play and monies lost at play. If the money was lost at play, the defendant is subject to a penalty under the statute. To avoid the penalty, he says the whole of the money was lent, and that excludes the question of money lost; so that there is no exception to the answer on that ground. Then, if the whole question is whether the money was lent at play, it is clear that he is not within the 5th section of the statute of Anne where winning by ill-practice, or winning more than £10 at one sitting, is an offence made liable to an indictment, and that he cannot be deemed either an actual or sleeping partner with the winner. A man who lends money for the purpose of gaming is not within that section unless he also participates in the game.

Then the question is whether the first section of the act, which prohibits the lending and makes the securities for money lent at play void, whether that section gives the defendant a right to refuse the discovery now sought of him, in order to give him a right to recover at law. That appears to me to depend only on the general question whether a man who brings an action on a bond or bill is protected from giving discovery to shew whether the consideration for that security is such as to render it void. I am at a loss to see how the present case differs from that where an action is brought, and, for want of evidence, the party comes into equity for a discovery. The case which comes nearest to the case made for the defendant is that of a lease. It has certainly been held that a party is not bound to make any discovery, the result of which would be a forfeiture of his lease. But this is not like a suit brought to create a forfeiture of a lease, or directly to set aside a lease. The forfeiture here is only a collateral question. The question is whether, without any other penal consequences, the mere fact of the defendant **[172]** not being able to recover on his securities at law, is to be a protection to him from giving the discovery now asked. I think it is impossible to carry the protection so far. It is an ordinary case to file a bill here, to find out the consideration given for a bill of exchange. In *Lord Glengall* v. *Edwards* (ante, vol. 2, p. 125) this was done. Lord Glengall said the bills belonged to the defendant's father, and that the defendant took them from his father's safe and brought the action in his own name. Long inquiries were made in the bill, and answers were given, which did, before a jury at law, directly turn the evidence. It was the result of the defendant's own answer. So again, in the ordinary case of an action on a policy of insurance, a party files his bill to discover matters which would make the policy void. Who ever heard of the defendant being protected from answering, on the ground that the answer would disable him from recovering at law? With respect to the cases which have been cited, that of *The Earl of Suffolk* v. *Green*, a case of usury, is a mere dictum. I thought there would be difficulty in finding any decision on this head, because I knew that in *Lord Chesterfield* v. *Janssen* (1 Atk. 301), where the authorities are collected, none such could be found. Now that case, as far as it applies to the present, was a mere dictum. The decision itself is not applicable: it was the case of a bond alleged to be given for a usurious consideration, and the object of the bill was to perpetuate evidence which would lay a ground for a penalty every time the party received interest; and Lord Hardwicke was of opinion that a

demurrer would hold to a bill brought for that purpose. Then *Smith* v. *Read* was a bill to discover whether a party under whose will the defendant claimed was not a papist when the purchase was made. Now, no one can doubt that the statutes disabling papists (which, thank God! are now repealed) were highly penal statutes, and therefore **[173]** the party in that case was prohibited from discovery. The case of *Chauncey* v. *Tabourden*, and the other cases which have been cited, involved questions of direct forfeiture. In *Boteler* v. *Allington* it was held that a man was not bound to discover whether having accepted one living above the value of £8 a-year in the King's books, he had afterwards accepted two other livings under that value, because, by the statute law, such an acceptance was an avoidance of the first living. Now, that was a direct forfeiture. Then, there is the case involving the forfeiture of a seat in Parliament. Surely the being incapacitated to sit, and the payment of £500, is a very high penalty, which a person is not bound to subject himself to by answering a bill of discovery. Upon these grounds, it appears to me that these cases are distinguishable from the present.

Exception allowed.

TOPLIS *v.* VONDER HEYDE. May 28th, 1840.—Testator devised a real estate to his wife for life, with remainder to the issue of a former marriage. He gave specific legacies to his wife, and made her executrix, together with A. and B. The real estate being mortgaged, the specific legacies, in default of general personalty, were sold to pay off the mortgage, and the mortgaged premises were assigned to a trustee to attend the inheritance, the wife apparently consenting: Held, that the wife without making out a case of fraud, misrepresentation, or ignorance of facts, could not afterwards establish a lien on the mortgaged estate to the extent of the monies produced by the sale of the specific legacies.—Where a second wife takes large benefits under her husband's will, and pays off a mortgage on lands devised by the husband to her for life, with remainder to the issue of the former marriage, and by her consent the mortgage term is assigned to attend the inheritance, this payment is primâ facie a gift to the remainderman, and the wife cannot afterwards set aside the gift, except on the ground of fraud, or mistake in fact.

[S. C. 9 L. J. Ex. Eq. 27.]

The bill alleged that James Toplis, being of sound and disposing mind, made his will, whereby he gave his copyhold and freehold land at Sydenham to his dear wife Mary Jackson Toplis, the plaintiff, for life, with remainder to his daughter Charlotte Ann, the wife of John Vonder Heyde, for life, with remainder to the testator's son-in-law John Vonder Heyde, for life, with remainder to the testator's grandson, John James Vonder Heyde, for life, with **[174]** remainder to the first and other sons of his said grandson successively in tail male, with remainder to the first son of the said Charlotte Ann Vonder Heyde thereafter to be born in the testator's lifetime for life, with remainder to the first and other sons of such first son successively in tail male, with similar limitations in remainder to the second, third, &c. sons of Charlotte Ann Vonder Heyde born in the testator's lifetime and their issue, with remainder to the first and other sons of C. A. Vonder Heyde born after the testator's death successively in tail male, with remainders over. And the testator gave £200 to his said dear wife, to be paid her immediately after his death. And he gave all his household furniture, money in the house, securities, plate, jewels, china, linen, books, &c., &c., unto his said dear wife, for her own absolute use and benefit. And he also gave all his leasehold premises in the borough of Southwark, wherein he carried on his business of tobacconist with his partner Pell, together with his share and interest in the stock in trade, fixtures, &c., with the good-will of the said trade, and all the book-debts due and owing to him at his decease, unto his said dear wife, for her absolute use and benefit. And he gave and devised all the residue of his real estate to his said dear wife for her life, with remainder to his said daughter in fee. And he bequeathed all the residue of his personal effects to his said dear wife, and James Peachey and William Thomas, and the survivors, &c., upon trust, to collect, &c., and invest in the funds, &c., and pay the dividends and interest to his said dear wife for her life; and after her decease, upon trust, to transfer the said fund to his said daughter absolutely. And the testator nominated his wife and Peachey and Thomas executors of his will.

The bill then alleged that the testator died on the 23rd March, 1834, without having revoked or altered his will, leaving the several parties named in the will surviv-**[175]**-ing him; that the plaintiff and Peachey and Thomas proved the will, but that Peachey and Thomas, or one of them, took upon themselves or himself the principal management of the affairs of the testator; and the plaintiff, being wholly unacquainted with matters of that nature, had taken no part therein, save and except in joining in the probate, and doing certain acts for the sake of conformity, under the direction and advice of Thomas.

That the property at Sydenham was, at the date of the will, in mortgage to three persons for a term of 1000 years, to secure £1095, which mortgage was due at the testator's death; that, upon the death of the testator, Peachey and Thomas took possession of his personalty to an amount much more than sufficient to pay the testator's debts except the mortgage debt, and that such debts were fully paid and satisfied by Peachey and Thomas out of the residuary personal estate not specifically bequeathed, the plaintiff having joined only in such acts as were necessary for conformity, under the advice and direction of Thomas.

That shortly after the testator's death the mortgagees called in their mortgage-money, and that Peachey and Thomas, alleging that only a trifling balance was left of the residuary personal estate not specifically bequeathed, sold the testator's leasehold premises at Southwark, together with his share of the stock in trade, fixtures, and good-will, and the book-debts due and owing to him at the time of his decease, the plaintiff joining in such sale for the sake of conformity as aforesaid, and thereout discharged the mortgage debt and interest, amounting to £1123.

That upon paying off the said mortgage, an indenture of assignment, dated the 29th October, 1834, was made and executed by and between the mortgagees of the first part, the plaintiff and Peachey and Thomas, of the second part, and William Knott of the third part; whereby, in consideration of the sum so paid to the mortgagees in dis-**[176]**-charge of their principal and interest, the mortgagees assigned to Knott, his executors, &c., the said mortgaged premises for the residue of the said term, in trust for the persons entitled to the freehold and reversion of the said premises, and to attend the inheritance.

That in consequence of the property of the testator specifically bequeathed to the plaintiff as aforesaid being applied in payment of the said mortgage, instead of the same being satisfied out of the property charged therewith, as the plaintiff was advised and submitted ought to have been the case, the plaintiff had been put to great inconvenience and embarrassment and had been obliged to raise £400 by mortgage of her interest under the will; that she had frequently applied to Peachey and Thomas for repayment of the said sum of £1123, but that they had refused, &c.

The bill which was filed against Mr. & Mrs. Vonder Heyde, their infant son Leopold Vonder Heyde, the executrix, Peachey and Thomas, and other parties, prayed an account of the personal estate not specifically bequeathed, and for payment thereout to the plaintiff of the said sum of £1123 with interest at 5*l.* per cent. per annum; and if such personal estate should be found insufficient for that purpose, that the deficiency might be made up by sale or mortgage of the premises comprised in the before-mentioned mortgage.

The defendants, the Vonder Heydes, by their answer, made the following case, which was in a great measure confirmed by evidence, or by admission in the plaintiff's bill, though there was no positive evidence as to the compromise:—That on the 8th March, 1834, the plaintiff, who was an entire stranger to the defendants, married the testator, who was then in a very bad state of health; that after the marriage he got worse; that during his illness the defendant, Mrs. Vonder Heyde, was prevented by the plaintiff and the defendant Thomas from seeing her father till he became insensible; and that on the 23rd of the same **[177]** month he died. That the will dated the 21st of the same month, which was prepared by Thomas, was signed by the testator, if at all, when he could scarcely write, and when he was not fully competent to make a will; but that it was represented to the defendants, and they believed, that they were to have the freehold estate clear for themselves and their family after the plaintiff's death, and that the estate at Sydenham was to be discharged from the mortgage out of the personal estate of the testator; that they were thereby induced to acquiesce in the will so made being proved, not considering it worth while to enter into a long and expensive litigation if the estate at Sydenham was to go unencumbered; and that

they allowed the plaintiff to take the benefit of the alleged devise and bequests in her favour, only upon the agreement and understanding that she should pay out of the personal estate, including the property so alleged to have been specifically bequeathed to her, the principal and interest due on the mortgage; and that the plaintiff accordingly, under such circumstance, paid and discharged such mortgage.

It appeared that the testator made a will in 1827, from which the present had been partly copied, containing the same limitations in favour of the children of Mrs. Vonder Heyde as the present will. At that time Mrs. Vonder Heyde had no children, which was the reason for the limitation in favour of her unborn children; but the effect of that limitation in the present will was to exclude two children who had been born between the dates of the two wills. No child was born between the date of the second will and the testator's death.

The plaintiff entered into evidence to shew that the testator was competent to make the will of the 21st of March, 1834, and that it was duly made by him; but she did not attempt to prove by witnesses that she had acted in relation to the testator's estate in ignorance of her rights; though one of her witnesses stated his belief that **[178]** she did not sign the deed of assignment of the 29th of October, 1834.

Mr. Simpkinson and Mr. Dixon, for the plaintiff, contended that there was no evidence of any such arrangement as that which had been suggested by the defendants; and that, as it was not proved that the plaintiff had executed the assignment of the 29th of October, 1834, it must be taken, under the circumstances, that she acted in ignorance of her rights. It was clear that Peachey and Thomas were the acting executors under the will. The mortgaged estate ought to bear its own burden: *Irvin* v. *Ironmonger* (2 Russ. & M. 541), Cox, P. W. vol. 1, p. 679, n. (1).

Mr. Swanston and Mr. James Russell, contrà. According to the plaintiff's own statement in the bill, she executed the deed of assignment; and it is clear from the other circumstances of the case that she acted in the testator's concerns, and understood her rights. At all events, she has given no evidence to the contrary. Considering the date of her marriage, and the circumstances under which the second will was made, it is pretty obvious, even without express evidence to that effect, that she entered into the compromise suggested in the answer of the Vonder Heydes. Slight circumstances are sufficient to shew that by payment of this money she intended to discharge the estate: *Jones* v. *Morgan* (1 Bro. C. C. 218). She cannot come here to impeach this transaction except for fraud: *St. Paul* v. *Dudley* (15 Ves. 167). *Irvin* v. *Ironmonger* involved a variety of circumstances which do not occur in this case.

Mr. James Parker, Mr. Williams, and Mr. J. H. Palmer, appeared for other parties.

[179] Mr. Simpkinson, in reply.

THE LORD CHIEF BARON. It appears to me that it is not every case of a voluntary surrender of the rights of a party that will entitle that party afterwards in a Court of Equity to claim to be released from the obligation or the gifts which he has made. The general rule of law is that a party who pays money with the full knowledge of all facts cannot have the transaction undone or defeated by reason of his ignorance of the law. So in equity, although a party who is imposed upon by a fraudulent statement of what the law or fact is, if he does anything in ignorance of it, may have relief; yet if he, with full knowledge of all the facts upon which his rights depend, chooses to act—to pay money, or to release money—no fraud being suggested, no attempt made to overreach him, and no deception of any sort, and comes afterwards into a Court of Equity for relief, he cannot on such grounds alone make out his case; he must add to the injury which he is supposed to sustain some imputation of fraud practised upon him by the party against whom he seeks relief. I believe that is the general rule; for you cannot say that a man who perfectly knows the state of his accounts, or has the means of a perfect knowledge of them, can afterwards set aside a transaction founded on those accounts, by alleging ignorance of the law. It is, I believe, an invariable maxim that a party so situated cannot afterwards come into equity. He may have a disinclination to inquire into the law; he may wish to act without reference to legal rights by judging for himself upon the state of facts; but if he chooses to pledge himself, or to release without further inquiry, nobody having deceived him, nobody having betrayed him, can he seek relief from those acts when he had the full power of information at the time? But if he could do so, ought he not to assign some reason why he does so?

[180] Now this is the case of a lady coming to be relieved from the effect of a

deed, by which an estate which had been in mortgage was conveyed to a trustee freed from that incumbrance which she now seeks to impose upon it. It appears that in the year 1834 every fact was known to her. She was the co-executrix of her husband. She acted with the co-executors who proved the will; she does not allege that they misrepresented the state of her rights; she does not state that she was ignorant of them; the whole foundation of her equity is that she acted with Mr. Thomas's advice. Well, then, did he tell her that she had a right to be recompensed from the real estate if she paid the mortgage debt? She does not say whether he did or not. Does she say when she made the discovery? She does not state that. She does not state that any new light came upon her; she does not state for the purpose of seeking relief that at the very moment when she concurred in the act of Mr. Thomas in paying the money, and directing the deed to be executed to which she meant to be a party, and to which she was a party—she does not state that at that very moment she was not fully acquainted with all the facts, and all the law of the case upon which her right was founded. Why did she not direct the mortgage to be transferred to a trustee for her benefit? She has not done so.

Now let me simplify this case, and put aside the circumstances which are relied upon on the one side, and controverted on the other, on the suggestion of a possible compromise between the parties. Put all that aside. Suppose a man dies possessed of real and personal estate, and that the real estate is subject to a mortgage, and that he makes a will, leaving that real estate to his wife for life, and after her death to another person in remainder, his son for instance, and the wife has a separate fortune of her own; that she employs a solicitor, and in concurrence with her husband's executor, she being an executrix pays off that mort-[181]-gage out of her own money, and has a deed made, though she does not execute it, by which the property is assigned to attend the inheritance; and she comes afterwards into a Court of Equity and prays to be relieved from that deed, and to compel the trustee to hold it for her benefit: can she be allowed to do that without laying before the Court some ground to shew that she has been deceived and misled, and was ignorant of fact or law? The answer would be, "You are the wife of the testator; he has provided for you, with remainder to a son of a former marriage. What is there more pertinent than to suppose that you, for the purpose of having the rents and profits for life, were willing to pay off the mortgage out of your own separate fortune; and that having done that, you are willing that your husband's son should be the party to whom you made the gift of the money: can you come here afterwards and say I will set aside the gift—it was no gift?" Why, these circumstances would be an answer to her case, unless there was any fraud or misrepresentation.

But the present case is much stronger. To say nothing of the answers, the plaintiff's husband died on the 23rd of March, having made a will on the 21st; she was married to him on the 8th. It is quite clear that this will was a repetition of some former will; because, at the time this will was made, two grandsons were born, and the will, though it gives the estate in the first instance to the eldest of his grandsons, only gives the remainder, when his issue is exhausted, to the grandsons that are born thereafter; so that those born before are excluded. I mention this to shew that this was not the will which the testator meant to leave a month after his marriage. It is a circumstance combined with other circumstances which would amount to evidence of the compromise suggested by the answer. How then can I direct the master to inquire into these facts, or to inquire whether she was acquainted with the fact of her husband's will at the time she proved it, or [182] when she made this sale with the concurrence of his executors, or whether she was imposed upon by any representations? She does not lay a case for this by the bill. It appears to me she has made out much too naked a case to warrant an inquiry into such facts, and that, divested of such facts, there is nothing in her case to release her from what appears to me to be a voluntary relinquishment of her own right. I do not mean to say that if she had proved any facts of that sort, I should not have decided that she had a right to stand in the place of the mortgagee, her specific legacy being applied to pay that mortgage debt, nor should I say that the book debts did not pass to her; but it appears to me that she has not disclosed a sufficient ground to enable her to maintain this bill, and that it must be dismissed with costs.

The plaintiff's counsel then applied that the bill might be dismissed without prejudice to the plaintiff's filing a new bill. After some discussion this was allowed.

Decree accordingly.

BENTLEY *v.* BATES. June 5th, 1840.—Mortgagee of the share of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the co-tenants in common.—On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern.

[S. C. 9 L. J. Ex. Eq. 30; 4 Jur. 552. Distinguished, *Dodds* v. *Preston*, 1888, 59 L. T. 719.]

The bill stated that in August, 1821, Sir Henry Ibbotson granted a lease of certain collieries to four persons of the name of Lascelles, for the term of thirty-one years, for the purpose of working the same in equal shares for their mutual benefit. That under and by virtue of this demise the lessees entered and commenced working the collieries in the shares before mentioned and for their mutual benefit. That they afterwards assigned their re-**[183]**-spective shares to different persons, and that one of them, Joseph Lascelles, assigned his share to Isaac and Thomas Hunt. That the assignment by the Lascelles was carried into execution by means of a deed of arrangement, which contained rules and regulations as to the manner in which the collieries were to be worked by the assignees. That after the execution of this deed Thomas Hunt died, and Isaac purchased his share, which was duly assigned to him, and that by this means Isaac became entitled to two-eighth parts of the concern. That in August, 1823, Isaac Hunt applied to Timothy Bentley to lend him £2000 on the security of his share and interest in the demised collieries; that the money was lent, and that Hunt executed to Bentley an indenture, dated the 17th of August, 1823, whereby, after reciting the indenture of arrangement, and reciting another mortgage for £500, which Bentley had agreed to pay off, Hunt, in consideration of the sum of £2000 so lent to him, and of the payment of the £500 mortgage, assigned to Bentley, his executors, &c., all that his one-fourth share of and in the collieries demised by Sir Henry Ibbotson, by the indenture of August, 1821, to hold the same to Bentley, his executors, &c., subject to a proviso for redemption on payment by Isaac Hunt, his heirs, &c., of the sum of £2500, on the 7th of February then next. That at the time of the execution of that indenture, the other shares were possessed by a variety of persons, and that various devolutions of those shares took place, under which the defendant Bates became the principal owner, and that he likewise became the principal manager. That in 1826 the only persons concerned in the trade were Isaac Hunt and the defendant Bates, the share of Isaac Hunt being subject to the before-mentioned mortgage to Bentley. That in December, 1826, Hunt was arrested, and by arrangement with Bates was excluded from the management of the concern without the sanction or concurrence of Bentley, and that since that period **[184]** Bates had been the principal manager. That Hunt died in 1830, having made the defendants Anderson and Colls his executors, who proved the will and became entitled to Hunt's share, subject to Bentley's mortgage. That Bentley had died and appointed the plaintiffs his executors. That under the management of the defendant Bates the collieries had become unproductive, as far as the plaintiffs were concerned, and that the whole of the principal sum due on the mortgage, with a considerable arrear of interest, remained unpaid. That large quantities of coal had been got from the property and great profits made, and that the plaintiff had applied to Bates for an account, but that none had been rendered and no money paid. That though some accounts had been pretended to be rendered they were imperfect and evasive. That the defendants, the executors of Hunt, were desirous of having the accounts settled and adjusted, but had declined to join in the suit. That Bates had in his possession all books, &c., relating to the partnership concern.

The bill prayed for an account of all the dealings and transactions relating to the collieries since the defendant Bates had been manager, and also for an account of his receipts and payments, and that the clear balance might be ascertained and paid; for the removal of Bates, and for the appointment of some proper person as manager, and for an injunction to restrain him from interfering in the concern.

To this bill the defendant Bates demurred generally for want of equity.

Mr. Elmsley, for the demurrer. This bill, which is filed by the plaintiffs solely in the character of mortgagees of Hunt's share of the partnership, asks for a general account of the partnership concerns; but no such account can be taken at the instance

of mere mortgagees of a share. These plaintiffs do not claim under Bates, but solely and [185] exclusively under Isaac Hunt. It is not stated that Hunt's share was so assigned to them as to make them tenants in common with Bates, but only that they are mortgagees. As mortgagees, they have no remedies but such as their contract gives them. A mortgagee may bring ejectment, foreclose, or sue on his covenant; but if, in addition to that, he can come for partnership accounts, the result will be that a new partner may be introduced into the partnership against the will of the other partner. A mortgagee of a partnership share is in the situation of a subpartner, who clearly cannot come here for a general account of the partnership dealings, though he may have an account as against the particular partner with whom he dealt: *Sir Charles Raymond's case* (2 Rose, 255), *Brown* v. *De Tastet* (Jacob, 284). [The Lord Chief Baron. Suppose one of two lessees of a mine conveys half his share to another person, is not that other person interested in the subject-matter of the general partnership? A case of that sort differs from that of an ordinary mercantile partnership.] This bill treats the partnership as one of trade, and states the lessees to be traders; but, at all events, in the case put by your lordship the assignment is absolute, and that would make the assignee and the other lessees tenants in common, because the whole interest is then taken out of the assignor. But a mortgagee of a share is not tenant in common with the other shareholders, at least not in equity. No interest passes in equity to the mortgagee, except by way of security. Besides, it is expressly alleged by the bill that in 1826 Hunt and Bates were the only parties interested in the trade.

Again, this bill is objectionable in point of form. It certainly has been held that a creditor may file a bill against the surviving partner, and the executors of a deceased debtor, without charging collusion: *Bowsher* v. *Watkins* (1 Russ. & M. 277), *Cropper* v. *Knapman* (ante, vol. 2, p. 338). But to raise that [186] equity a suit must be framed for that purpose. The Court cannot take the administration of the debtor's estate partially. The bill does not ask that his assets shall be collected and his debts paid, but simply an inquiry into the partnership dealings and transactions. But in all the cases where a creditor has been allowed to file a bill, it has been where a general administration has been sought. [The Lord Chief Baron. There is a difference between a creditor generally and a creditor of a specific fund. Hunt could have had no remedy except in a Court of Equity.] It may be said, certainly, that the defendant was dealt with as a partner, and that he rendered accounts. But the rendering insufficient accounts, as the bill charges him with having done, will not make him a partner. Besides, unless the bill seeks a dissolution of the partnership, it is demurrable: *Loscombe* v. *Russell.*(*a*) [The Lord Chief Baron. There are other cases upon that point.]

Mr. Simpkinson and Mr. Kenyon Parker, for the bill. This is a simple case of a bill filed by the representatives of a mortgagee of a share of a colliery, against the managing copartner or co-tenant in common, calling upon him to account by reason of the defendant's gross mismanagement, and for the appointment of a receiver. First, the defendant says that Hunt, under whom the plaintiffs claim, had no right to assign his interest absolutely, or if he had, that he had no right to mortgage it. He says it was a trade; and that one partner in trade has no right to assign to a third person so as to make him a partner. That does not apply to an interest in land or a colliery, where persons have a mutual interest in the colliery, and in the land, which is a component part of it. It is the common practice for partners in a colliery to assign over their interest without the concurrence of their copartners. Then, if a partner has the power of assigning [187] his share absolutely, omne majus continet in se minus, and he must have power to do so conditionally. Until the mortgagor redeems, the mortgagee stands in the same relation to the partnership concern as the mortgagor. The deed of arrangement shews the power to assign. It appears by that deed that the original lessees had assigned, and the assignees are made to hold to them, their executors, administrators, and assigns. Bates himself was not an original lessee; and, under such circumstances, he has not only refused to account, but has grossly misconducted himself in the management; we therefore ask a receiver. [The Lord Chief Baron. Can you put a tenant in common out of possession?] It may be

(*a*) 4 Sim. 8. See the observations of Lord Cottenham, C., in *Walworth* v. *Holt*, Legal Observ. vol. 21, p. 298.

done in the case of a tenant in common of a mine. In *Jefferys* v. *Smith* (1 Jac. & Walk. 298), in which a mine is called a species of trade, a receiver was appointed. That case likewise disposes of the objection which has been raised as to the bill not praying a dissolution, for there the bill prayed no dissolution, and yet an account was decreed. In *Wynget* v. *Heathcote* (*b*) the parties were tenants in common of lands and mines, and the defendant, against whom the application for a receiver was made, had the management and was in the possession of the mines. The parties had not a mere lease, but the lands and mines were the subject of settlement, the parties being relations. On the principles of *Jefferys* v. *Smith* an application was made to the Vice Chancellor that a proper person might be appointed to manage the mines, on the ground that the parties not agreeing in the management, the Court would take upon itself the management; and the application was granted. So, in *Rowe* v. *Wood* (2 J. & W. 559) an application was made to Lord Eldon by one tenant in common of a mine against another for a manager and receiver, the defendant being in possession as mortgagee of the plaintiff; and his lordship **[188]** thought that the possession of a mortgagee was to be dealt with differently than if he were a mere copartner. So here, the partnership is not merely one of trade, but a tenancy in common, for a long term of years, of a mine. Would the Court, where justice required such an interference, refuse to interfere between tenants in common of a farm, without putting an end to what is called the partnership between them? An account was given to tenants in common by the statute of Anne (4 & 5 Anne, c. 16, s. 27), and by Courts of Equity before the statute. But the account so given would be a most inadequate remedy, if it could not be had except upon the terms of having the partnership dissolved and the property sold. What would the defendant have said if there had been a prayer for sale?

As to the other objection, this is not the case of a general creditor filing a bill against his debtor. The bill is filed by a specific creditor to enforce his security, not against a mere debtor, but against a cotenant in common; praying for an account of the property which is the subject-matter of the assignment. Besides, we proceed on the ground that the parties having a common interest in the land, the defendant has taken possession of it to the exclusion of his companion. We say that the defendant turned Hunt out, without the privity of the person who claimed under Hunt, and took upon himself the management; and that he cannot turn round and treat himself as a partner, so as to exclude the other party from an account. He rendered the account as manager, and has thereby recognised the title which the plaintiffs gave him by their bill. He admits, by his demurrer, the mismanagement and exclusion. As between tenants in common where there is exclusion, a Court of Equity will relieve by appointing a receiver: *Street* v. *Anderton* (4 Bro. C. C. 414).

[189] Mr. Elmsley, in reply. There is no question that, as a general rule, one partner in a mine may assign his share, and the assignee is tenant in common with the other partners; but the situation of a mortgagee is altogether different. And if he cannot, as it is submitted that he cannot, call the copartner to an account, it is immaterial that on his bill the demurrer admits mismanagement. The case of *Jefferys* v. *Smith* is an authority for treating this as a trade. [The Lord Chief Baron. They say if he is a partner, *Jefferys* v. *Smith* shews that a receiver may be appointed; but that, if he is not a partner, then, at least, he is a tenant in common, and may account.] Then if he is a partner, there must be a prayer for a dissolution; if he is not a partner, but a tenant in common, the bill should be framed as between tenants in common, and ask for an account of rents and profits, which it does not. [The Lord Chief Baron. In the case of a partnership in land, it seems to me extraordinary to pray for a dissolution. Why pray for a dissolution in a case where you may dissolve the partnership yourself, by selling your own share?]

THE LORD CHIEF BARON. It ought to be a clear case which should induce a Judge in equity to allow a demurrer, because if allowed, it puts an end to the bill. If the case is one of doubt, all the advantage which may be had by the party demurring may be obtained by him at the hearing of the cause.

But I own I entertain a strong opinion that there is no ground for this demurrer. The case of the defendant has been very ingeniously argued by Mr. Elmsley; but in the course of his argument he assumes, for the purpose of enforcing his objections

(*b*) In Chan. Not reported.

to the bill, that the parties are tenants in common of a mine, while he answers those very objections by saying that they are mercantile [190] partners. Now the ownership of the colliery places them for some purposes in the situation of mercantile partners, but not for all purposes. They are partners for purposes of justice and convenience, but not for purposes of injustice and inconvenience. It is hard to say that the joint ownership of a colliery must be put an end to by dissolution, before an account can be taken. I do not agree that in a case between joint tenants, or tenants in common, of a colliery, one party can compel another to sell his share, and dissolve the concern previously to taking the account. That was not the meaning of the statute which gave the account between them, or of Courts of Equity which had the jurisdiction over such accounts previously to the statute. The rule as to the necessity of praying for a dissolution, in order to take the account, was meant to apply only to mercantile partnerships.

Now as to partnership itself. If you look to the constitution of a mercantile partnership, what is the meaning of a partner mortgaging his share? Nothing more than that he covenants to pay the amount borrowed. It cannot mean that another person is, by means of such a transaction, to be forced into the partnership. The mortgage is nothing more than a personal covenant: it conveys no interest in the partnership effects. Put the case of the other partner having had notice of the transaction, and afterwards rendering an account to the creditor. He does not thereby make himself a partner with the creditor, but only shews that he means to be accountable, and to render accounts: and supposing the accounts are fallacious, if there is no remedy in equity the party has none at all, for there is none at law; and no action against the supposed mortgagor would be available.

But that is not the case here. I only put it to shew the effect of such a transaction between mercantile partners. Here the partnership is in land. Now nothing is better known at law than that such a partnership has not [191] all the incidents of a common mercantile partnership. It has been held by all the Courts of law that the partners in such a concern cannot sign promissory notes, or give bills of exchange to bind each other. I held this in a late case at Guildhall, on a bill accepted in the name of the Sneid colliery by a partner in the concern. I decided that the other partners were not bound by such acceptance, and that ruling was confirmed yesterday in the Court of Exchequer. That shews that the partners in these concerns do not stand in the same situation as ordinary partners. The nature of their obligations is different; their implied obligations are different; though in some cases it is useful to apply the principles of partnership to their proceedings.

This is an interest in a colliery for a 31 years' term. One lessee has assigned his share to a mortgagee, with the usual proviso for redemption. Mr. Elmsley does not deny that if he were a perfect assignee, he might file a bill for an account against his co-lessee. Let us see how far that admission carries the argument. There is some confusion arising out of the words "equity of redemption." If you examine it strictly, the interest conveyed by mortgage can be taken advantage of by the mortgagee or his assignee to the fullest extent, subject to the power of redemption. A power of redemption is reserved in the conveyance, but the mortgagee has the absolute interest at law. Now it would be absurd to give him the absolute interest without all the powers attached to such an interest. It is true that in certain circumstances he is treated as a trustee for the mortgagor, but in point of law his remedy on the title is the same as if there were no equity of redemption at all, except against the person who has the equity of redemption. At law he may bring his action and turn out the mortgagor. In equity, if it be necessary for him to file a bill in which the owner of the fee or termor has an interest, can any person not claiming under the mortgagor make any objection to that bill? When in possession, he has [192] the same interest as the mortgagor, except in the one case of the mortgagor calling him into equity. How can this be taken advantage of by a co-tenant who is a mere stranger? It appears to me that a mortgagee like this has the same remedy against his cotenants as his mortgagor had. I put the case of an original mortgagor against the joint-tenant; in this particular case the executors of the mortgagor are made defendants, because they will not join. That I think is immaterial. I cannot allow this demurrer, because I think that the party has no other remedy than this bill. Besides, as Mr. Parker put it, the defendant Bates is manager of the concern, and how can the plaintiff have remedy against him except in equity?

Demurrer overruled.

TULL *v.* OWEN. June 9th, 1840.—In 1792 husband and wife, in consideration of a sum of money, executed a conveyance, with a fine, of the wife's estates of M. & F. to O. in fee. In August, 1798, they conveyed the M. estate alone to O. in fee, with a declaration that the fine already levied should enure to the uses of that deed. In November, 1798, by a deed reciting that the original transaction was only a mortgage, and that it had been lately discovered that the wife had only a life interest in the F. estate, the husband and wife, in consideration of a further advance of money from O., conveyed to him the wife's life interest in that estate. O. never executed the last-mentioned deed, but he entered into possession of both estates at the time of its execution. Upon a bill filed in 1836, by the heir of the wife, to redeem the F. estate: Held, that he was not entitled to relief; for that with the exception of the recital in the deed of November, 1798, the circumstances of the case were consistent with the original transaction being a purchase; and that although O. entered into possession under that deed, yet not having signed it he was not bound by its recitals.—The Court refused, after a long lapse of time, to rectify the deed by altering it from an absolute conveyance to a mortgage.

[S. C. 9 L. J. Ex. Eq. 33; 4 Jur. 503.]

Lucy Charlotte Tull, the wife of Ebenezer Tull, was, prior to the execution of the deeds after-mentioned, seised of an estate in fee simple or fee tail, in certain lands at Meopham, in the county of Kent, and of a life estate in certain lands at Frinsbury, in the county of Surrey.

By indenture of lease and release, dated respectively the 27th and 28th of August, 1792, and made between Ebenezer Tull and Lucy Charlotte Tull his wife of the one part, **[193]** and Henry Owen, the brother of Lucy Charlotte Tull, of the other part, reciting that John Owen had contracted with the parties for the purchase of the estates thereinafter mentioned, for an absolute estate of inheritance in fee simple, free from incumbrances, at the sum of £601: it was witnessed that in consideration of that sum paid by Owen to the parties of the first part, they granted, released, &c., all those estates called the Meopham estate and the Frinsbury estate, to the use of Owen in fee. And the indenture contained a covenant on the part of E. Tull, that he and his wife would levy a fine sur cognizance de droit of the estates, which fine should inure to the use of Owen in fee.

The fine was levied in Trinity Term, 1793. Subsequently to this, the two estates became the subject of two separate deeds in the manner following:—

By indentures of lease and release dated the 6th and 7th July, 1798, and made between Mr. and Mrs. Tull of the one part, and John Owen and Nathaniel Tull of the other part, reciting that Owen had contracted for the purchase of the Meopham estate for £450: it was witnessed that in consideration of that sum paid by Owen to Mr. and Mrs. Tull, they granted, bargained, sold, and released, &c., the Meopham estate to Owen and his heirs, to the use of Owen and N. Tull, and the heirs of Owen, and as to the estate of N. Tull, in trust for Owen. This deed, after reciting that a fine had been levied of the estate thereby released, together with other lands, stated that it had been and then was concluded, determined, and agreed upon by the said Ebenezer Tull and Lucy Charlotte his wife, and covenanted by all parties, that the fine which had been so levied relating to these lands, and all other fines and all common recoveries which had been or might be suffered concerning the same, should operate and inure to the use of Owen according to the limitations of that deed. This deed was executed by all the parties.

[194] By indentures of lease and release dated the 2nd and 3rd of November, 1798, and expressed to be made between Mr. and Mrs. Tull, of the one part, and Owen of the other part, reciting that by indentures of August, 1792, and by a fine sur cognizance, &c., levied pursuant to a covenant contained in the said indentures, the hereditaments thereinafter released were with other hereditaments absolutely released to Owen; and reciting that though the said indentures of lease and release were drawn as an absolute conveyance, they were in fact only a mortgage; and reciting that part of the principal mortgage money and interest had been satisfied by the sale of part of the premises comprised in those indentures, and that, by an account between the parties, there appeared to be owing to Owen the sum of £245; and

reciting that upon a late investigation it had been discovered that Ebenezer Tull and Lucy Charlotte had in the Frinsbury estate only an estate for the life of Lucy Charlotte, or some other estate less than a fee simple estate; and reciting that Tull owed Owen £75, which together with the said sum of £245 made the sum of £320; and reciting that Owen had contracted and agreed for the absolute purchase of the premises at the said sum of £320, and the additional sum of £115, making £435 in the whole: it was witnessed, &c., that in consideration of that sum paid by Owen to Ebenezer Tull and Lucy Charlotte his wife, they conveyed the estate to Owen and his assigns for the life of Lucy Charlotte Tull.

This deed was never executed by Owen; but it appeared that he took possession under it of the Frinsbury estate, or at all events that about the time of the execution of the deed by the Tulls he was in possession both of the estates and the deeds. In a Chancery suit which was subsequently instituted against him in respect of these estates, he was compelled to produce the deeds; and by means of such production the limited interest of Mrs. Tull in the Frins-**[195]**-bury estate appeared. In 1834 Mrs. Lucy Charlotte Tull died, leaving her husband Ebenezer Tull surviving her, and leaving her son the plaintiff her heir at law and heir in tail. Upon Mrs. Tull's death, Owen delivered up possession of the Frinsbury estate, together with the deeds of November, 1798, to Ebenezer Tull. In 1836 Ebenezer Tull died; and in 1838 Owen died, having remained up to that time in possession of the Meopham estate, and having by his will devised that estate to his son the defendant, whom he also appointed his executor.

The bill after stating these facts, prayed a declaration that the deeds of August, 1792, were intended to operate and operated only as a mortgage; that on the death of the plaintiff's father, the defendant's father became a trustee of the Meopham estate for the plaintiff; that an account might be taken of the rents and profits of the Meopham estate due since the death of Ebenezer Tull, and received by the defendant, and that the defendant might be decreed to pay the amount to the plaintiff, and might be decreed to convey the estate to him; but if the Court should be of opinion that the defendant had any claim against the plaintiff, then that the plaintiff might be declared entitled to redeem and might redeem the estate.

Mr. Treslove, Mr. Hodgson, and Mr. Metcalfe, for the plaintiff. The transaction of 1792 was a mortgage transaction. In 1798 a new transaction took place. It was then agreed that Owen should purchase the equity of redemption of the Meopham estate at £450. It was probably thought that the fine conveyed the fee simple, the parties not adverting to the fact that the deed of 1792, being a mortgage, left an equitable interest in the wife, which she could not afterwards part with except by another fine; for it is clear that the second declaration of the uses of the fine which was levied could not be operative so as to convert the original mortgage into an absolute conveyance in **[196]** fee: *Corbett* v. *Barker* (1 Anst. 141), *Jones* v. *Morley* (2 Salk. 677). In the latter case Holt, C. J., says, "If the fine had been levied pursuant to the covenant, no parol averment could have been allowed to declare the uses, or that the fine was not to the uses of that deed; and all parties had been estopped to aver the contrary by parol: but by deed subsequent and before the fine, other uses may be averred." And Mr. Preston in commenting on these observations says, "Note that the second declaration must be before the fine is levied" (2 Prest. Conv. 14). [The Lord Chief Baron. No doubt if a man and his wife levy a fine for the purpose of a mortgage of her land, if she afterwards conveys the equity of redemption, she must levy a new fine.] Thence arises the practice of introducing a power of appointment in the mortgage deed, in order to avoid the expense of a new fine.

But although the wife could not convey her equity of redemption without a fine so as to bar the plaintiff; yet, as between her and her husband and the mortgagee, the transaction of 1798 had the effect of a purchase, at least during the husband's lifetime. In this Court the wife is merely a surety for the husband. Up to 1798 she might have filed a bill against her husband; or in case of his death, against his representatives for redemption. But after Owen had agreed to purchase the equity of redemption, and to change his character of mortgagee into purchaser, the mortgage debt was at an end. The wife could not file a bill after part of the consideration money had been applied to the other estate. After 1798 she could not proceed in equity against her husband and Owen, and insist on redeeming. Owen might insist

on his defective title as purchaser: at least he might do so during the husband's lifetime. Then, if the character of mortgagee did **[197]** not continue after 1798, the plaintiff is rectus in curia. The mortgagor is dead. The estate tail has descended on him. The legal estate is still in the defendant by virtue of the fine, and he is a trustee for the plaintiff, who is entitled to take the estate free from incumbrances. Supposing, however, that the Court will only treat the plaintiff as a mortgagor, he is entitled to an account of the rents and profits.

That the original deed was intended to be a mortgage may be inferred, not only from the general aspect of the transactions, but from particular circumstances. It is a singular fact, and admitted without qualification, that though the defendant is stated to have been a purchaser in 1792, he did not take possession in that year. It is admitted that, upon the execution of the deed of 1798, Owen entered into possession of the Meopham estate, and into the receipt, rents, and profits thereof, and continued in such possession and receipt until his death. That is an admission that he did not enter before. Coupling that with the recital of the deed of 1798, it is pretty strong evidence that he was not a purchaser in 1792. But that is not all. The consideration of the original deeds was £601. That was for the absolute purchase of the two estates. When Meopham was conveyed a second time, the consideration was laid at £450; and when Frinsbury was conveyed in November, 1798 (and it will be remembered that that conveyance was only of the life interest of Mrs. Tull), the consideration for it was £435. So that the first consideration is £601, and the last is £885, which, combined with the other circumstances, is strong to shew that this was only a mortgage. [The Lord Chief Baron. On any other supposition you say the consideration would rather have diminished than increased.]

Mr. Simpkinson and Mr. Stinton, for the defendant. **[198]** The Court will not interfere after so great a lapse of time, and the witnesses being all dead. It is assumed by the counsel on the other side that the plaintiff is entitled to something. But if they rely on the original transaction being a mortgage, they must shew that it was so, and that the deeds of 1792 have been rectified by decree. Those deeds are expressly to the effect that it was a purchase out and out. It appears that a good title could not be made to the fee simple of the Frinsbury estate; and, accordingly, in 1798, a second conveyance, absolute on the face of it, was made to Owen of the Meopham estate, and then by a subsequent conveyance the life interest of Mrs. Tull in the Frinsbury estate was conveyed; and between the execution of the two sets of conveyances a fine is levied, the uses of which are declared by the parties to be to Owen in fee. In the absence of living witnesses the motives for executing these deeds can only be left to conjecture. Is it then strange to suppose that, inasmuch as a good title could not be made to the Frinsbury estate in fee, this subsequent transaction adopted the agreement for sale of the Meopham estate, and cut down the agreement for the purchase of the Frinsbury estate to a life estate? But it is inferred that the original transaction was not a purchase, but a mortgage; and the inference is founded on the recitals of the deed of 1798, and other minute circumstances. That deed, however, was not executed by Owen; he is, therefore, not bound by the recitals of it, though he may be bound by some of the transactions relating to it. None of the other deeds allude to a mortgage; and the parties could only rectify the original deed by another deed or by decree. It was incumbent on the plaintiff before resorting to his present argument to obtain such a rectification. Besides, it is by no means clear, notwithstanding the authorities which have been cited, that the second declaration of the uses of the fine in the conveyance of the Meopham **[199]** estate was not good. *Vavisor's case* (Dyer, 307 b.), *Jones* v. *Morley* (2 Salk. 677, 2nd resol.), *Fleetwood* v. *Templeman* (2 Atk. 79).

Again, the question is whether the plaintiff is entitled to relief after the long lapse of time. Possession has been had and held by the mortgagee, if he be a mortgagee, ever since 1792 or 1798. Can a party who has been lying by during that time come here and ask not merely for redemption, but for a declaration that a deed purporting to be an absolute conveyance shall be rectified after so many years? The case of *Corbett* v. *Barker* is no doubt applicable, but the Court at the hearing did not answer the argument of Sir Samuel Romilly, and so the Vice Chancellor thought in *Ashton* v. *Milne* (6 Sim. 369). The only way in which the wife's case can be put is as a mortgage. If it is not a mortgage her heir at law has no right here. But she could only redeem the mortgage by coming forward and having the deed reformed, and for that purpose

she is bound to file her bill within the proper time. She is bound to take the same steps in that respect as if she were sui juris. She cannot take advantage of her disability in order to defeat the effect of expiration of time: *Haworth* v. *Bostock* (ante, p. 1). Here there has been no acknowledgment of a mortgage within twenty years. 3 & 4 Will. 4, c. 27, s. 28. *Cholmondeley* v. *Clinton* (Turn. & Russ. 107), *Grenfell* v. *Girdlestone* (ante, vol. 2, p. 662), *Baldwin* v. *Peach* (ante, vol. 1, p. 453).

Mr. Treslove, in reply. Owen is bound by the recital in the deed of November, 1798. Though he did not execute it, he took possession under it. If there be a letter or other document signed by A., saying that B. is a trustee for such and such purposes, and the document is found in B.'s [200] pocket or desk at the time of his death, is that not evidence against B., though not signed by him? Besides, here, if the deed of November, 1798, does not reveal the truth, what is the truth? That Owen paid £601 for the estates in 1792, and £800 for the same estates in 1798. But the deed of November, 1798, under which Owen took possession, and which he himself produced, is inconsistent with those payments.

Then as to lapse of time, the conversion of the mortgage into a defective purchase in the year 1798 prevents time from running against the plaintiff. From the year 1798 until the death of the husband the defendant was in as purchaser and not as mortgagee. The wife could not have redeemed. [The Lord Chief Baron. Could she not have said, equally with the heir at law, it was only a mortgage?] If she had filed a bill treating Owen as a mortgagee, would your lordship have taken the estate from him? He would have said he had bought her life interest. So if Owen had filed a bill to foreclose, she would have said that the debt had been discharged, that he had given her husband a release, and that she could not file a bill against him to compel him to pay the money. Owen, therefore, having had possession as purchaser, and not as mortgagee, during the life of Tull, the plaintiff's title to redeem did not commence till Tull's death. The consequence is, that this case falls within the observations of the Master of the Rolls in *Raffety* v. *King* (1 Keen, 617), and the plaintiff is not barred by the statute. "If," says the Master of the Rolls, "the mortgagee enters, not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and to the validity of the conveyance he takes."

The Lord Chief Baron. Many points have been brought forward in argument which, if they were really [201] involved in the case, would deserve great attention; but it appears to me that one point is decisive of the whole case. This bill is filed for the recovery of the possession of an estate, on the ground that it was originally mortgaged to Owen by the father and mother of the plaintiff, and that after the mortgage an attempt was made to convey away to the mortgagee the estate of the mortgagor, and that that was ineffectual for want of a fine. Suppose it was so, and that after some years it was discovered that the husband and wife had not conveyed away the equity of redemption, so as to pass all her interest, and that being so, that the conveyance though good for the life of the wife was not good afterwards, so as to bar her heir at law. If such were the facts, I should be disposed to think the statute no bar to the heir, and I should be disposed to adopt the reasoning of the Master of the Rolls that the party could not be treated as mortgagee in possession from 1798 to the mother's death, because he would claim by another title, and not as mortgagee. It might seem hard, under such circumstances, that a man should not be allowed to set up his title as mortgagee against the plaintiff; but it seems to me that, during the life of the mother, the plaintiff could not have redeemed, and that the conveyance would have been good as a conveyance, at least during her life. If, therefore, the case depended on those facts, I should think it fit to give attention to the authorities which have been cited. But the preliminary question is, was the original transaction a mortgage? Unless it is so, the plaintiff cannot establish his case. What are the facts? In 1792 a proper conveyance was made of certain estates, under a fine properly levied; and it appears by that deed that Owen was the purchaser of that estate. It appears doubtful whether he took possession at that time. Let us assume that he did not. In 1798 I find he took possession of an estate in Surrey from the same parties, which is a confirmation of the deed of 1792. It was the same conveyance, with the exception of one estate: he takes posses-[202]-sion. Then by a deed executed in November, 1798, it appears that an estate at Frinsbury, in the county of Kent, which had been included in the deed of 1792, is likewise conveyed to Owen, the

parties having discovered that Mrs. Tull had only a life interest in that estate. In that deed the parties came to a new arrangement, and it appears that the sum which was deducted from the purchase money is added to sum a of £75, which was a debt of the father, and this is increased by another sum, and the three sums together make the aggregate consideration for the absolute conveyance of the life estate of the wife. But there is a recital in that deed which is the only foundation on which the plaintiff rests his claim, when he insists that the original transaction was only a mortgage. If Owen had signed the deed, it would be conclusive against him; but he has not signed it, and though I cannot say it is not evidence against him, coming as it does out of his possession, and he having been in possession of the estate under it, yet it is not every recital in a deed which a person holds under such circumstances that shall bind him. How can I come at the truth of the facts stated in that recital? At the distance of forty-seven years, or at all events at the distance of forty-one years, I am called upon to do what? Upon a recital of a deed which is not conclusive against the party, and without any other evidence, to defeat a transaction founded on a deed executed by all the parties interested in that transaction, and to do something totally at variance with that deed. Mr. Simpkinson says, all I could do would be to decree the deed to be rectified; but is difficult for me to say how I could make even such a declaration. It is true, if fraud or imposition were suggested, the parties might file their bill to set aside the original deed, and make another according to the true intent of the parties. If fraud were proved, and a proper case laid before the Court; for instance, that the solicitor by fraud prepared the deed, the Court would grant relief; **[203]** but how would it grant relief? By setting the deed aside. No step of that sort has been taken for forty-seven years, and how shall I deal with it? Shall I set it aside? Shall I say that it is void, and order another to be executed? It is difficult to say how that shall be done. To make any other declaration is still to go counter to the deed. I am to declare that a party holding under an absolute conveyance holds only as mortgagee. Is there any case of that sort? If you alter the rights of the parties under the deed, do you not set aside the deed? This is to give it a totally different construction. But then it is said Mrs. Tull has been led to give different uses to a fine which was intended to operate only as a mortgage, and to be subject to a proviso for redemption. Mr. Hodgson has suggested that it is a common practice of conveyancers to declare the fine to enure to the use of the mortgagee, and then to such further uses as the parties should appoint. Suppose the party borrowing says to the party lending the money, I have a perfect confidence in you, and will give you an absolute conveyance. No doubt if the party afterwards brought forward evidence of fraud, he might come to the Court and say, set this deed aside. But suppose it to have been the intention of the parties to make an absolute conveyance, reserving to themselves the right of modifying it, on the very ground that one of the estates was only for life, and the other absolute. There would be no fraud in that. The same reason which should prompt the conveyancer in modern practice to prepare such a power of appointment as I have described might have induced the parties to say, we will make an absolute conveyance at first, and will make our other arrangements afterwards. I cannot conceive that such a case might not occur. I mention this to shew that a doubt might clearly exist as to the circumstances under which the original deed was made. But a party who comes into this Court after so long a time, to vary the effect of a transaction of this nature, must **[204]** make out a very clear case. Why did not Owen execute the deed of November, 1798? How do I know, if he could be called from the dead, whether he might not say—I had by that deed all I wanted, namely, the possession of the estate, but I did not sign it, because I disagreed to the recital?

I cannot, therefore, in the absence of all evidence on the subject, and of confirmation by positive deeds—I cannot say that this was only a mortgage. It is unnecessary therefore, to enter into the other questions which have been argued. I will, however consider the matter a little further and mention it again, should I in any degree change my opinion; and I do so the rather, because what I have now said is the result of an impression which I took early in the cause; but unless I should mention the matter again the bill must be dismissed.

Bill dismissed. Issue refused.

ROME *v.* YOUNG. June 13th, 23rd, 1840.—Vendor of an estate obtained a decree for specific performance, with a declaration that if the purchase-money was not paid by a given day the estate should be sold and the proceeds paid in discharge of principal, interest, and costs, and that the purchaser should be made personally liable in the event of any deficiency. Before the day of payment arrived the purchaser died insolvent, and a creditors' suit was instituted for the administration of the assets. The estate was afterwards sold, but the proceeds were insufficient to pay the whole amount due to the vendor: Held, that by the construction of the decree which rendered the purchaser liable only for the deficiency, the vendor was entitled to prove in the creditors' suit for the balance only of his debt; but semble, that independently of the decree he would have been entitled to prove for the balance only; the case of a vendor's lien being different in this respect from the case of a mortgagee's security.—In an administration suit a mortgagee, unless he seeks the aid of a Court of Equity for the sale of his security, has a right to prove for his whole debt, and not for the balance only, after deducting the value of the mortgage.

[S. C. 9 L. J. Ex. Eq. 41.]

The facts of this case are fully reported, ante, vol. 3, p. 199. The estate having been sold, but the proceeds of the sale being insufficient to pay the principal, interest, and costs due to the vendor, the question now was whether he should be allowed to prove, as a general creditor, for the whole amount of his debt, or for the balance only.

[205] Mr. Purvis, for the other creditors, contended that the vendor's proof should be confined to the balance only. This is not a question of equity as between parties, but as between creditors; and the law upon which it depends is daily administered in bankruptcy. The lien in equity of the purchaser is the same as that of a mortgagee at law. In bankruptcy the mortgage security is sold, and the amount which it produces, if less than the money due on the security, is handed over to the mortgagee, and he is admitted to prove for the difference, and the difference only. Here there is a mere simple contract debt beyond the lien. In *Greenwood* v. *Taylor* (1 Russ. & M. 185), which was a suit for the administration of the assets of a deceased mortgagor, the mortgagee petitioned for the sale of his security, and for leave to prove the full amount of his debt before the Master; but it was held that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate. The Master of the Rolls observed, "The rule in bankruptcy must be applied here, and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded as has been argued upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a Court of Equity in the administration of assets; the mortgagee, who has two funds as against the other specialty creditors, who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay."

That case is an express authority for the present. It is true that in *Mason* v. *Bogg* (2 Mylne & Cr. 443) the decision of Sir John Leach would appear to have been questioned by the Lord Chancellor. But in that case there was not only a special **[206]** lien by virtue of the mortgage, but also a specialty debt by virtue of the personal covenant. And the Lord Chancellor in disposing of the case observed that he thought that the matter was not in such a state as to call for an opinion upon the question which arose in *Greenwood* v. *Taylor*. In *Perry* v. *Barker* (8 Ves. 527), after a foreclosure and sale of the mortgaged estate, the mortgagee was restrained by injunction from proceeding at law for the balance between the proceeds of the estate and the money due on the mortgage. And on the hearing of that case (13 Ves. 198) it was held that the bringing of an action for the balance opened the foreclosure, and let in the mortgagor to redeem.

These cases shew the principles on which the rules, as between mortgagor and mortgagee, are applied. If the mortgagee thinks proper to take the estate, then, after taking the estate, he is precluded from bringing an action on the securities. In the administration of equitable assets, if the estate be insolvent, the creditor, supposing him to be a specialty creditor, is not entitled to more than the other specialty creditors. Here all the debts are debts by simple contract. It has been said that this is a mere

rule in bankruptcy; but it is not so. Lord Loughborough's Order (*c*)[1] was made for the express purpose of meeting the case of mortgagor and mortgagee, and for the purpose of preventing the necessity of constant applications to the Court. It was not merely a rule founded on an act of Parliament, but it is in accordance with the principles of a Court of equity. The doctrine for which we contend is most equitable. It is inequitable that a party should avail himself of his specialty debt, either by sale or mortgage, and then override the other creditors by claiming the full amount of his debt. Beyond his lien on the property he is only a general creditor.

[207] Mr. Wray, for the vendor. The administration in bankruptcy is a statutory administration, without reference to the nature of the debt. A party coming in under the bankruptcy submits himself to the jurisdiction. Where a party had a security, the rule in bankruptcy was that he might have the security sold and come in for the difference. Such was the rule before Lord Loughborough's Order, and that was only a general order on the subject, to save the necessity of preventing a petition in every case. We are not creditors by simple contract, as stated on the other side, but specialty creditors. The decree was obtained in the testator's lifetime, and is equivalent to a judgment at law. The administration of legal assets is the same in equity as at law. The case before Sir John Leach proceeded on a mistake as to the application of the rule. It is impossible to read the observations in *Mason* v. *Bogg* without seeing that the Chancellor denied the rule altogether. An inquiry was made among the Masters at that time, and no such rule was found to exist. The mortgage in this case was an equitable mortgage. In the lifetime of the mortgagor there was a decree for a sale by consent. The debtor dies before the sale, and then intervenes the rule as to the administration of assets. It is perfectly clear that the mortgagor was a debtor to the full amount, and the decree was not intended to put him in a worse situation than he would have been in without it, as a simple contract creditor, holding a security for part of his debt. The question is put in *Mason* v. *Bogg*, what would be done with the equitable mortgage, and the Chancellor says the Court would give the mortgagee the full benefit of it. In every case, except the case before Sir John Leach, which clearly is erroneous, the party has gone in before the Master, and proved for the whole of his debt. A party is not bound to give up his security on going in before the Master. *Perry* v. *Barker* (13 Ves. 205). It does **[208]** not follow that because the mortgage being an equitable mortgage, the party is necessarily obliged to come into equity, that he is to be deprived of his legal rights. It is true that if this were a legal mortgage, and there had been a foreclosure, the commencement of an action on the bond would open the foreclosure, but still the mortgagee would keep the estate subject to redemption: *Aylet* v. *Hill* (2 Dick. 551), *Tooke* v. *Hartley* (id. 785). *Perry* v. *Barker* affirms the principle that when the estate is not sold, an action may be brought, though where sold to a stranger, and the mortgagor cannot redeem, the mortgagee will be restrained from bringing an action.(*c*)[2]

Mr. Purvis, in reply. Of the cases cited on the other side from Dickens, the first corresponds with *Perry* v. *Barker*. The other was overruled by it. It is clear that unless the creditor is in a situation to restore the mortgagor to the right which he had before the sale, he is not entitled to prove for the full amount, nor has any case been cited to shew that the party is so entitled. Every rule of justice requires that where a party has had the full benefit of his pledge, he should only prove for the deficiency. The decree only declares the party a creditor for the deficiency. Assuming the law, therefore, to be against us, the party has consented to take the pledge for what it will produce.

THE LORD CHIEF BARON. The decree must be taken to have been a decree by consent; and I am inclined to think the petitioner is bound by it.

June 23rd.—THE LORD CHIEF BARON. The question is whether the plaintiff, Rome, should be allowed to prove the whole amount of his simple contract debt against the estate of Young, or the balance only.

[209] I have given some consideration to the case, and I am inclined to adhere to the opinion which I at first expressed, that the petitioner is bound by the decree which has been taken by consent. The case of *Greenwood* v. *Taylor* is supposed to have decided that the mode of proving debts in equity is similar to that adopted by

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(*c*)[1] General Order, 8th March, 1794. See Arch. Pr. 182.

(*c*)[2] See ante, vol. 1, p. 348, n.

the rules in bankruptcy. It seems to be considered that the Master of the Rolls meant to lay down the general proposition that in all cases of administration of assets in equity the creditor by specialty, who has also a security by mortgage, should make the most of that security first, and then prove for the balance. I must say, if that was his intention, I do not accede to such a proposition. But I think it plainly appears that he did not mean to lay that down generally, but only where a party is obliged to apply to a Court of equity for the sale of his security.

Where a man is a creditor by bond and also has a mortgage for the same debt, on administration in equity for the benefit of the creditors, he is at liberty to make use of both securities; that is, to prove his bond debt to the full extent along with the other creditors, and to enforce his mortgage in the usual manner. And there is no occasion at all to apply to a Court of equity about the mortgage. He may prove his debt and take other remedies on his mortgage. He may give notice to the tenants and receive the rents, and equity cannot interfere. All he can do in equity is to foreclose the mortgage. Therefore, generally speaking, I do not see how any question can be raised as to the mode of proof in equity under such circumstances.

But the circumstances in this case present a substantial difference. There is no specialty creditor here at all; but Rome, being the vendor of property for which he had not received the purchase-money, became entitled in equity to file his bill for specific performance. By consent he obtains a decree under which he is entitled to an account and payment in the Master's office, and if the money **[210]** is not paid by a certain day, the estate is to be sold, and he is to get his remedy; and if he is not paid the whole, he is to stand as a creditor for the balance only. Equity might not enforce that against him, but that is his own prayer and his own consent. Suppose he had received a portion of his debt, and then the party had died, could it be said he could come here and then prove the whole amount of his simple contract debt? I do not think it could be allowed as to a bond debt; certainly not as to a simple contract debt. It would be unjust that he should receive more than he had contracted for. That cannot be the consequence of any principle adverted to by the Chancellor in *Mason* v. *Bogg*.

Here the creditor was contented to remain a creditor of the party for the balance. Can it be different if the party dies? He takes advantage of a creditor's suit to have his debt paid. Part is already paid. Under these circumstances, I think he is entitled to prove for the balance only. This does not affect the general rule; and I beg to have it understood I do not think it like the case of a mortgage, and that I do not in this decision intend to interfere with the doctrine in *Mason* v. *Bogg*. And with respect to *Greenwood* v. *Taylor*, if the Master of the Rolls meant what seems to be imputed to him, I do not agree with him; but I do not think he did. I should like to see the petition upon which he made the order in that case.

Be that as it may, in this case the party must stand upon his own contract. The death of the other party makes no difference, and the decree will have the same effect as it would have had in his lifetime.(*a*)

[211] GEORGE *v.* EVANS. June 18th, 1840.—Receiver refused though as between parties who had stood in the relative situation of cestui que trust and trustee, and though the latter, against whom the receiver was prayed, admitted that he had purchased the trust property. The ground of the decision being, though the case was one of suspicion, that the Court could not interfere till the purchase deed was actually set aside.—A case laid before counsel on behalf of the defendant, which has been produced for the inspection of the plaintiff under the usual order, may be read in support of the plaintiff's motion for a receiver.

The object of the bill was to call the defendant to account for certain monies paid and received by him for the plaintiff, and to have it declared that he, as trustee for sale for the plaintiff, was not competent to purchase the trust property; or otherwise that he might be decreed to reconvey the trust property to the plaintiff, the latter offering to pay all sums of money which should be found due from him to the defendant; for an injunction to restrain the defendant from selling the lease of the

(*a*) See *Ex parte Davenport*, Jurist, vol. 4, p. 1066.

premises, and for a receiver and manager to collect the outstanding debts, and carry on the business of the plaintiff, &c.

It appeared that the plaintiff, who had for some years previously carried on the business of a mathematical instrument maker and optician, in Tooley-street, in the Borough, under the name of Dring & Fage, in May, 1837, called a meeting of his creditors, the result of which was, that by a deed dated the 10th of the following June he assigned to Smart, Robins, Hawkes, and the defendant Evans, all his property, wearing apparel excepted, upon trust, to carry on his business upon the premises for eighteen months from the date of the indenture, and to apply the profits, after the expiration of that time, in the first place in payment of the usual costs; next, in payment of certain sums advanced for the plaintiff by Robins and Hawkes, and subject thereto in payment of other debts due to Robins and Hawkes and the other creditors, by instalments of three, six, and eight months, and subject thereto to hold the premises in trust for the plaintiff, his executors, administrators, and assigns. By the deed, power was given to the trustees to sell and dispose of the premises, in case the profits of the business were insufficient to pay any of the instalments when due, and to allow £2 a-week to the plaintiff.

[212] The trustees entered upon the trust, and in September following Hawkes died leaving Robins his executor.

The first instalment not being paid, a meeting took place in December, 1837, when, as alleged by the bill, Robins, in order to preserve the business for the plaintiff, and to carry the trusts into effect, offered to postpone his own right and that of Hawkes's estate to that of the other creditors, and to guarantee the other two instalments, provided he were allowed to carry on the trade. This was denied by the defendant; but it was admitted that the draft of a deed was prepared to some such effect, and sent to the defendant for his approval, and that several negotiations on the subject took place, which terminated in Robins's plans being rejected.

Ultimately a great portion of the creditors, upon the representation of the defendant and his attorney, accepted a composition of 13s. 4d., and those who did not accept were paid in full. These payments were made by the defendant to the amount of £1646. An assignment dated the 24th January, 1838, was then executed between Smart and Robins of the first part, the plaintiff of the second part, and the defendant of the third part, by which, after reciting that £1646 had been applied by the defendant in satisfaction and discharge of the debts due by the plaintiff, the other trustees and the plaintiff assigned to the defendant all the property comprised in the trust deed.

The bill charged that the deed of January 1838 was executed by the plaintiff in consequence of a representation made to him by the defendant, that if he acceded to Robins's offer, Robins would infallibly take the whole business into his own hands, and exclude the plaintiff from the enjoyment of it; but that if he, the defendant, took the business, he would pay all the plaintiff's debts, and subject thereto would hold in trust for the plaintiff; but that it was necessary, in point of law, that the deed should be in its form absolute; that in fact the plaintiff and the trustees, Smart and **[213]** Robins, executed the deed upon an express undertaking on the part of the defendant that he would hold the premises merely as a security for the sums paid by him with interest: that nevertheless the defendant claimed to hold the same absolutely; and although he had at first allowed the plaintiff and his aunt to reside on the premises, and paid the plaintiff two guineas a-week, yet, in March, 1838, he turned them both out, and had discontinued the payment: that the defendant, who was a potato merchant, had since carried on the plaintiff's business of optician under the name of Dring & Fage, and had introduced into the concern his son, who was totally unacquainted with the business, proposing to allow him a salary of £200 a-year: that the profits of the business were considerable, amounting to about £700 a-year; and that the defendant employed a great part of them in repairing the premises and increasing the stock in trade.

The defendant, by his answer, denied that he had prevented the arrangement with Robins being carried into effect. He stated that the plaintiff had frequently called upon him and said that if the business was ever put in the hands of Robins there would be no chance of his getting it again; and therefore he, the defendant, at the earnest entreaty of the plaintiff, agreed to purchase the premises. He admitted that he had told the plaintiff that if he paid his debts he would let him have his property

again, but he insisted there was no contract for that purpose. He also admitted that he had told the plaintiff that the assignment must be absolute and not conditional, but he stated that he had also told him that this was in consequence of a counsel's opinion which he had taken. That in fact he had intended it originally to be a conditional assignment, but that he was advised, for his own safety, that it should be absolute. He denied that the profits were £700 a-year, but admitted that he had laid out part of them in repairs. He admitted that he was carrying on the business under the name of **[214]** Dring & Fage; that he had introduced his son into the business, who originally knew nothing about it, and that he had turned the plaintiff out; but he alleged that he had only taken the plaintiff as his shopman, and had taken care that the receipts for his wages should specify this.

It appeared that the plaintiff had tendered to the defendant the sum of £1646, with interest, which the defendant had refused to accept. The defendant alleged, by his answer, that the sum of £2570 was due to him.

Mr. Simpkinson and Mr. Bailey now moved for a receiver. The defendant has worked himself into this business by fraud, and is now carrying it on, not on the terms on which he ought to have carried it on, but for his own benefit. He admits that by his answer. He carries it on also in the name of Dring & Fage, which is more to his advantage than carrying it on in his own name. If he is allowed to do that until the hearing, the consequence will be that he will draw away all the old customers, and the decree will be useless. The lease had only two years to run, and will expire at Christmas. He will then carry on the business on some other premises, and whether under the name of Dring & Fage or not will be immaterial, as he will then have established his connexion. The plaintiff has treated him by the bill as a mortgagee, and as entitled to reimburse himself with interest. We offered to redeem him on these terms; but he refused to take the offer. Though he was not bound to do so, yet he is bound by the fact of a tender. At the hearing this will be cut down to a mortgage. Here the defendant was a trustee for payment to the creditors and ultimately for the plaintiff. A trustee for sale cannot generally purchase; if he do, he must have distinctly thrown off his character of trustee, and purchase at the full value in his real name. It is clear here that he did not give the full value, and by his resistance shews that **[215]** he thought it a lucrative concern: *Stillwell* v. *Wilkins* (Jac. 280; 6 Mad. 49). He refuses to set forth an account of the receipts and profits. No doubt the general rule is that the Court cannot change the possession as against the mortgagee, so long as the party has not paid the mortgage money. But here the plaintiff having actually tendered the money, can the defendant, insisting that he is an absolute owner, be allowed to continue in possession, when he actually refuses to receive the money, which is the only money coming due to him in the event of his being declared a mortgagee? And we offer to pay the money into Court.

Mr. Bethell, contrà, having cited the observations of Lord Eldon in *Stillwell* v. *Wilkins* (see Jac. p. 283), was stopped by the Court.

ALDERSON, B. I think the present motion cannot be granted. This is a case in which certain transactions appear to have taken place which, if not fully explained, may lead ultimately to a decision adverse to the defendant. But in the mean while the defendant has, at all events, a claim upon the property for a certain sum, and unless there be some precedent to shew me that I can interfere in this intermediate stage of the cause where the contract has not yet been set aside, or unless it be distinctly shewn me that the property is likely to perish from the neglect or misconduct of the defendant (which certainly has not been shewn to me), I think there is nothing to authorize the Court to interfere in a summary way. There is nothing to shew that the defendant is likely to destroy the business. It would be a commercial suicide if he did. For anything that at present appears, all he is to get in exchange for what he has paid is the **[216]** good-will. If he carries the business away he will destroy that security. I do not think it ought to be presumed that he will do so. No doubt a trustee purchasing of his cestui que trust must shew that the transaction was fair and open: but there are cases in which a trustee purchasing is allowed to retain possession. The case of *Stillwell* v. *Wilkins*, which has been cited for the plaintiff, is strong the other way.

Motion refused.

On the foregoing motion, a case laid before counsel on behalf of the defendant, and which had been produced for the inspection of the plaintiff under the usual order,

was read in support of the motion; the defendant not insisting upon any privileged protection by his answer.

The cases cited for the plaintiff were *Powell* v. *Lassalette* (Jac. 549) and *Walker* v. *Corke* (ante, vol. 3, p. 276).

HALL *v.* LAVER. July 1st, 2nd, 23rd, 1840.—A solicitor who had used the names of certain parties as plaintiffs in a cause without their consent was held entitled to no lien against them on the fund in Court for his general bill of costs, though entitled, under the circumstances, to be paid out of the fund their share of the costs of the suit properly incurred.

[S. C. 5 Jur. 241: affirmed 1842, 1 Hare, 571.]

Under the will of Robert Barnevelt, Hall was the trustee for sale of the testator's real estates; and Robert Woolley, Richard Woolley, and their sister Mrs. Landers, the wife of Captain Landers, were the parties beneficially interested in the estates in thirds (see ante, vol. 3, p. 191). The share of Mrs. Landers was, upon her marriage settlement, settled upon herself for life, with remainder to her children. In 1814 the estates were contracted to be sold to various purchasers. At that time Blamire and Marriott were the solicitors of the vendors; but, in 1820, Robert and Richard Woolley retained Poole, who was their nephew, as their attorney in the room of Blamire and Marriott. This retainer was adopted **[217]** by Hall, the trustee, and the title-deeds were delivered to Poole. Robert Woolley having previously assigned his share by way of mortgage, under which Lomas was a trustee, that mortgage was, after the retainer, assigned to Lomas.

The estates of the testator being sold in lots, and several of the purchasers refusing to complete their purchase, bills were filed against them in this Court under the direction of Poole, as the attorney for the vendors; and in these suits Poole used the names of Mr. Lomas and Captain and Mrs. Landers and their trustees, as plaintiffs, without ever having been retained by them. The result of three of these suits was successful, and the purchase-money was paid by the defendants in those suits into Court. In those cases where no suit had been necessary, the purchasers had paid their purchase-money to the parties entitled under the will. Amongst these purchasers was the purchaser of the largest lot, to whom Poole delivered the title-deeds of the estate, without taking any covenant for their production.

Poole having delivered bills of costs to a very large amount to Captain and Mrs. Landers for business transacted in the Exchequer suits, and also in relation to the lots which had been sold without suit, and in relation to certain actions of ejectment, the question now, on exceptions to the Master's report, was whether, considering the manner in which he had made them parties to the Exchequer suits, he had a lien on the funds in Court, as against Captain and Mrs. Landers, for his general bill of costs.

It was admitted that Captain and Mrs. Landers had retained Poole in the ejectments; but it was clear that they had avoided employing him as solicitor in the suits in the Exchequer, having, on the contrary, retained another solicitor, Mr. Gordon, with instructions to see that they were not introduced by Poole into those suits. It ap-**[218]**-peared also, contrary to the Master's finding, that they had employed Gordon in other matters in which Poole claimed to have been their solicitor.

The Master found that Lomas was made a party to the suits only as a trustee.

Mr. Simpkinson and Mr. Lowndes, for the exceptions.

Mr. Swanston and Mr. Koe, for the report. Captain and Mrs. Landers have been parties deriving benefit from these suits. They have been partaking in the interest of the money paid into Court; and they have, from time to time, received money in respect of the lots which were sold without suit. The title-deeds were handed over to Poole to realize the purchase-money. They were placed in his hands at the desire of the parties entitled to two-thirds of the estate, and with the acquiescence of the others. Unless Poole had handed over the deeds to the purchasers, the money never would have been paid. Can these acquiescing parties now turn round and refuse to pay the costs? [Alderson, B. Can Poole have any general lien against them out of the particular suit? Lien arises out of contract.] A solicitor, independently of contract, has a general lien. Suppose Woolley had not retained Poole, and Poole had instituted these suits in their name, and they had taken the profits, could they say he

had not a lien? But here the case goes farther. He had possession of the title-deeds. If he does business relating to the title-deeds and other business not relating thereto, he has a lien for both businesses. The Woolleys had no title to the title-deeds except through Hall. Poole is also solicitor of Hall. The Woolleys could not have called upon Hall to deliver up the deeds. The suits are merely incidental, to carry into effect the trusts of the will. The mere circumstance of a sale, and the deeds being handed over to the purchasers, makes no difference: *Worrall* v. **[219]** *Johnson* (2 J. & W. 214). [Alderson, B. The purchasers to whom the deeds were delivered did not pay the money into Court, but to the parties themselves.] He has the same lien for his entire demand as if the fund were in Court: *Ex parte Sterling* (16 Ves. 258). Then, if the parties adopt the suit, it is a retainer from the beginning. If a solicitor institute a suit in the name of a party (the suit being a proper one), and the party is not aware of it at the time, but the solicitor subsequently gives him notice, and he does not direct the solicitor to stop it, but permits it to go on, it is incompetent for the party afterwards, and after the suit has gone on to a hearing, to say that he did not institute it. [Alderson, B. I should be glad to have an authority for that proposition. I should be much alarmed if it were true. It is raising a contract out of a man's doing nothing.]

Mr. Simpkinson, in reply. There is no evidence or admission against the Landerses of their adoption of Poole as their attorney. The purchase-money for the lots which were sold without suit was not paid to Poole, but to the parties themselves, according to their interests under the will. That is anything but evidence of Poole being employed for them. It is true he got possession of the deeds, but not on account of the Landerses, and therefore he can have no lien against them on the deeds without their consent. As to the ejectments, it may be conceded that he had some authority from them; but it is evident they did not retain him in the suits. At law it requires a special retainer to authorize an attorney to commence an action; and I should say the rule in equity was even more strict: for in *Lord* v. *Kellett* (2 Myl. & K. 1) it was discussed whether a retainer to commence a suit in equity should not be in writing. Even supposing the circumstances were sufficient to **[220]** make the Landerses liable to Poole for the costs in a particular suit, does that give him a lien beyond the extent of his demands in that suit? If he had other demands, could he tack them to the demands in that suit, so as to give him a general lien on the fund in Court? In that respect a lien on a fund recovered differs from a lien on paper: *Lowe* v. *Church* (4 Madd. 391), *Davies* v. *Bush* (1 Younge, 358). And his having had the deeds is immaterial, if he can shew no recognition of his claim by the Landerses. Besides, if he even had a lien on the deeds, he has deprived himself of it by parting with them. We can reach the money in Court without the assistance of the deeds, and in that respect this case differs from *Worrall* v. *Johnson*.

ALDERSON, B. As far as Captain and Mrs. Landers are concerned, the question is, what is the fund in Court? It is the balance after payment of the reasonable expenses of the cause. I should say the lien on that fund does not depend on the question whether they retained Poole or not. All the divisible fund is the fund deducting the costs. It seems to me that Poole has no lien on the divisible fund, that is to say, the surplus of the fund after payment of the costs of the suit.

July 23rd.—ALDERSON, B. I have examined the papers in this case, and am of opinion that the exceptions to the Master's report must be allowed.

On the facts, the proper conclusion to be drawn is that the petitioner is to be allowed the costs properly incurred by him as solicitor in each of the three equity suits, to be taken in each case out of the sum in Court, and that the parties are then in each case to be entitled to their distributive share of the residue.

It appears to me that Mr. Poole was not the attorney **[221]** of Captain and Mrs. Landers, or of Mr. Lomas, or of their trustees: that the utmost that can be said is that they did not interfere after they knew their names were used by him as plaintiffs, to prevent that being done. But this, though it will give the defendants a claim against them, will give no claim to Mr. Poole on them. He can only establish a claim under a contract with them, and there is no evidence of that.

But still as he, as attorney for the Woolleys (using their names), recovered the fund, and the parties come in now to have the benefit of it, they can only have their share of the divisible fund recovered, which is the amount recovered deducting the reasonable expenses of recovering it.

It seems also to be proved that the parties did retain Mr. Poole in the actions of ejectment, therefore he will have a lien on the shares of all the parties as to those costs.

And as to the shares of the two Woolleys, he will have a lien for his general bill.

I think the costs of Captain and Mrs. Landers and Mr. Lomas, incurred by the petition and examination before the Master, must fall on the petitioners.

Order accordingly.(*a*)

BAILEY *v.* GOULD. July 11th, 1840.—An executor is not bound to insure, or continue the insurance, of his testator's property against fire.—Executors, against whom an inquiry has been directed as to what part of the testator's assets might, but for their wilful default, have been got in, and who have been guilty of some acts of negligence, may nevertheless be entitled to their costs of an administration suit brought against them.

[S. C. 9 L. J. Ex. Eq. 43.]

The bill was filed by parties interested under the will of Abraham Bailey, against the executors Gould and Powell, calling them to account for the testator's assets. The executors being decreed to account for what, but for their **[222]** wilful default, they might have got in, the Master made his report, whereby he found that four several sums of £150, £180, £120, and £50, which were outstanding on various securities, had not been called in by the executors, and had by their negligence and wilful default been lost to the testator's estate. The Court overruled the Master's opinion as to the three first items, but it appearing upon the admission of the defendant Gould, who was the more active executor, that he had omitted to keep insured a certain leasehold factory of the testator, which had been burnt down since the testator's death, it was referred back to the Master to make inquiries upon that subject, with liberty to state special circumstances as to that particular point.

The Master by his further report found that the testator was at the time of his death in partnership with one Barlow as a silk manufacturer. That the partnership premises which the testator held under a long lease, and which he let to the partnership, were insured by the testator for £550 against damage by fire. That the original policy bore date the 15th March, 1816, that this policy expired on the 15th March, 1817, when a new policy was effected by the testator for a year. That the testator died in April, 1818, after this policy had expired, but that three weeks previous to his death he was unable to transact business, and Gould acted for him. That the will was proved in June, 1818. That after the testator's death the executors continued the business with Barlow. That the insurance on this property had not been kept up by the executors, though they had insured other property of the testator. That in 1824 the factory was burnt down. From these facts the Master concluded that the executors were chargeable with the amount of the sum insured.

In the lease of the factory there was no covenant to insure.

The principal question, on further directions, was whe-**[223]**-ther the executors were chargeable for the non-insurance. Another question, however, was raised in argument, arising from the circumstance of the Master having again reported against the executors as to the sums of £150, £180, and £120.

Mr. Temple and Mr. Bacon, for the plaintiffs, contended that it was the executors' duty to insure whether the premises were insured at the testator's death or not: and they submitted that the executors ought to pay the costs of the suit.

Mr. O. Anderdon, for the heir-at-law of the testator, took the same line of argument, contending that the ordinary policies of insurance belonging to the testator must have been found amongst his papers; and that even if the executors were not bound to insure in the abstract, they were bound to continue the affairs of the testator in the same course in which they had found them at his death; and that one omission by the testator to insure immediately before his death would not absolve the executors from their duty in this respect. He also commented on the liability of the executors for the three sums of £150 &c., reported by the Master to be chargeable against them.

Mr. Kenyon Parker, for the testator's widow.

(*a*) See *Bozon* v. *Bolland*, 4 Myl. & Cr. 354.

Mr. Simpkinson and Mr. Teed, for the defendant Gould. On the balance of the receipts and payments by this executor there is a sum of £85 coming due to him. As to the insurance, it will be observed that this was not an old policy on which the testator paid the premiums from time to time, but an isolated policy, renewable as the testator might find it convenient. The last policy expired before the testator's death, and was not renewed by him. How is Gould answerable for that? The bill is **[224]** not filed against him as the testator's agent, but as his executor: and the sums which he paid to the testator's workmen have been disallowed by the Master for the express reason that they were paid in the testator's lifetime. Is then the executor bound to insure property which the testator failed to continue insured? Or is there any authority which decides generally that an executor is bound to insure or to continue the insurance of his testator? [Alderson, B. I must determine this case upon that ground. I cannot make it depend on the circumstance of the policy expiring a few days earlier or later, the testator being incapable of managing his affairs.]

As to the other items, the Court has already decided that they ought not to be charged against the executors; and as no direction was given to the Master to review his report, it is clear that he went beyond his powers in adjudicating upon these items: *Gayler* v. *Fitzjohn* (1 Keen, 469), *Lewis* v. *Loxham* (1 Mer. 179).

Mr. Cole, for the personal representatives of Powell, said that the Master had found a considerable sum coming due to Powell. He contended that his clients were entitled to their testator's costs; for that, even if they were chargeable with anything, a balance was due to them on the whole transaction. He cited *Bennett* v. *Attkins* (ante, vol. 1, p. 247), *Baker* v. *Carter* (ante, vol. 1, p. 250), and *Taylor* v. *Tabrum* (6 Sim. 281). [Alderson, B. There is no difference between Gould and Powell as to the non-feazance; it is otherwise as to mis-feazance. There may be a difference as to the insurance, for there was knowledge in one and not in the other.]

Mr. Temple, in reply, contended, with reference to costs, that there was no instance in which, where a decree had **[225]** gone against executors for an inquiry as to their wilful default, the Court had allowed them their costs. [Alderson, B. The executors must be security for the debt of £50 which they have left so long outstanding: *Powell* v. *Evans* (5 Ves. 839). But it does not follow that they are to lose their costs. In *Taylor* v. *Tabrum* they were allowed their costs, though there was a loss of £3000.] If this case is put upon the question of wilful default or not, there are no such extenuating circumstances as to take the case out of the general rule. But I submit that costs do not follow the event of the suit after such a decree as this.

Alderson, B., after stating the circumstances under which the inquiry contained in the decree had been directed, said: I much doubt whether the sum of £550, for which the Master finds the property to have been insured, can be called the personal estate of the testator at all. It was a contingent claim which the testator might, by possibility, himself have realized, but which he did not. Whether the value of the property was £550, or whether you take the utmost sum the parties could reasonably be charged, is immaterial. It was no claim existing at the time of the testator's death. What then existed the executors did possess; that is, the leasehold premises and manufactory. Being in their possession, a fire, for which they were not to blame, occurred. It was a mere misfortune which took place. Can the loss be said to have happened through their default in not keeping up a contingent claim? Was this property which, but for their wilful default, they might have got in? It is very difficult to say that it was.

But the next question is whether there was any wilful default. It was in the possession of two persons as partners. They carried on the business jointly. Barlow was **[226]** interested in having the insurance as well as the other. The omission of his insurance, he being a party directly interested, is a material circumstance. It would be a strong thing to say (he, as a reasonable man, and taking reasonable care of his own property, not doing it)—it would be a strong thing to say that these parties were guilty of wilful default in omitting to do what Barlow himself might have done. I think, therefore, as to this part of the case, that the executors are not chargeable as for wilful default.

Then, as to the other parts of the case, it seems to me that the question as to the sums of £150, £140, and £120 is concluded by the previous order of the Court. The Master had, on a former occasion, reported that the parties were chargeable with these sums; but the Court was of opinion that the state of facts relating to them

was not such as to raise a question of wilful loss. But as to the £50, it was outstanding on personal security which had been taken by the testator, and which had not been got in, but on which interest had been paid up to the date of the report. The Master took the correct distinction between property invested on real and property invested on personal estate; holding that, inasmuch as the personal security changes from day to day by reason of the personal responsibility of the party giving the security, and as a testator's means of judging of the value of that responsibility are put an end to by his death, therefore, although no loss may have occurred in the interval, the executor who has omitted to get it in within a reasonable time, becomes himself the security. Now, upon that point, all that was determined on the former occasion was that the party was to be charged with the £50 for not getting it in within a reasonable time; and if a loss occurred he was to be responsible for it. As to the other sums, as I have already noticed, the Master's report is overruled, and I must consider myself as bound by the decree. I cannot look at the circumstances which have occurred since, because, in fact, the Master had **[227]** no right to look at them; and, indeed, if I could, I will not say they would alter my judgment. I consider, therefore, the party to have succeeded as to the three sums of £150, £140, and £120, but to have failed as to the £50; and as to the latter sum, it appears that interest was regularly paid upon it up to the date of the Master's report, and there is no reason to suppose that it cannot be got in.

It seems to me, therefore, that if ever there was a case in which costs should be allowed to executors after an inquiry as to their wilful default, this is that case.

COOKE *v.* BROWN. June 11th, 1840.—On a suit brought by a first mortgagee, with power of sale, for the sale of the mortgaged premises, in this Court: Held, that the subsequent mortgagees were entitled to their costs, although a sale had been ordered with their consent, and the produce of the sale had not been sufficient to satisfy the first mortgagee.

[S. C. 9 L. J. Ex. Eq. 41.]

A mortgagee, with power of sale, filed a bill, praying a sale in this Court. The subsequent mortgagees were made parties, and they appeared on the plaintiff's motion, and consented to a sale. The premises, being sold, did not produce sufficient to satisfy the first mortgagee. The question was whether the subsequent mortgagees were entitled to their costs.

Mr. Wright, for the first mortgagee.

Mr. Faber, for the second mortgagees, observed that the circumstances of this case were much more favourable to the subsequent incumbrancers than those of *Wontner* v. *Wright* (2 Sim. 543), in which they had been allowed their costs; because here the plaintiff had no occasion to come into a Court of equity. He also remarked that this case was clearly distinguishable from *Upperton* v. *Harrison* (7 Sim. 444).

Mr. Metcalfe, for the other parties.

[228] ALDERSON, B., said that the subsequent incumbrancers, being brought into Court without necessity, were entitled to their costs.

Order accordingly.

CATTELL *v.* CORRALL. July 4th, 11th, 1840.—Conditions of sale, describing a title to premises as arising under an exchange, by virtue of an award of commissioners under an Inclosure Act, are satisfied by shewing a title by award in respect of other lands and of common rights, without shewing the further particulars of the exchange; and if the vendor contracts to commence his title with the award, the purchaser has no right to inquire into the title of the lands given by the vendor in exchange for the lands contracted to be sold.—An award by commissioners of lands in general terms, without stating their tenure, is primâ facie evidence of their being freehold.—The enrolment of the deed of disposition under the stat. 3 & 4 Will. 4, c. 74, may be made immediately upon the execution of the deed, and may be effected either by vendor or purchaser; and as the inrolment relates to the execution of the deed, it follows, that a tenant in tail who has not barred the entail under the statute can, nevertheless, make a good title in

fee simple.—A conveyance by a trader of part of his property for the benefit of his creditors is not an act of bankruptcy, unless executed under circumstances of fraud; and mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance.—The dicta of Sir John Leach in *Hartley* v. *Smith*, Buck, 368, commented upon and doubted.

[S. C. 9 L. J. Ex. Eq. 37.]

In this case (*a*) the Master reported that the plaintiff could make a good title at the time of the report, and also before the commencement of the suit.

Several exceptions were taken to the report, of which four were the most material.

The two first exceptions were—1st, That the plaintiff had not shewn whether the premises were freehold or copyhold, or held in fee for life or for years. 2nd. That the nature of the title had been misrepresented; the conditions of sale stating them as having been acquired by exchange, whereas no title by exchange appeared in the abstract.

With reference to the matter of the two first exceptions, it appeared that amongst the conditions of sale was the following:—"That the premises to be sold having been taken in exchange by Samuel Cattell, deceased, the father of the vendor, under an award made pursuant to an act of Parliament, 42 Geo. 3, for dividing and inclosing the common and open fields of Daventry, and which award bears date **[229]** the 30th April, 1838; the abstract of title will commence with an abstract from the award, and the purchaser shall not be at liberty to require any earlier title to be shewn either to the premises to be sold, or the property in respect of which they were awarded, nor make any objection on account of such exchange, nor require any copy of the said act to be produced, or any evidence of the award having been made pursuant thereto."

The heading of the abstract of title delivered to the purchaser was as follows:—"Abstract of the title of Thomas Cattell to a freehold messuage or dwelling-house, and two closes, with barns, yards, and appurtenances, containing eight acres or thereabouts, situate and being in Daventry, in the county of Northampton."

The abstract began with the commissioners' award, alluded to in the conditions of sale, dated the 18th March, 1804; and it stated that the commissioners did, by their award in writing of that date, set out and allot unto and for Samuel Cattell for and in lieu of his rights of common, one cottage in the occupation of B. Clarke, one plot of ground, No. 163, containing 3 acres 16 perches, bounded &c.; and unto the said Samuel Cattell, for and in lieu of a certain cottage near the public house, one other lot or plot of ground, &c.

The abstract then stated the will of Samuel Cattell, which was attested by three witnesses, and by which he devised the property in question, subject to an annuity to his daughter Mary Cattell, to his son the plaintiff, and the heirs of his body, with remainder to his own right heirs.

Mr. Simpkinson and Mr. Bird, for the exceptions, contended that these statements in the abstract were not sufficient to shew that the property was freehold. Also, that the condition of sale, which represented that the property was taken in exchange, amounted to a misrepresentation. **[230]** The property was not allotted to Samuel Cattell in exchange, but generally. It did not therefore follow, in case the party was evicted, that he could proceed against the other lands. And although, according to some opinions, conveyances under inclosure acts operate as an exchange of lands only, and not title, yet that point was doubtful; and the Court would not compel a purchaser to accept a title depending upon it without having the question tried at law. They referred to Coventry on Inclosures, chap. 4, p. 36; Noy's Maxims, ed. Bythew, p. 160; stat. 4 & 5 Will. 4, c. 30; 6 & 7 Will. 4, c. 117, sect. 35, 36.

Mr. Temple and Mr. Hodgson, contrà, contended, first, that the allotment under an award, followed by a will attested by three witnesses, was primâ facie evidence of a freehold; and, secondly, that there was no misrepresentation in the conditions of sale arising from the mere circumstance of the word "allotment" being used instead of "exchange." [Alderson, B. There is no misrepresentation. The award was to be the root of the title.]

Third exception. That the plaintiff at the time of the contract was tenant in tail

(*a*) See ante, vol. 3, p. 413; 4 Mees. & Wels. 734.

only of the premises, and ought to have barred the entail before he could make a good title.

Mr. Bird, for the exception. This is a question of title and not of conveyance. If an estate not in the vendor is outstanding in some person who is trustee for the vendor, or who must convey as the vendor shall direct, any question as to the interest or the acts of that party is a question of conveyance. But if the estate is in any other person who is under no legal or moral obligation to convey as the vendor shall direct, any question of the same sort as to that party is a question of title. Thus, if a mortgagee dies, upon the mortgage being paid off, his heir, as representing **[231]** the real estate, and his executor, as representing the personal estate, are bound to reconvey: so, if a vendor die before conveyance, his heir, upon the purchase being completed, must convey. But it is otherwise in the case of a jointress, for she has an independent interest; and unless the vendor puts her under his control by contract, the Master must report against the title: *Esdaile* v. *Stephenson* (6 Madd. 366). Here the reversion is in the right heir of Samuel Cattell. The plaintiff is only tenant in tail, and there are issue in tail. The title is not an indefeasible title, and therefore the report that the party can make a good title is wrong. Consistently with the facts, the utmost that the Master could report would be, that a good title could be made on barring the entail; but according to the practice of the Court the Master has no authority to make such a qualified report: *Lewis* v. *Loxham* (1 Mer. 179). [Alderson, B. This is not a case in which the consent of any other person is necessary.] In *Lewin* v. *Guest* (1 Russ. 325), where the title depended only on the suffering of a recovery, and everything was done for that purpose before the filing of the bill, except that the writ of seisin was not returnable, the Court was of opinion that a good title was not shewn before the commencement of the suit. Suppose here that the vendor had executed the conveyance under the statute and died before enrolment, his heir could not be compelled to convey. Besides, as by the new act the conveyance cannot be made at one time, and as the vendor would not be entitled to his money till the conveyance was completed by enrolment, it might happen that he might die between the enrolment and the payment of the purchase-money, in which case his representatives would lose both the money and the estate: and the same thing might happen to the purchaser if he paid his money before enrolment.

Mr. Hodgson, contrà. Before the stat. 3 & 4 Will. 4, **[232]** c. 74, an estate tail being barrable only by recovery could only be barred in term time. Therefore, tenant in tail could not strictly make a title in fee in the vacation; and yet a Court of equity treated a tenant in tail in the same situation in this respect as a tenant in fee: *Lord Braybroke* v. *Inskip* (8 Ves. 417). Any argument, however, which might arise before the stat. 3 & 4 Will. 4, c. 74, as to the capability of tenant in tail to make a good title, is now at an end; because, under that statute, an estate tail is barrable by deed, which may be executed at any time. The disentailing deed operates as a deed of appointment in execution of a power preceding an estate tail. Suppose a man were tenant for life with a power of sale with remainders over, could it be denied that he might make a contract for sale, and obtain a decree for specific performance? No doubt the vendor might have actually barred the entail; but he would have been ill advised to do so. There might be reasons why a purchaser would not be so safe if he had done so. The moment the disentailing deed is executed, and the transaction completed by enrolment, the remainders are barred. The enrolment relates to the deed in the same manner as the enrolment under the stat. 27 Hen. 8, c. 16, related to the bargain and sale: *Perry* v. *Bowes* (1 Ventr. 360). According to *Hawkins* v. *Kemp* (3 East, 410) the enrolment must take place in the life of the tenant in tail; but that is immaterial, for the deed may be enrolled on the day of its execution, either by vendor or purchaser. The purchaser may, if he please, for his own safety, enrol the deed on the very day on which he pays his money. This case is clearly distinguishable from *Lewin* v. *Guest*, for there the estate tail was not in the vendor himself, but in a party over whom he had no legal control.

Mr. Simpkinson, in reply. If this report be confirmed **[233]** the effect may be that the purchaser may be compelled to accept the title and pay the costs of the suit, though the property goes to another person. It is impossible to say that this vendor has a good title in fee; nor will the mere completion of the conveyance give him one. By the 74th section of the new statute it is expressly enacted that the enrolment of the deed shall not operate against a subsequent purchaser who enrols his deed first.

The enrolment, therefore, has not relation back to all intents and purposes, but only in the event of there being no intermediate dealing with the estate. A subsequent purchaser, under certain circumstances, has the priority. Again, this case is distinguishable from that of a trustee. By the death of a trustee the trust is not barred, but descends. But even in the case of a trustee it is not an incontrovertible proposition that the point is a mere question of conveyance; because it has been decided that where the legal estate is vested in trust, and the heir at law of the trustee, or other person in whom the estate is vested, is not specially named in the abstract, it is not an objection of conveyance but of title: *Wynne* v. *Griffith* (1 Russ. 283). Even where the legal estate is outstanding, the purchaser is not bound to pay the money till he has got a conveyance, and till the conveyance is enrolled. It is of the essence of the title that the deed should be enrolled; and it must be executed before the purchaser is called upon to pay his money. Sugd. V. & P. vol. 2, p. 301.

Fourth exception. That a conveyance, dated the 2nd September, 1835, which appeared by the abstract to have been executed by the vendor to one Rowlatt, was an act of bankruptcy.

The deed in question was made between the plaintiff, described as Thomas Cattell, of Northampton, carpenter, **[234]** of the first part, John Rowlatt, of the second part, and the several persons who should subscribe their names and affix their seals to the schedule thereto annexed, of the third part. After reciting that the plaintiff was indebted to Rowlatt in the sum of 18l. 10s., and to the other parties in the sums set opposite their respective names in the schedule, it was witnessed that, for barring all estates tail in the premises, Cattell did, by the abstracting indenture which was intended to be duly enrolled, &c., grant, bargain, and sell unto the said John Rowlatt, his heirs and assigns, the said premises, discharged of all former trusts, &c., upon trust, with or without the concurrence of the plaintiff, and subject to the annuity of £2 payable to M. Cattell, to make sale of the said premises, either in parcels, &c., and to receive the monies to arise from such sale or sales, and to stand possessed thereof, in trust, in the first place, to pay the costs of the said indenture; and, in the next, to pay Rowlatt and the parties of the third part the amount of their respective debts; and, in case of any surplus, to pay the same to the plaintiff, his executors, administrators, and assigns.

The schedule to this deed contained the names of four creditors only, one of whom was Mr. Henry Becke, the plaintiff's attorney.

The deed was never enrolled.

Mr. Bird, for the exception. The purchaser cannot be compelled to take with notice of an act of bankruptcy. The deed to Rowlatt describes the vendor as a "carpenter," and therefore liable to the bankrupt laws. The deed itself, though expressed to be a conveyance in favour of all the creditors who should execute it, was evidently intended for the preference of particular creditors. The debts for which it was a security were old debts. No money was advanced at the time. Therefore, though the deed may be a conveyance of part only of the trader's effects, and in **[235]** other respects may be unobjectionable on the face of it, yet if the circumstances attending it are such as raise a pregnant suspicion of mala fides, as is the case here, it will be deemed an act of bankruptcy: *Hartley* v. *Smith* (Buck, 368), *Pulling* v. *Tucker* (4 B. & Ald. 382). The observations of Sir John Leach, in *Hartley* v. *Smith*, are decisive of this case.

Mr. Hodgson, contrà. There are cases where even the conveyance of the whole property of a trader for the benefit of his creditors has been held not to be an act of bankruptcy: *Churchill* v. *Greenwood* (1 Myl. & K. 546). But this is only a conveyance of part. Unless therefore such a transaction be tainted with fraud, it is clearly no act of bankruptcy. Now, if the purpose with which such a deed is executed be security for money actually due, it is not fraudulent within the statutes. It cannot be contended that a mortgage for an antecedent debt is an act of bankruptcy. This deed is in effect a mortgage. The form is immaterial. The great majority of mortgages contain trusts for sale; and many are in the form of conveyances in fee in trust to sell. Such instruments, unless executed in contemplation of bankruptcy, are valid. *Carr* v. *Burdiss* (1 Cr. M. & Rosc. 443). There is nothing here to shew contemplation of bankruptcy. Five years have elapsed and no bankruptcy. In almost all the cases bankruptcy has occurred. In *Hartley* v. *Smith* Sir John Leach would not compel the purchaser to take the title; but there the Master had reported against the title, which

was primâ facie in the purchaser's favour. The "extrinsic circumstances" alluded to by Sir John Leach must have been before the Master. *Mortimer* v. *West* (10 Barn. & C. 44) shews that Lord Tenterden was disposed to narrow the grounds on which assignments of particular property, for the payment of particular debts, are held to be acts of **[236]** bankruptcy. [Alderson, B. There is no doubt as to the law. A conveyance of a man's property so as to render him unable to carry on his trade by reason of insolvency is an act of bankruptcy. A conveyance of part must be a fraudulent conveyance. The only difficulty arises from the expressions of Sir John Leach. How can I presume fraud from extrinsic circumstances? I think his dictum must not be pushed to the farthest extent which the words will possibly bear.]

Mr. Simpkinson, in reply.

ALDERSON, B. The exceptions must be overruled. There is no evidence of the property in question being of copyhold or customary tenure, and therefore primâ facie it is freehold. Besides the allotments are freehold, unless they are expressly made copyhold by the act of inclosure.

Then as to misrepresentation, I think there is none. The plaintiff says he will give no other title except a title commencing from the award. The title does not depend on the exchange. The exchange is a mere reason why the title should commence from the award alone.

The other objections are of importance. By the will of his father Samuel Cattell, Thomas Cattell is tenant in tail of this property; and the question is whether the Master can say that he can make a good title? To do that he must make a good title in fee-simple. Now it appears to me that, if a party conveying according to the conveyance as settled by the Master can make a title in fee-simple, he can make a good title. By the act of Parliament, a new mode of conveyance is prescribed instead of a recovery. The question is whether the party does not, by executing that conveyance, give a title in fee simple. No doubt, unless the conveyance is enrolled, it is void; but if it be enrolled within six months, it takes effect from the time of execution. That may be provided for reasonably enough, because the Court can retain the purchase-money **[237]** till the party has enrolled the conveyance, or in other words, until that which is good by agreement becomes indefeasible by enrolment. It is said, indeed, that without that precaution the vendor might convey to another party who might obtain a prior enrolment. But I see no reason to presume he would be guilty of a gross fraud. As to the imaginary difficulty of his dying before conveyance, that is a contingency which applies to all cases. I think, therefore, that the Master is right in holding that he can make a good title.

Then as to the deed. It is said that if any circumstances can be imagined which would make this deed an act of bankruptcy, then, on the authority of *Hartley* v. *Smith*, no purchaser ought to be compelled to take the title. Now, as to *Hartley* v. *Smith*, there was real ground of suspicion in that case, and the decision was right. But the argument of Mr. Bell and the other gentleman is entirely confined to the question of fraudulent conveyance. They do not seem to have argued the question which Sir John Leach suggested; and I think his observation must have been taken in a larger sense than the learned Judge intended. I quite agree that a purchaser ought not to be compelled to take such a title as on reasonable ground might be litigated; but then there must be a reasonable, decent probability of litigation. Is that so here? The deed executed by a carpenter conveys a certain portion of his landed estate to his creditors. The deed is five years old, and nothing has been done since. There is no ground for saying that it comprises all the property of the party conveying; there is no ground for saying that in the execution of it he intended to favour one creditor more than another, nor any ground for saying (more especially as five years have elapsed and no bankruptcy) that he did it in contemplation of bankruptcy. I see no reason therefore for disagreeing with the Master, and the exceptions must be overruled.

Exceptions overruled.

[238] CHESLYN *v.* DALBY. DALBY *v.* CHESLYN. May 14th, July 3rd, July 14th, 1840.—Where a deed, executed by A. and B., recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck; and that A. was willing to pay B. the amount which might appear

to be due to B. in respect of such sums, such amount to be ascertained and paid as thereinafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed: Held, that notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient, consistently with the stat. 9 Geo. 4, c. 14, to take the debt out of the Statute of Limitations.

[S. C. 10 L. J. Ex. Eq. 21.]

By the decree made on the hearing of these causes (ante, vol. 2, p. 199), the Court declared that, under and by virtue of the deed of declaration of trust of the 22nd April, 1830, in the pleadings of the said causes mentioned, the defendant Thomas Dalby was entitled to a lien upon the estates and premises in the pleadings of the first-mentioned cause, for what the Master should find to be due to him for principal and interest on the account thereinafter directed. And it was thereby referred to the Master to take an account of what was due for principal and interest from the plaintiff Richard Cheslyn, in the first-mentioned cause, to the defendant Thomas Dalby, at the time of the execution of the said deed of trust of the 22nd April, 1830, in respect of all monies advanced professionally, bills or other matters referred to by the said deed, and to compute interest on all sums of money carrying interest, if any, from the times when the same respectively became due or were advanced, and on all other sums, as from the date of such deed; and in taking the said last-mentioned accounts, it was further ordered that the said plaintiff should be at liberty, if he should be so advised, to insist upon the Statute of Limitations, and upon payment or satisfaction, to be proved or inferred from lapse of time, or on any other defence; but this direction was not to preclude the said defendant Thomas Dalby, if he should be so advised, from insisting on the said deed of the 22nd April, 1830, or on any other evidence, as taking the case out of the Statute of Limitations, or rebutting the proof or inference of payment from lapse of time, or meeting any such other defence as the plaintiff in the said first-mentioned cause might be advised to insist upon; and in taking the said accounts the Master was to make to all parties all just allowances, &c.

[239] The Master by his report certified, amongst other things, that he found there was due on the 22nd of April, 1830, from Cheslyn to Thomas Dalby, the sum of 4875l. 6s. 6d., in which was included interest upon such of the sums as carried interest from the times when the same respectively became due and were advanced; the particulars whereof were set forth in the second schedule to his report. The first item mentioned in the schedule was dated 24th April, 1797, and was followed by items dated in 1798, 1799, 1800, and other subsequent years, to the year 1820.

The question now was whether, upon the construction of the recitals (see ante, vol. 2, p. 170, post, p. 242) in the deed of trust of the 22nd April, 1830, the Master was right in holding that these items were not barred by the Statute of Limitations.

Mr. Girdlestone and Mr. L. Wigram, for the plaintiff, Richard Cheslyn, contended that these sums were barred by the statute. They relied on *Kennett* v. *Milbank* (8 Bing. 38; 1 M. & Scott, 102), *Morrell* v. *Frith* (3 Mee. & W. 402), *Whippy* v. *Hillary* (3 B. & Ad. 399), and *Williams* v. *Griffiths* (2 Cr. M. & R. 45). They distinguished the present case from *Bird* v. *Gammon* (3 Bing. N. C. 883; 5 Scott, 213), and *Lechmere* v. *Fletcher* (1 Cr. & M. 623), on the ground that here there was no general promise in writing to pay the debt, but only a conditional promise to pay what the arbitrators should ascertain, the arbitrators being judges of the party's own selection. They also contended that, under Lord Tenterden's Act, the sum acknowledged must be a sum the liability to which was not matter of dispute; but that here the writing itself expressed that the debt was not ascertained. Upon the effect of conditional promises, as taking cases out of the statute, they cited **[240]** *Tanner* v. *Smart* (6 B. & C. 603), *A'Court* v. *Cross* (3 Bing. 329; 11 Moore, 198), and *Haydon* v. *Williams* (7 Bing. 163; 4 M. & P. 811). They also referred to *Burleigh* v. *Stott* (2 M. & R. 93; 8 B. & C. 36).

Mr. Simpkinson and Mr. Bethell, for the defendant, Thomas Dalby, said that the recital in the deed of trust did not amount to a mere conditional promise; but that there was an express acknowledgment of the debt coupled with an express promise to pay the amount when ascertained; and that no case, except, perhaps, that of *Kennett*

v. *Milbank*, had gone the length of deciding that, under such circumstances, the debt was barred. They relied on *Lechmere* v. *Fletcher* and *Bird* v. *Gammon*.

Mr. Boteler and Mr. Metcalfe, for other parties.

July 14th.—ALDERSON, B. In this case the parties have argued before me as a preliminary point the question whether the Master has done right, upon taking this account, in determining that, notwithstanding the lapse of time, the case did not fall under the operation of the Statute of Limitations. This is a convenient course, and as the point is one of some interest, I took time to deliberate; although at the time of the argument, I thought that the law as settled by late decisions would, ultimately, be found to have concluded this point.

When this case was heard at first, it had not occurred to me to consider whether the recitals in the deed of the 22nd April, 1830, were of themselves sufficient to take the case out of the statute; and the only point to which my attention was then drawn was whether I should send this question of account to the Master, with a direction for him to decide it as the arbitrators would have done, in conformity with the express stipulation contained in the **[241]** body of the deed; and I then thought, and still think, that such stipulation could not be so extended, for that it was not unreasonable to suppose that in agreeing to that stipulation, Mr. Cheslyn might have been influenced by the nature of the tribunal selected by his own assent, to try the question between him and Mr. Dalby.

At a subsequent period, in settling the minutes, my attention was drawn to the recitals in the deed, and I then directed the decree to be so framed as to leave open to each party the question which has since been discussed. At that time my impression was founded on the case of *Kennett* v. *Milbank*, that these recitals could not be coupled with extrinsic parol evidence, and so be made sufficient to bring the cause within Lord Tenterden's Act; and, I confess, that even now, but for the subsequent authorities which have, I think, concluded the matter, I should entertain a strong doubt upon this subject. But, after the case of *Bird* v. *Gammon*, which proceeded upon the authority of *Lechmere* v. *Fletcher*, I apprehend that it must be considered as fully established that a general promise in writing to pay, not specifying any amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations. But it was said by Mr. Wigram in argument, and I think with great force, that this must have some limit; and that, where the writing itself expresses that the debt is not ascertained, such debt cannot by other evidence be taken out of the operation of the statute. Unfortunately, however, this very point has been decided otherwise. Mr. Baron Bayley in *Lechmere* v. *Fletcher* puts this very case, "Suppose," says he, "a debt of very considerable standing, and the defendant to write thus—'I do not know the amount, as we have had no settlement—none, however, has been paid, but if you will ascertain what the amount is, I will pay you.'" And he then adds "that such an acknowledgment would be **[242]** sufficient." Now, that is this very case, if, here, the acknowledgment be an absolute one; or if, being a conditional one, it appears to have become absolute by the condition having been performed. For, in truth, there is no legal difference between these two cases. Those authorities, such as *Tanner* v. *Smart* and the like, where the party succeeded because the acknowledgments were held to be conditional, turn upon the form of the promise contained in the declaration —an absolute promise, which is not established by proof of a conditional one; and whether the effect of the acknowledgment within six years be to establish a new promise or to continue the old one is, in such cases as those, immaterial. In the one view of the law there is a variance between the declaration and the new promise proved—in the other, the proof itself does not, in fact, establish a continuation of the promise originally made. This being the state of the law, it becomes necessary, in order to apply it to the circumstances of this case, for the Court to examine the provisions of this deed and ascertain whether the promise to pay contained in it was absolute at first, or, if conditional, whether the condition has been performed, and it is now absolute.

On the fullest examination I can give to this deed, I have arrived at the conclusion that this was an absolute promise. Indeed, that was the view, which, in my original judgment, I took of this case. It seemed then to me, and I still retain that opinion, that this deed contains an absolute admission of there being a debt due, for the repayment of which £5000 is to be reserved, and an agreement to ascertain that

debt in a particular way. I do not think that the one was conditional upon the other. The recitals are these: "Whereas Richard Cheslyn is indebted to the said Thomas Dalby in various sums lent and advanced at various times, commencing in 1797, for interest thereon to the present time, and also for divers professional bills for business done by the said Thomas Dalby as the solicitor **[243]** and attorney of the said Richard Cheslyn or on his account, the amount of which loans and bills is not yet ascertained, and a balance not yet struck." Now, this is a clear and absolute acknowledgment of the existence of a debt of which the exact amount alone is not yet ascertained; and from this unqualified admission the law would raise a promise to pay it unless there be something added thereto by the party making the admission which shews that either he does not mean to promise at all, or to promise upon certain conditions to pay the debt. The next recital in the deed is therefore to be looked at. It is this: "And whereas Richard Cheslyn is willing to pay the said Thomas Dalby the amount which may appear to be due to the said Thomas Dalby upon the said account, commencing in the year aforesaid; such amount to be ascertained and paid as hereinafter mentioned." Now it is argued that these last words form a condition to the promise to pay. But these words do not necessarily mean to import a condition. They may well be equivalent to these words, "and that such amount shall be ascertained as hereinafter mentioned." And, on looking at the whole deed, which, treating this as a question of fact (to be determined at Nisi Prius, as was done in *Bird* v. *Gammon*, upon an examination of the whole instrument), I am bound to do, I think the true meaning of this recital is so; that it imports that the plaintiff is willing to pay the amount, and on that footing he agrees to ascertain that amount in a particular mode to be thereinafter specified. And each of these stipulations seems to me independent of the other. For the deed proceeds to recite an expectation that the amount would have been previously ascertained and paid at the time of execution, and an intention of making Thomas Dalby a party to the deed, thereby to testify his receipt for the balance; and then recites that delays having prevented the ascertaining of the balance previously to the execution of the deed, the parties had as a substitute for such **[244]** payments, arranged that the mortgagees should retain a specific sum of £5000, and should become trustees for Thomas Dalby for so much of that sum as should be equal to the true amount, when ascertained and found due to him; and should, after making that declaration, pay over the residue of the £5000 so retained to Richard Cheslyn himself. All these provisions are very inconsistent with a mere acknowledgment and conditional promise to pay what shall be ascertained to be due; but they well agree with the notion that Richard Cheslyn absolutely admitted the existence of some debt, upon accounts commencing in 1797, and promised to pay whatever sum should be found to be its true amount; and that he further agreed for the mutual advantage of both Dalby and himself, who had each a claim upon the sum so reserved, that their respective shares of it should be promptly and amicably adjusted by arbitration.

On the whole, therefore, I think this was an absolute promise to pay the amount when ascertained; and, if so, it falls within the cases of *Lechmere* v. *Fletcher* and *Bird* v. *Gammon*. The Master, therefore, was right in allowing the items in this account, at least so far as the present objection applies to them.

COOKE *v.* BOWEN. July 15th, 1840.—Testator directed the residue of his personal estate, after the death of his wife, who was tenant for life, to be divided as follows: To his five nephews and nieces, A., B., C., D., and E., two shares each, and to their children one share each; the nephews and nieces survived the testator. Held, that the residue vested in the nephews and nieces and their children living at the testator's death, or born in the lifetime of the tenant for life; the children taking per capita, but the shares of each of the nephews and nieces being double that of each child.

[See *Dowding* v. *Smith*, 1841, 3 Beav. 541.]

Thomas Guise by his will bequeathed as follows:—"I will to my wife Sarah Lucy Guise, for and during her natural life, all my property, monies, and effects in the funds, property in trade in the firm of B. & Co., profits therefrom, **[245]** and all the household furniture, plate, linen, books, book-debts, and all other property whatsoever to me belonging; and at her decease, the whole of the property so devised shall be divided in manner following: to Mrs. Joice Bowen, if a survivor at the death of Mrs. S. L.

Guise, £200, and to Mrs. Sarah Butler, £200 in like manner; and at the decease of Mrs. S. L. Guise, the remainder or residue of my property to be divided as follows: to William Guise, son of my deceased brother, to my niece Joice Cooke, to my niece Mary Ann Bowen, to my niece Elizabeth Godwin, to my niece Joice Evans, each two shares, and to their children one share each, to be in that manner divided after all incidental expenses shall be discharged."

The testator died on the 4th June, 1825, and his widow, the tenant for life, died the 25th July, 1839.

All the testator's nephews and nieces named in the will, except William Guise, were living at the death of the tenant for life.

William Guise, and one of his children, of which there were nine, died after the testator, and in the lifetime of the tenant for life; the other children were living at the death of the tenant for life.

Joice Cooke, the wife of the plaintiff William Cooke, had four children, all of whom died after the testator, and in the lifetime of the tenant for life.

Mary Ann Bowen was unmarried.

Elizabeth Godwin had two children, of whom one survived the tenant for life, and the other died after the testator, and in the lifetime of the tenant for life.

Joice Evans had no children.

The question was, in what manner the residue was to be distributed?

Mr. Girdlestone and Mr. Shadwell, for the plaintiffs. The question is, how the shares of the children of the nephews and nieces are to be distributed? We say, **[246]** amongst all the children who came in esse before the death of the tenant for life, whether living at the death of the tenant for life or not; and the fund is divisible per capita, and not per stirpes. That would make the fund divisible in twenty-five shares, two shares being allotted to each of the nephews and nieces, and one to each of the children. The children would only take per stirpes, on the ground of taking through the parent, which is not the case here. The only doubt is whether this is a gift to the children immediately, or only to those who are alive at the period of division; but, on the authority of *Devisme* v. *Mello* (1 Br. C. C. 537), it is an immediate gift to the children living at the testator's death, and to those coming in esse afterwards during the life of the tenant for life.

Mr. Koe, for Elizabeth Godwin, said that *Devisme* v. *Mello* was decisive of the point.

Mr. Temple and Mr. Bailey, for the children of William Guise. Whatever children take under this bequest take per capita. "Children," here, is a word descriptive of certain legatees, whether they consist of a class or individuals. It is not a case where parent and child take in succession, but where they both take immediately: *Barnes* v. *Patch* (8 Ves. 604), *Lady Lincoln* v. *Pelham* (10 Ves. 166), *Blackler* v. *Webb* (2 P. W. 383). But we say they took vested interests, liable to be devested by their death in the lifetime of the tenant for life: *Pope* v. *Whitcombe* (3 Russ. 124). The estate is divisible among the four persons living, who are named, and the children living at the death of the testator who survived the tenant for life, or at all events the children living at the death of the tenant for life. *Devisme* v. *Mello* turned on the words "reverting to William's children."

[247] Mr. Spence and Mr. Caley Shadwell, for the four nieces.

Mr. Simpkinson, for the representatives of W. Guise.

ALDERSON, B. I am of opinion that the parties will take according to Mr. Girdlestone's view of the construction of this will. The nephew and nieces take each two shares; and their children living at the testator's death, or born afterwards, and before the death of the tenant for life, one share each.

WARBURTON *v.* VAUGHAN. July 14th, 1840.—Where a testator's real estates had been sold by order of the Court for payment of his debts, and the devisees of the estates, who were infants, had refused to execute conveyances to the purchasers; the Court, to avoid the delay arising from the ordinary process to compel devisees to convey, declared the infants trustees within the stat. 11 G. 4 & 1 Will. 4, c. 60.

[See *Robinson* v. *Wood*, 1842, 5 Beav. 246.]

Charles Edwards by his will directed that all his just debts should be paid in the first place out of his personal estate, and if that were insufficient, he charged his said

debts upon his real estates, and subject thereto, he devised all his real estates and the residue of his personalty to John Rowlands and Edward Vaughan, their heirs, executors, administrators and assigns, in trust for the absolute use and benefit of Edwin and Charles Warburton, their heirs, executors, administrators and assigns, as tenants in common. And he appointed Rowlands and Vaughan the executors of his will. Rowlands renounced probate.

The bill was filed on behalf of Edwin and Charles Warburton, who were infants, against Vaughan, to have the trusts of the will established, and the real and personal estates of the testator administered. Under a decree in that suit, a portion of the testator's real estates was sold in lots; and by a subsequent order, the infant plaintiffs were directed to join in and execute all proper and necessary conveyances to the purchasers, and it was referred to the Master to settle such conveyances in case the parties differed about the same.

[248] The Master having in pursuance of this order prepared the conveyances for the execution of the infants, but the latter, having by the advice of their next friend, refused to execute them, the defendant Vaughan now presented his petition, praying that it might be declared that the plaintiffs were trustees of the hereditaments sold under the decree, and they were such trustees for the purchasers within the meaning of the statute 11 Geo. 4 & 1 Will. 4, c. 60 (see sects. 8, 13, and 18), and might be ordered in pursuance of the said statute to execute the conveyances so approved of by the Master.

Mr. Bird, for the petitioner, said that the object of this petition was to avoid the necessity of the usual compulsory process against devisees refusing to convey,(*b*) which would occasion great delay. He cited *Prendergast* v. *Eyre* (Rep. temp. Sugd. 11), and *Beale* v. *Ridge*,(*d*) and observed that if the infants persisted in refusing to convey after the lapse of twenty-eight days after tender of the conveyance for their execution, the Court might, under the 8th section of the statute 11 Geo. 4 & 1 Will. 4, c. 60, appoint another person to execute conveyances in their names.

The Court made the order as prayed.

[249] CROPPER *v.* KNAPMAN. 1840.—Where an inquiry was directed as to a particular account, and the defendant by his answer and examination relied on a general account, including both the items of the particular account and general items, but was unable to prove the general items (which were in his discharge) by the usual evidence: Held, that by such failure of proof the general account was cut down to the particular account, and that the defendant must be bound by the result.

[See p. 589, post.]

This case is reported on the hearing, ante, vol. 2, p. 338. The Master being directed to take an account of the dealings and transactions between the testator, Gibbon, and Knapman, in respect of the building speculation, made his report, by which he found a considerable balance due to Gibbon's estate on that account.

The defendant excepted to the report, on several grounds; and, amongst others, that the Master had included in his calculations an item of £480, which did not properly belong to the building speculation, and without which the balance would have been the other way.

It appeared that the parties had agreed to build two houses, and to divide the expenses and profits equally; but that Knapman having advanced the greater part of the money, the testator, upon the completion of the houses, assigned to Knapman his house in consideration of £480.

(*b*) See as to infants, the stat. 11 Geo. 4 & 1 Will. 4, c. 47.

(*d*) In Chan. 31 March, 1835. In this case the testator devised his real estates to trustees upon certain trusts, for the benefit of his children. The bill was filed by creditors; and an order was made that a sufficient part of the testator's real estates should be sold to satisfy the lien of certain bankers on the testator's freehold property. The devisees in trust having disclaimed, and the testator's heir at law (his eldest son) having gone out of the jurisdiction, in 1831, and not having been since heard of, the Court of Chancery ordered him to be declared a trustee, and that a proper person should convey in his name.

Knapman, by his answer, admitted that he had placed the £480 to the credit of the testator in their general accounts; but he denied that that sum was agreed to be placed, or was placed, to the building account. In the schedule to his answer, which he alleged to be a schedule or list of all sums received and paid by him on account of the building speculation, or otherwise on account of the testator in his lifetime, were several items, described as money received and paid on account of the building speculation, and other items not so described, as £480 for the purchase-money of the testator's house, £10 for a lottery ticket purchased by the testator, &c.; but, with the exception of the £480, there were no general items to the testator's credit, and those which were placed to the defendant's credit, he was unable to prove by evidence before the Master. The result was that the only items left standing were those expressed to be on account of the building transaction and the £480.

[250] Mr. Temple and Mr. Blunt, in support of exceptions to the Master's report, contended that the sum of £480 had nothing to do with the building speculation, and that the plaintiffs had no right to make it a debt on the particular account of building, so as to charge the defendant's estate with the costs of this inquiry.

Mr. Simpkinson and Mr. Sutton Sharpe, for the report, said that no general account was alleged by the answer; on the contrary, almost all the items of charge and expenditure contained in it are connected with the building; that the few items which were not connected with the building were not proved by the defendant before the Master, by proper evidence, and were consequently struck out of the account: *Talbot* v. *Rutledge* (4 Bro. C. C. 74, cited). That the effect of this was to put an end to the general account; and there being no other account between the parties, the £480 must be referred to the building account.

ALDERSON, B., after having stated that, in 1822, Knapman had laid out £1050 on the concern, and that, in 1824 and 1826, Gibbon had contributed four several sums—£100, £200, £50, and £277, said: It appears that nothing was afterwards paid between 1826 and 1828, either way, on the account, because the other items are struck out for want of evidence. De non apparentibus et de non existentibus eadem est ratio. That being the case, in 1828 the house allotted to Gibbon is assigned to Knapman for £480, for which credit is given to Gibbon. Now, there being no other account between the parties, that reduced the balance from one side to the other, and Knapman became indebted. It appears, therefore, as to this part of the case, that the Master in substance is right, and that the balance was properly struck.

[251] MEMORANDUM.

In Trinity Vacation, William Glover, Esq., of the Middle Temple, and Stephen Gaselee, Esq., of the Inner Temple, were called to the degree of the coif, and respectively gave rings with the mottoes, Reginâ et lege gaudet serviens, and Nec temerè nec timidè.

BURROWS *v.* GREENWOOD. Nov. 14th, 1840.—A voluntary contract in favour of a mother and her children, held to be executory only as related to the children, and executed as to the mother, and therefore enforced for the benefit of the mother absolutely.—Trustees decreed to pay out of the trust estate the costs of a suit occasioned by their legal doubts in a plain case.

The plaintiff, Anne Jane Burrows, and Thomas Marshall King were the natural children of Thomas King, who died many years since, and Hannah Goude.

By an agreement, dated the 14th of March, 1833, signed by Hannah Goude and Thomas Marshall King, Hannah Goude, who, by virtue of the will of Thomas King, was seised of considerable freehold estates in Grasmere, in the county of Westmoreland, subject to certain mortgages, agreed to sell them to Thomas Marshall King, "in consideration whereof," as was expressed by the agreement, "the said Thomas Marshall King hereby agrees to pay off and discharge the mortgage incumbrances affecting the said premises, amounting to £1500, and all interest hereafter to become due and owing in respect of the same, and also to pay to the said Hannah Goude, or her assigns, for and during the term of her natural life, one annuity or clear yearly sum of £60, by two equal half yearly payments, &c., and further, and in full for the absolute purchase of all the said hereditaments and premises, to pay the sum of £600 of lawful money

to such person or persons, immediately upon the decease of the said Hannah Goude, as she shall by deed or will direct or appoint, in trust, nevertheless, for the sole, absolute, and exclusive use and benefit of Mrs. Anne **[252]** Jane Burrows, the wife of Mr. Thomas Summers Burrows, independent of her present or any future husband, and of her children, in such manner and form as therein shall be expressed and declared." And it was declared that due payment of the said annuity, and the said sum of £600, should be secured by the bond of Thomas Marshall King, to be executed by him, upon the completion of the conveyance.

After the execution of this agreement Thomas Marshall King entered into possession of the property, but died in November, 1834, without having executed any conveyance. By his will he devised his real estates to James Greenwood and John Green, jun., upon certain trusts, and appointed his wife, Hannah King, his sole executrix.

By indentures of lease and release, dated the 8th and 9th of December, 1834, and made between Hannah Goude of the first part, Hannah King of the second part, and Greenwood and Green of the third part, the property, which was the subject of the agreement, was duly conveyed to Greenwood and Green upon the trusts of the will of Thomas Marshall King. The deed of release, in reciting the several charges upon the premises, stated them to be "liable finally to the payment, upon the decease of the said Hannah Goude, of the further principal sum of £600, to her executors, administrators, or assigns, or to or for the use and benefit of such person or persons, or for such uses, ends, intents, and purposes as she the said Hannah Goude, by any deed or deeds, writing or writings, &c., or by her last will and testament in writing, or any codicil thereto, or any writing in the nature of or purporting to be her last will and testament or codicil, to be by her signed and published in the presence of, and attested by, two or more credible witnesses, shall direct or appoint."

Hannah Goude made her will, bearing even date with the release, and attested by two witnesses. By this instrument, after reciting totidem verbis the power con-**[253]**-tained in the release, she, in pursuance and exercise of the power, gave and bequeathed the said principal sum of £600 to her daughter, Anne Jane Burrows; and did thereby accordingly direct the said sum to be paid to her immediately upon her Hannah Goude's decease, for her own absolute use and benefit. And the testatrix appointed her brother John Goude executor of her will.

Hannah Goude died in June, 1836. Thomas S. Burrows, the husband of the plaintiff, died without having reduced the £600 into possession, leaving three infant children by the plaintiff.

The bill, which was filed by Mrs. Burrows against Greenwood and Green, as the trustees under Thomas Marshall King's will, and against the infants and John Goude, prayed a declaration of the rights of the parties interested in the £600, and payment; the principal question being whether the plaintiff was entitled to that sum absolutely, or whether by virtue of the agreement of March, 1833, it ought to be settled on the plaintiff and her infant children.

Mr. Girdlestone and Mr. Bichner, for the plaintiff. The contract entered into by Hannah Goude was not complete till December, 1834, until which time it was competent to her to vary the appropriation of the purchase-money. By the deed of that date she thought fit to make a different application of it than she had proposed to do by the agreement of 1833, and there is nothing to prevent it. The only argument that can be raised on the other side is that in the deed the original contract is misrecited; but that is only for the sake of brevity. [The Lord Chief Baron. The deed does not go on to state the trusts.] *Ellison* v. *Ellison* (6 Ves. 656) and *Holloway* v. *Headington* (8 Sim. 324) are in point. [They were then stopped by the Court.]

Mr. Evans, for the infants. It is admitted that the **[254]** trust stated in the agreement is for the infants. To make this settlement defeasible the plaintiff must shew that it is both executory and voluntary. If she fails in establishing either position, she cannot succeed. No doubt a voluntary settlement which is executory, cannot be enforced in equity. But if the relation of cestui que trust and trustee exist, the settlement cannot be retracted. Now this agreement is not executory, either as respects the £600, or as regards the settlor. There is a perfect agreement on her part to pay the £600, independently of the subsequent agreement as to the bond. [The Lord Chief Baron. Suppose King and Mrs. Goude had been off the bargain, could your clients have filed a bill against them to have the agreement executed?] The agree-

ment gave the children an interest, and they might have filed their bill, not to ask to have the contract performed, but to have the £600. But the contract was in substance performed. King took possession under it, and the only act not provided for was the nomination of the trustees. This being in form an agreement only will not prevent the benefit to the children. *Fenner* v. *Taylor* (1 Sim. 169).

Mr. Metcalfe, for other parties.

THE LORD CHIEF BARON. I think there is no doubt in this case. I am of opinion that the contract was neither involuntary nor executed. It is merely an agreement which it was originally the design of this lady to execute in a particular manner, by deed or by will; and she makes it a condition that the estate shall be sold, and the money appropriated in a particular way, but until the appropriation of the money in the way proposed, there is no execution of the contract. She has not done that which gives the children interests.

Girdlestone then applied to have the costs of the suit **[255]** paid by the trustees of Thomas Marshall King's will out of his estate; suggesting that they had unnecessarily raised the present question.

The Court after some opposition on the part of the trustees, acceded to the application.

HENDRICK *v.* ABBOTT. Dec. 3rd, 1840.—On an injunction bill to restrain proceedings at law on a promissory note, publication was enlarged, for the purpose of giving an opportunity to the plaintiff in equity to enter into evidence to be read in his defence at law.—A plaintiff under the peremptory order of dismission, not examining his witnesses in the vacation, may, under circumstances, be allowed to enlarge publication beyond the following term.

Motion on behalf of the plaintiff, that publication might be enlarged till the first day of next term. The bill was to have a promissory note given by the plaintiff to the defendant declared fraudulent and void, and that it might be delivered up to be cancelled, and that the defendant might in the mean time be restrained by injunction from proceeding on it at law, or indorsing it over. It appeared from the affidavit in support of the motion that an action had been brought on the note, and that the Judge who tried the action was of opinion that, as the note purported to be for value received, the plaintiff (defendant at law) could not enter into evidence to shew want of consideration; upon which a rule absolute for a new trial was granted. The object of the present motion was to obtain evidence for the plaintiff to be read at the new trial.

It appeared that the plaintiff had, in July last, given a peremptory undertaking to speed the cause, and ought according to the undertaking to have entered into evidence in the long vacation. But it also appeared that his not having entered into the particular evidence now required arose from inadvertence.

Mr. Cooper, for the motion.

Mr. Wilson Hetherington, contrà. The Court will only enlarge publication on affidavits shewing that no evi-**[256]**-dence has been entered into, or that the evidence entered into has not been read; and here the plaintiff can get no benefit from the evidence, as he cannot read it at the trial. [Alderson, B. Yes, he can.] At all events the plaintiff is too late. Indulgence in these cases is only allowed till the term next following the peremptory undertaking: Fowl. Pr. vol. 2, p. 27. But here the plaintiff has let the term go by.

ALDERSON, B., after consulting Master Richards, said that the cause was in Court notwithstanding the delay, and that he was of opinion that publication should be enlarged.

GRANT *v.* GRANT. Dec. 11th, 1840.—A person attains his 25th year when he becomes 24.

[S. C. 10 L. J. Ex. Eq. 5.]

The testator in this case appointed two persons to be the executors of his will, and to be the guardians of his adopted daughter, M. H. Grant, "whose property I wish to be paid into her own hands, on the day she attains her 25th year, and not till then."

M. H. Grant was 24 years old on the 11th September, 1840. The question was whether she had attained her 25th year.

Mr. Simpkinson and Mr. Beavan, for the petition, contended that she had.

Mr. Temple (with whom was Mr. J. Bailey), contrà. Attaining such a year means attaining the complete year; as, for instance, attaining 21. [Alderson, B. You mean twenty-one years.]

ALDERSON, B. She attained her 25th year on the 11th of September, 1840, when she became 24 years old.

[257] DAVIES *v.* QUARTERMAN. Dec. 12th, 20th, 1840.—Where persons having conflicting interests are made co-plaintiffs in a suit in Equity, the objection may be taken at the hearing; but mis-joinder of co-plaintiffs by reason of mere want of interest can only be taken advantage of by plea or demurrer.

[S. C. 10 L. J. Ex. Eq. 17.]

Meredith Davies being mortgagee in fee of certain lands, and mortgagee for a term of years of certain other lands, bequeathed, in 1817, all his real and personal estate to his son John Davies, his heir at law, whom he also appointed his sole executor. In 1819 John Davies, by his will, bequeathed all money due to him on bond or mortgage to his wife Mary Davies, in trust for herself for life, and after her death, for Levia Davies, his daughter; and he made his wife executrix of his will. He died leaving Rice Jones Davies his son and heir at law. Mary Davies afterwards died intestate, whereupon the bill was filed by James Davies, who was administrator de bonis non both of Meredith Davies and John Davies, praying a foreclosure of the mortgaged premises comprised in the term. Rice Jones Davies and Levia Davies were joined as co-plaintiffs in the suit.

Upon the cause coming on for hearing,

Mr. James and Mr. Younge, for the defendants, objected that the cause could not proceed, by reason of Levia Davies being improperly joined as a co-plaintiff.

Mr. Simpkinson and Mr. Wilbraham, contrà, relied on various cases which are commented upon in the judgment.

Dec. 20th.—ALDERSON, B. (after stating the facts of the case). The question is whether the joining Levia Davies as a plaintiff in this suit, is such an objection as ought to prevent me from making the usual decree for a foreclosure, to which, but for such alleged misjoinder, the plaintiffs are undoubtedly entitled. I am satisfied that Levia Davies and her husband are unnecessary parties, [258] and that they must be treated as mere strangers, entitled to no relief. But, then, what is to be the result? The general rule as to parties to a suit in equity seems to be that all persons whose interests are materially affected by the attainment of that which is the object of the suit must either personally, or by representation, be made parties thereto. For, unless this be so, the Court would be deciding either imperfectly, or in the absence of those whose interests would be compromised by a complete settlement of the dispute. And the rule as to plaintiffs seems to be that those only can join as plaintiffs who have some common interest in obtaining that relief which is the object of the suit. This rule, however, includes both those cases of misjoinder where parties who have no interest in the suit are joined with those who have an interest, and those cases also where parties having adverse interests are made co-plaintiffs on the same record. But I think that both the principles of equity and the authority of decided cases entitle me to say that these two classes ought to be dealt with in a very different mode.

The object which a Court of equity has in its rules relative to parties is to enable itself to settle justly all the dispute, and to put an end to litigation with respect to that which is the object of the suit. Now, it is manifest that the introduction of a mere stranger as a party into the record cannot affect this. The matter in dispute may, it is obvious, be as completely settled, if all really interested are before the Court, in the presence as in the absence of the stranger. Nor can any future litigation arise out of the decree. But I quite agree that the introduction of a mere stranger upon the record is by no means without its inconveniences and objections. It renders abatements of the suit more frequent, may embarrass the defendants as to the course proper for them to take, and is liable to the various objections so well and forcibly put by Mr. Russell, in his argument in the case [259] of *The King of Spain* v. *Machado*

(4 Russ. 231). It is right and just, therefore, that the rule should exist which makes such introduction a misjoinder, and that the infringement of the rule should be guarded by some penalties. But in doing this we should take care that we do not intrench upon the main object of all equitable jurisdiction, the settling the dispute between the real parties. The application of the rule should never prevent that.

On the other hand, the case of the plaintiffs having opposite and conflicting interests either reduces the Court to the necessity of making a decree which is to be the foundation of future litigation, or introduces a new object into the suit, and one in which (the defendant having no concern in it) an erroneous judgment cannot be set right on appeal. Thus, in *Cholmondeley* v. *Clinton* (2 J. & W. 135; 4 Bligh, 123), the object of the suit was to take from the possession of Lord Clinton an estate. But the introduction of Lord Cholmondeley and Mrs. Damer as co-plaintiffs involved a new question whether the heir or the devisee was entitled to have it. In that question Lord Clinton, the defendant, had no interest at all; and either, therefore, the Court must have determined that he had no title to hold without determining to whom he was to give it up, and with a suit then to be commenced between the plaintiffs to settle that question—or they must have gone on to determine the dispute between the co-plaintiffs; and as they could not compel the defendant to appeal, it might have occurred that, after another long course of litigation, requiring new and conflicting statements, and the introduction of fresh evidence, the Court might, after all, have made an erroneous decision between the co-plaintiffs, for which there would have been no remedy. The Court, therefore, in such a case, is not able to make a decree at the hearing which can settle the dispute justly between the conflicting parties. It ought, therefore, to decline to make any decree, and to dismiss the bill, [260] in accordance with general principles on which it is accustomed to act.

The cases seem to me to follow these distinctions, and to establish that where the interests of co-plaintiffs are conflicting, it is a ground for dismissing the bill at the hearing; but that, when a plaintiff having no interest at all is introduced on the record, and the other circumstances of the case are such as to enable the Court to make a just and complete decree, such an objection is not a valid one at the hearing, but must be taken either by demurrer or plea at the earlier stages of the suit. Let us examine them with this view.

The early dicta which are to be found in the books are those cited by Mr. Russell in his argument in *The King of Spain* v. *Machado*. They only shew that Lord Chancellor Parker, in 1719, held that the joinder of an immaterial plaintiff was a ground of demurrer, and that the same point was suggested as clear law in *Troughton* v. *Getley* (1 Dick. 382) before Lord Northington. Modern decisions, however, certainly go this length: for the same point was expressly ruled by Sir John Leach in *Cuff* v. *Platel* (4 Russ. 242); in *The King of Spain* v. *Machado*, by Lord Lyndhurst, upon demurrer to the plaintiff's bill; in *Makepeace* v. *Haythorne* (4 Russ. 244), by Sir John Leach, where the point was raised by plea; and in *Glyn* v. *Soares* (3 M. & K. 450), by Lord Cottenham, on demurrer.

The case of *Cholmondeley* v. *Clinton* was one where the co-plaintiffs had conflicting interests, which they vainly endeavoured to reconcile by an illegal agreement, which was incapable of binding either themselves or their descendants. This was, no doubt, a good objection at the hearing. *Sigel* v. *Phelps* (7 Sim. 239); and the class of cases similar to it may be considered either as cases of conflicting interests, or (which I think is the better explanation of [261] them), they really turn upon this—that a suit by husband and wife is, in truth, a suit conducted by the husband alone; and that, consequently, a decree made without the full hearing of the wife herself in a matter in which she ought to be heard on her own behalf (as, for instance, the taking of an account), could not bind her separate interest at all. The objection is, in truth, the absence of a material party, the wife; and not the joinder of an immaterial one, the husband: and this objection is one which may be proper for the hearing of the cause. I say, "proper;" for Lord Langdale, in *Wake* v. *Parker* (2 Keen, 59), points out several cases in which it is obvious he would hesitate in allowing it, and in those observations I do most fully concur. The case of *Rhodes* v. *Warburton* (6 Sim. 617), was also cited in the argument. Perhaps that case might require some further consideration if the present question depended upon its authority. But it clearly shews the inclination of the Court against such objections, even where they were taken on demurrer. For there the joinder of the legatees, who were before the Court by their representatives,

the executors, was held not even a good ground of demurrer; though it was suggested that, by allowing that course, the Court prevented the examination of any of those legatees as witnesses for the defendant.

There was another case referred to, said to have been decided by the Lords Commissioners; *Leonard* v. *Flight;* but I have not been able to find any full report of that case.

The next case is that of *Hunter* v. *Richardson* (6 Madd. 89) before Sir John Leach. The report is very short and not very accurate. But there, although at the hearing Sir John Leach dismissed the bill, one of the plaintiffs being entitled on the facts reported by the Master to no relief; yet it would seem that, in that case, there was the additional reason that no proper decree could then be **[262]** made on the facts found, for though one plaintiff was entitled to have the money paid into Court, yet the defendant in that case would be entitled to receive the money back from the other plaintiff; and there might be also a question between those plaintiffs inter se, consistently with the facts found by the Master. That case is not, therefore, any authority for the present question. Nor is *Bill* v. *Cureton* (2 Myl. & K. 503) any authority. That was the case of adverse or rather of alternative interests. If the one plaintiff had a title to relief, it was because the other had not. It is true the dictum of Lord Cottenham is more generally expressed, but all dicta should be construed according to the circumstances of the case in which they are found. With the most unfeigned reverence, therefore, for Lord Cottenham's authority, I cannot act upon even his extra-judicial dictum, in opposition to decided cases in which the very point was necessarily before the Court. I proceed to advert to those cases. The first of them is *Wilkinson* v. *Parry* (4 Russ. 272), in which the very distinction on which I now propose to act seems to have been taken by Sir John Leach. For there, the objection as to the misjoinder of a stranger was overruled by him at the hearing, upon the ground that there was nothing in the mere joinder of the persons entitled to no relief upon the record, which precluded the Court, in a case where notwithstanding that difficulty they were still able to do complete justice, from making a decree as to all the parties really entitled to relief. And he added that the case was very different from that of allowing a demurrer under such circumstances. And this decision of Sir John Leach is in exact accordance with the opinion expressed by Lord Langdale, in *Raffety* v. *King* (1 Keen, 619) and *Lambert* v. *Hutchinson* (1 Beav. 277). Indeed, the case of *Mosley* v. *Lord Hawke* (2 You. & J. 520), before **[263]** Sir William Grant, shews the efforts which the Court will make to carry into effect at the hearing that which I have before called the general principle on which they proceed.

Upon the whole, then, as there is nothing on this record to prevent the Court from making a complete decree justly as to the object of this suit, inasmuch as all the persons really interested in contesting the question are before the Court, I think that I ought to make the decree, looking as a Court of equity ought always to do, to the substance and not to the form, when a case is arrived at the hearing. I agree, however, that it is very convenient that the case should be brought by orderly steps to this ultimate stage; and, therefore, I am clearly of opinion that such an objection is to be allowed at the earlier stages of the cause; but I think that the only objection which can or ought to avail a defendant at the hearing, must be one which shews that either from the absence of parties, or from the misjoinder of parties, no decree, as to the matter which is the object of the suit, can be made on the evidence before the Court, which will, with justice to all the parties to the suit, finally put an end to litigation in respect of it between them; with justice, I say, because that cannot be, if the course pursued deprives any of them of the right to that appeal which the law has provided for them.

I am quite satisfied, however, that the decree proposed in this case will not have that effect. I will only add that, looking to the different proceedings in this case, I do not perceive that any of them has been rendered necessary solely in consequence of this misjoinder. If there had been any such proceeding, I should have deemed it just to the defendants to have given them the benefit of it by a special direction as to the costs.

Judgment accordingly for usual decree of foreclosure.

[264] DRURY *v.* SCOTT. Dec. 14th, 1840.—Where, by marriage articles, it was agreed by the intended husband that any money which might devolve by will or otherwise to the intended wife, should be settled on her and his children by her, he drawing the interest; and the wife's father afterwards bequeathed to her a legacy for her separate use, as to which the wife died intestate in the lifetime of the husband: Held, that the legacy was not subject to the trusts of the articles, but that the husband took it jure mariti; and that a settlement, which had been prepared at his instance, by which the interest of the legacy was settled upon himself for life, and the principal upon the children of the marriage at the age of twenty-one, should be carried into execution.

The bill was filed on behalf of Charles R. Drury and Emily H. Drury, who were infants, praying that the interests of the parties entitled to a certain legacy of £3000 might be ascertained and declared under the following circumstances:—Previously to the marriage of Mrs. Drury, the mother of the infants, with Mr. Drury, a letter was written by General Graham, Mrs. Drury's father, containing certain short stipulations in the nature of marriage articles, by which Mr. Drury agreed to be bound. One of these articles was in the following terms:—"Mr. Drury engages that any sum or sums of money or other property which may devolve by will or otherwise, to his said intended wife, shall be settled on her and his children by her, he drawing the interest." A settlement was made in pursuance of these articles, but this settlement was lost. General Graham, afterwards, by his will, gave and bequeathed to his daughter the sum of £3000 sterling, and declared it should be paid to her sole and separate use, and should not be liable to the debts and engagements of her then present or any future husband; and that her receipts, notwithstanding her then present or any future coverture, should be a good discharge to his executors for the same.

During the life of Mrs. Drury, her husband received the interest of the fund. Upon her death, in consequence of the loss of the settlement, another settlement was prepared at his instance, by which he was made to covenant that the £3000 should be invested in the funds in the name of two trustees, who should stand possessed of the fund, upon trust to pay to or empower him to receive the interest, dividends, and annual produce of the stock during his life, for his own use and benefit, and after his decease, upon trust to pay, transfer, and divide the **[265]** principal stock between the two children equally, with benefit of survivorship between them, the shares of the children to be a vested interest on their surviving their father, or on their attaining the age of twenty-one in his lifetime.

Mr. Harris Prendergast, for the plaintiffs, said that it might possibly be contended for the husband, on the authority of *Douglas* v. *Congreve* (1 Keen, 410) and *Travers* v. *Travers* (2 Beav. 179), that he took an absolute interest in this property, inasmuch as being left to the separate use of the wife, it was not embraced by the marriage articles, and, consequently, that upon the death of the wife it fell to the husband, who might settle it in what manner he pleased. But he contended that the husband having stipulated for a life interest in the fund was precluded from taking any other benefit; and that as he had consented to abide by the articles, the question was whether the proposed settlement was in conformity with the articles. It was observable that during the husband's lifetime, the interest given to the children was contingent upon their attaining twenty-one.

Mr. O. Anderdon and Mr. G. L. Russell, appeared for other parties.

Mr. Romilly, for the husband. The settlement prepared by the direction of Mr. Drury is a more liberal one than he was called upon to make. He has given up to the infants a sum of money which he might reasonably have claimed for himself. This was not property which he was bound to settle pursuant to the articles. It was property left to his wife's separate use, and as to which, during her life, he was, in the construction of law and according to the rules **[266]** of equity, purely and exclusively a stranger. The intention of the articles was that, if he took any property as her husband, then he was to settle it. That proposition is fully supported by the cases which have been cited. It is also in accordance with the intention of the testator. He knew of the settlement, and therefore avoided leaving the legacy to his daughter in general terms; because he felt that if he did so, it would become subject to the trusts of the settlement, or in other words to the engagement of the husband,

for the settlement was as much an engagement of the husband as any thing else. The wife, therefore, having died intestate as to this property, it goes to her husband as her next of kin. [The Lord Chief Baron. I think he acquires it as her husband.]

Mr. Prendergast, in reply.

THE LORD CHIEF BARON. I think the case must be considered as if the property had been left to the wife, and the husband had not reduced it into possession: the jus disponendi, therefore, devolves to him jure mariti. Let the money be invested in the names of the trustees of the husband's settlement, to be held upon the trusts of that settlement.

WITHY *v.* NORTON. DANIELS *v.* NORTON. Dec. 14th, 1840.—The Court refused to order a decree to be drawn up, nunc pro tunc, after a long lapse of time.

Motion that a decree pronounced in the first-mentioned suit, which was the original suit, on the 7th July, 1753, might be drawn up and entered, nunc pro tunc.

The original bill was filed in the 12 Geo. 2 by John Withy and Hester his wife, against Cornelius Norton, alleging that Norton was employed by them as their attorney and had recovered for them a certain property, **[267]** consisting of five houses, of which possession was delivered to them; but that he had afterwards compelled them to execute a mortgage of the premises for his costs and a gratuity of sixty guineas, the mortgage deed being brought to them for their signature, already engrossed; that he ultimately, in 1748, brought ejectment, and obtained possession of the premises. The bill prayed for an account, and taxation of the bill of costs; that the mortgage deed might be cancelled; that the plaintiff might be let into possession; and for the interim injunction.

Norton, by his answer, stated that there was an absolute conveyance to him of two of the houses in satisfaction of the money lent on mortgage. He claimed the benefit of that purchase, and disclaimed all interest in the other part of the estate.

The cause came on for hearing on the 18th July, 1753, when, according to a minute entered in the registrar's book, it was decreed that the sum of 31l. 10s., for which the plaintiff had given his bond, should be considered as a liquidated sum for the purchase of the two houses, and that interest thereon at 5l. per cent. should be calculated to the time of the purchase. That an account should be taken of all monies advanced by the defendant to the plaintiff, with interest at 5l. per cent. from the time of such advances to the time of the purchase; and an account of all sums due for business done at the time of the mortgage, with interest in like manner to the time of the purchase. Liberty to state special circumstances. Costs reserved.

In October, 1757, Withy died, having appointed his widow his executrix, and having devised his real estate to her in fee. The widow proved the will; but before any further proceedings were had, she died, having made her daughter Hester her executrix, and sole devisee of the real estate. Norton died in 1774; and in 1776, Hester Withy, the daughter, filed a bill of revivor against certain persons who were stated to be the personal representatives of Nor-**[268]**-ton, but no order of revivor was made. From that time till November, 1840, when an order to revive was obtained, no further proceedings were had in the suits.

In 1821 the representatives of Withy took possession of the property, but were afterwards dispossessed by persons claiming under Norton.

The defendants to the present bill of revivor insisted on the Statute of Limitations.

Mr. Girdlestone and Mr. Elderton, for the motion, said that the question as to lapse of time did not arise at this stage of the proceedings. The only question now was whether the motion was regular; and that it was so was clear from *Donne* v. *Lewis* (11 Ves. 601) and *Lawrence* v. *Richmond* (1 J. & W. 241), in the latter of which cases twenty-three years elapsed without any proceedings being had under the decree. In the present case there was an abatement of the suit for many years, during which the decree could not be drawn up.

Mr. Simpkinson and Mr. Pigott, contrà, relied on lapse of time, and observed that in the cases cited the decree had been drawn up.

THE LORD CHIEF BARON. If any use is to be made of the decree in this suit, it will be for the purpose of disturbing existing claims to property; but after the long period of eighty-seven years I should be reluctant to put in force a decree which should have that effect.

Either this decree has been acted upon, or it has not. If it has been acted upon, it is to no purpose to revive it. If it has not been acted upon, and the estate has been enjoyed in a manner inconsistent with it, it would be unjust after so long a time to make any alteration.

The case is very different where the decree has been **[269]** made and acted on. In the first case which was cited in argument, the decree was evidently drawn up, though not entered in the registrar's book. This appears in the most satisfactory manner from the report, because the order there recites the decree. As it was a decree acted on, it might be evidence of the acts of parties not contested at that time. In the second case, there was an office copy of the decree. It was a decree to take an account then existing.

This case differs from the others. There is a difference in the length of time, and in the important point that the decree is not drawn up. It continually happens that a decree is not drawn up till long after the judgment is pronounced, and the Court has often to revise the minutes, in order to ascertain what it was that was decreed. How do I know that after this decree was pronounced the suit was not compromised? Every thing is to be presumed in favour of a long-continued state of things.

Motion refused.

COOPER *v.* HEWSON. Nov. 19th, Dec. 8th, 9th, 14th, 1840.—The case of *Cooper* v. *Byron*, ante, vol. 3, p. 467, confirmed upon a rehearing.—Commentary on the inferences to be drawn from the value of money at various times in forming a judgment as to the validity of a modus.

It will be seen from the arguments and judgment in this case, that this was in effect a rehearing of the cause of *Cooper* v. *Byron*, which is reported ante, vol. 3, p. 467.

Mr. Simpkinson, Mr. Swanston, and Mr. O. Anderdon, for the plaintiff, said that since the decision in *Chapman* v. *Bishop of Lincoln* (Moseley, 266; 2 E. & Y. 11), it was too late to contend that a modus for outners was invalid; though it was difficult to see on what principle it could be supported, being in effect a premium for non-residence. They then proceeded to **[270]** comment on the proceedings in the several suits which were put in evidence in this cause, and in that of *Cooper* v. *Byron*, remarking upon certain inconsistencies in the pleading (*a*) and evidence in each; particularly, with reference to the evidence, that in the earlier suits there was no attempt at distinguishing in appearance ancient pasture land from newly converted ground, but that now all the land was stated to be ancient pasture except two closes. They also contended that in *Ashfordby* v. *Newcomen*, the defendants allege as a custom (that is one custom), that which the jury had in a previous case found to be a good and valid custom, namely, the payments of the four pence and the twelve pence; but that this custom, taken as an entire custom, was in *Ashfordby* v. *Newcomen* held bad, the Court being of opinion that it had been pleaded as one custom and so proved and treated, and therefore that if bad in part it was bad altogether. And that this was the opinion of the Court was clear from the argument of Mr. Cruise in *Chapman* v. *Bishop of Lincoln* (Moseley, 266; 2 E. & Y. 11). That in the subsequent case of *Claxton* v. *Langton* the defendant set up a solitary modus of four pence per acre for ancient pasture, and upon the hearing of the cause the plaintiff's counsel confessed the custom to be 'proved, though he insisted on its being void; and that upon that admission the Court declared the custom good and dismissed the bill, but that in fact this admission by the plaintiff's counsel was not warranted by the facts or the proof. They then contended that no subsequent evidence was equivalent to the distinct finding of the jury in *Ashfordby* v. *Christopher Newcomen;* and that it was impossible for the witnesses now to distinguish between the ancient pasture and the newly converted ground (except in very recent cases of conversion), and that in fact they disclaimed the power to distinguish it.

[271] Mr. Boteler, Mr. Bethell, and Mr. Sutton Sharpe, for the defendants. The first thing to be considered is the mode of laying the modus. The defendants allege, first, that the modus is for "ancient pasture." These words are not here used as in questions between landlord and tenant, or remainderman and tenant for life:

(*a*) As to the variance in the pleadings see the judgment of the Lord Chief Baron, ante, vol. 3, p. 479.

but in the language of tithe law they mean pasture from the date of the commencement of legal memory; and in this sense they are used in cases of old meadow, ancient park, and ancient mill.

Secondly, it is alleged that the ancient pasture lands are well known and "easily distinguished." In the report of the former case your Lordship is made to say "distinguishable"—a word of which the meaning is essentially different from that made use of by the defendants.

Thirdly, the defendants aver that if the ancient pasture lands are broken up and meadowed, and then restored, "the modus revives." Now your Lordship on the former occasion considered that the words "ancient pasture" meant pasture at the time of the commencement of legal memory; but that the putting of that sense upon these words destroyed the modus as laid; and that it was a contradiction "to call that ancient pasture which had been 100 years arable and in the last year converted to pasture, merely because it was originally ancient pasture." But that is not the language of the defendants' answer. They do not say that, when the ancient pasture land has been broken up and restored, it is again ancient pasture in its original sense; they only say that the privilege revives. In common parlance the parishioners may call it ancient pasture to denote the privilege; but that is not the language of the defendants, and the objection put into your Lordship's mouth cannot apply. That this revivor of a modus is no new thing is apparent from *Brown's case* (Godb. 194; 1 E. & Y. 203).

Your Lordship on the former occasion likewise adverted **[272]** to another construction of the modus, which had been suggested by the arguments of the defendants' counsel; namely, that it was not for pasture itself, but for lands when in pasture—a construction which would render the antiquity of the pasture immaterial; and your Lordship thought that such a modus might be good in law, but that it was not sustained by the evidence in this case, because through the whole mass of the evidence the idea of ancient pasture was connected with the modus. But this objection as to the evidence is answered by considering that the modus as laid consists of two branches to which different evidence may apply. The allegation in the answer requires that the land for which the exemption is claimed should have been ancient pasture from the commencement of legal memory; or, having been broken up, should have been restored. Now as to all the land continuing ancient pasture, the idea of ancient pasture is rightly mixed up with the modus; but as to that which has been broken up and restored, different considerations apply; and the witnesses express themselves differently upon it. Your Lordship, indeed, seemed to consider that the verdict of the jury in *Ashfordby* v. *Christopher Newcomen* was fatal to the second branch of the present modus, inasmuch as it referred only to land continuing ancient pasture without ever having been broken up; but it is submitted that the words of the finding—"whilst it remains ancient pasture"—admit of a wider signification, and may equally well express that the modus is payable whilst the lands are in pasture. At least those words will easily admit of that sense if the evidence requires it.

Thus much as to the modus as laid. But it has been objected by the plaintiff's counsel that the defendants ought to have set out all the ancient pasture lands in the parish by metes and bounds, and that the case is one to which the evidence of the parishioners does not apply. Now these rules apply only to farm moduses, and not to moduses which concern the parish generally. In the case of **[273]** a farm it concerns the owner, and no one else, to know the boundaries of the lands claimed to be covered by the modus. In the case of a general modus it concerns every one; and therefore evidence of reputation is admissible. As to bounds in cases of ancient park, upland, lowland, meadow, marsh, old orchards, old gardens, it has always been considered enough to describe the defendant's own land protected by the modus. So, with respect to ancient pasture, it has never yet been held that it is not enough to describe the defendant's own ancient pasture; and evidence of reputation is receivable.

To proceed to consider the evidence. In the first place the plaintiff is bound by the evidence which he has given against himself, if the defence made by the defendants be in any respect faulty. The plaintiff has laid before the Court a mass of evidence which, in our apprehension, proves beyond a doubt the existence of a modus for ancient pasture lands in the parish. That being so, he cannot, according to the decided cases, recover tithes of ancient pasture land in this suit. *Scott* v. *Fenwick* (3 Gwill. 1250; 3 E. & Y. 1318) is a well-considered, clear and decisive authority on

his point. The defendants may not need this defence; but if their modus be ill laid in any particular, or not proved in any particular, they have a right to have the plaintiff's bill dismissed as to the antient pasture land, even if they are obliged to account for the tithe of the land once ancient pasture, but since broken up and restored.

The various former suits which have been put in evidence for the plaintiff incontrovertibly prove the existence of a modus for ancient pasture lands in this parish. In *Ashfordby* v. *Purley* the witnesses speak to a payment of four pence an acre by outners, some say for all lands, others for ancient pasture. In *Ashfordby* v. *Christopher Newcomen* the jury found a modus payable by foreigners of four pence for every acre of ancient pasture when the **[274]** same remained pasture lands, and twelve pence for every acre of newly converted ground; and the plaintiff being willing to receive, and the defendants to pay, on that footing, it was decreed accordingly. In this suit the witnesses never speak even of the twelve pence but as a customary payment. In *Ashfordby* v. *Nicholas Newcomen* a distinction was made by the witnesses between ancient pasture and newly converted ground, both as to appearances and to the customary payments; the payment of twelve pence being called by some of the witnesses a composition. In this case the custom, as stated by the jury in the previous case, was declared void. But in the following case of *Claxton* v. *Langton*, the judgment of the Court in *Ashfordby* v. *Newcomen* was overruled.* The bill in *Claxton* v. *Langton*, which was brought for the tithe of agistment for wool and lamb, charged that the defendants pretended that foreigners paid four pence per acre for all their pasture land, but that that custom never existed, and was unreasonable and unwarrantable, and had lately been held to be contrary to law. It appears clear, therefore, that the same point was put in issue as had been decided by the jury in *Ashfordby* v. *Nicholas Newcomen*. Upon the hearing of the cause the defendants gave evidence of the customary payment of four pence for ancient pasture, and in many instances for pasture only, without using the word ancient. The plaintiff's counsel admitted the custom to be fully proved, but insisted that it had been decreed to be void, and prayed a like decree. The Court, however, held the custom to be good, and dismissed the bill with costs.

[The defendants' counsel then commented on the inferences drawn by the Lord Chief Baron in *Cooper* v. *Byron*, from the relative value of money at various times.]

Dec. 14th.—THE LORD CHIEF BARON. When the cause of *Cooper* v. *Byron* was heard, I took a very full note of every document that was read, and of the evidence of every witness **[275]** on either side; besides which I made it my duty to read the whole evidence in extenso before I delivered my judgment. In the present case, which is in effect a rehearing of the same question, upon the same evidence, between the same plaintiff and a different class of defendants, I have not thought it necessary to have recourse again to an investigation and dissection of the whole evidence; but I have carefully re-examined my notes in the first cause, and considered the arguments advanced by the counsel in the present cause, and I have done so with a sincere desire to discover and to correct any erroneous impressions I might have received upon the first discussion. If, aided by the further light which has been thrown upon the question by the late argument, I could have detected a fallacy in any of the steps which led me to the conclusion I formed in the first cause, or if by any renewed consideration of the topics which belong to the cause I could have brought my mind to any different conclusion, no desire to appear consistent, nor any reluctance to acknowledge myself to have been in the wrong, would have prevented me from confessing my error, and endeavouring to amend it. But I must own that after the most candid and close investigation of the whole subject, I am forced to the same conclusion, namely, that the plaintiff is entitled to a decree according to the prayer of his bill, with the same qualifications as in the former cause. The reasoning which led me to this conclusion was so fully stated in my judgment in the case of *Cooper* v. *Byron*, and has been in the most essential parts so fully reported by the gentlemen who take the trouble of publishing reports of what passes in this Court, that I think it unnecessary to repeat it again, or to do more than refer to that judgment as containing the grounds of my unchanged opinion. All that I feel myself called upon to do upon this occasion is to advert to such of the topics recently urged by the counsel as appear to have any novelty, or as have been especially directed to the correction of some of the impressions under which **[276]** my former judgment was supposed to be given. The first of these which I shall mention was the last in point of order, having been selected by

Mr. Sharpe as the only one upon which he thought it necessary to add anything to the argument of his leader. That topic was to the following effect:—that if a rector who files a bill for tithes in kind does by his own evidence, in answer to a modus set up by the defendants, shew the existence of a modus, though it be a different one from that pleaded by the defendants, he is not entitled to a decree. And it is insisted that this has been done by the present plaintiff, who, in reading the evidence in the old causes, has proved a certain modus, though not that which the defendants have pleaded.

Now, if the defendants' counsel were satisfied that the plaintiff had proved the existence of a modus by his own evidence, why did they read any evidence themselves? Why, for the mere chance of setting up their own modus did they shrink from the opportunity of praying to dismiss the plaintiff's bill upon his own evidence? If they did not suppose the proof so clear of another modus as to take this special ground, how can they ask the Judge, after he has heard the whole case on both sides, to look only at one part of the plaintiff's evidence, and to lay all the rest of the evidence on both sides out of his consideration? But, in truth, the plaintiff's evidence taken altogether, and I conceive it must be taken altogether, so far from proving to my satisfaction the existence of a modus different from that pleaded, affords very strong reasons for doubting the existence of any modus whatever for pasture land.

The next argument to which I shall advert was pressed upon me to correct an erroneous impression which I was supposed to have received as to the meaning of the words "ancient pasture," and "ancient pasture ground." It is said that the modus claimed is neither for ancient pasture nor for ancient pasture ground, in the sense of ground that has always been in pasture from the time of legal [277] memory; and this is certainly true, for the modus claimed extends to modern pasture, if the ground either goes by the name of ancient pasture ground, or if it was in pasture in the time of Richard I. Whether both these last circumstances should concur is left somewhat in doubt. But the same topics were urged before. The counsel in support of the modus were driven to argue that it was applied to specific lands known by the name of ancient pasture land, whenever they were in pasture. The appellation of ancient pasture land was a mere name attached to a well known portion of the lands in the parish, merely to distinguish them from other lands, and had no necessary relation to the period when they might have existed in pasture, nor any other efficacy than any other name, except, indeed, that Mr. Bethell is very unwilling to lose the benefit of the word ancient which carries with it a sort of association with prescription, very useful in an argument for a modus. There was a magic in the word which raised the idea of land in pasture when the modus was first arranged, though it did not imply that it was then ancient pasture, nor that it had continued for any time afterwards to be in pasture. I cannot say that I have discovered any new light in this argument which was not displayed before. It appears to me that I have fully disposed of it in the former case. And I shall only add, upon this point, that if any thing turns upon the distinction between ancient pasture and land known by the name of ancient pasture, there is nothing either in the statement of the modus or in the evidence of the witnesses in any of the former causes which justifies that distinction; and that after all the varieties in which the modus for pasture ground in this parish has been stated in former suits, this suit for the first time, states it in such a manner as to give rise to such a distinction, or to give colour to the argument. Connected with this topic is the argument urged by Mr. Boteler to shew that in the verdict of the jury in the case of *Ash*-[278]-*fordby* v. *Christopher Newcomen* the words remaining in pasture ought to be construed in a manner consistent with the modus now claimed to signify restored, and not continuing in pasture. It must be admitted that this would be doing some violence to the words. But Mr. Boteler says that if the words are at all capable of that construction, they ought to be expounded by the evidence in that sense. Now, upon looking at the only evidence preserved in that cause, it will be found not to give him the benefit of that exposition. The evidence without or with hardly any exception, aims at proving a modus of four pence for ancient pasture ground occupied by foreigners, and a shilling for newly converted ground. There is no proof of a modus of four pence for ground that was once ancient pasture broken up into tillage and reconverted into pasture. On the contrary, there is reason to presume that when the witnesses speak of newly converted ground they mean ancient pasture once broken up, and again newly converted into pasture, to which they apply their modus of one

shilling per acre. This view of their evidence is confirmed by what was pointed out by Mr. Simpkinson in his reply, as appearing on the case settled by Chief Baron Montague in the next case, in which there is an allusion to other pasture land besides ancient pasture and newly converted ground.

Mr. Boteler next labours to shew that the judgment of the Court upon the modus, as stated in that case, was founded upon nothing else than the objection to the modus as payable by a foreigner, and had no relation to any other view in the modus; and therefore, he argues, that the subsequent opinion of the Court in *Claxton* v. *Langton* in favour of the modus, then admitted by the counsel to be proved, was, in effect, an overruling of their former judgment. If this had been so, I should have been of opinion that their first thoughts were best. But I cannot go along with the argument. The Court, in the former case, were **[279]** called upon to pronounce an opinion on the whole modus as one modus; and the part of it which related to the shilling payment being clearly bad, they thought the whole bad. Had it been otherwise, it is obvious that in the next case of *Claxton* v. *Langton* the counsel for the defendant would have insisted that the whole of the modus, as stated in the case, had been proved, there being just as much proof of one as of the other. He must have thought, therefore, that the judgment of the Court was founded on the objection to the whole modus as it stood in the case, and was, therefore, glad to take the unwary concession of the counsel for the rector that the first branch of the modus, which only was in question, was fully proved, whereas the evidence by which it was sought to be proved was much impaired in value by attempting to prove too much.

With respect to the case of *Elliott* v. *Holder*, Mr. Boteler's argument is not altogether consistent. When it is urged upon him that the modus for agistment tithe there pleaded shews the difficulty and uncertainty which the counsel felt in stating any certain modus, he replies that it is perfectly consistent and legitimate to narrow in pleading a larger modus, by limiting it to one only of the articles which it covers. But when the decree is relied upon as a judgment against his present modus, he says it was only a decree against the modus then pleaded. But in that case all the evidence in the former causes was read; and if the modus was correctly pleaded, the decree was against the modus as now pleaded. He cannot escape both horns of the dilemma.

I come now to those parts of Mr. Boteler's argument which were addressed to the topic I had suggested respecting the value of money, and of this modus in the time of Richard I. This, however, is but a fringe of the case, and forms no substantial ground of my judgment, which would have been the same upon the evidence if the modus had **[280]** been two pence or one penny an acre instead of four pence.

I take this opportunity, however, of stating that nothing was or is further from my design than to treat this as a rank modus in point of law. All I contend for is, that upon a question of fact, whether a modus be satisfactorily proved, the amount of it in value in time before legal memory is a consideration that, in combination with other circumstances, may well have place. It may form no objection to a modus well proved and found by the verdict of a jury; but before the modus is found by the jury, it is a topic which they have a just right to consider, and therefore a Judge in Equity has the same right. For this purpose I referred to the case of *Askew* v. *Greenhow* (2 Price, 314; ante, vol. 3, p. 491), which was an issue directed by this Court to be heard at Carlisle on the question whether a modus existed of one shilling for every tenth lamb. I was counsel for the rector. Evidence was given on his behalf to shew that within the last century one shilling was the common price of a lamb, and I urged before the jury the several acts of Parliament to shew the value of money in ancient times. The verdict was given for the rector. A motion was made to set it aside, upon the ground this was not a proper consideration for a jury. But the Court of Exchequer, after a full hearing, decided that it was, and supported the verdict.

In answer to my statements of the value of money, Mr. Boteler has very properly advanced his view of the same subject; and if his premises were just, I should be ready to admit his conclusion. He has referred to the prices of wheat collected by Fleetwood in his Chronicon Pretiorum, and set forth by Adam Smith in his first volume of the Wealth of Nations, from the years 1202 to 1601 inclusive; from which he says, very justly, that the averages taken at different periods of twelve years shew a price of wheat fully equal, and often superior, to the modern price. **[281]** If this

were strictly true, it would defeat all the calculations and inferences that have hitherto been made of the comparative value of money. But it is first to be remarked that during a period of 400 years, from 1202 to 1602, the number of years in which the price of wheat is here recorded is but eighty-four, and that these comprise years of great scarcity approaching to famine. Take, for example, the first period which embraces the year 1270, when the price of corn in money of modern times was no less than 16l. 16s. the quarter. There are other years within the same twelve in which the price was enormously high. The average will be greatly reduced by striking out those high numbers. The same remark applies to each of the succeeding periods of twelve years. It is a well known historical fact that in early times, when the state of agriculture was much less perfect than it is now, years of great scarcity were of more frequent occurrence, and that the high price of corn, occasionally resulting from that cause, is not a source of wealth or of increase in the rent of land, but the reverse. The price of corn, however, upon the average, is not left in any doubt during those periods, but rests upon the authority of the legislature itself. For instance, in the statute of 25 Ed. 3, called the Statute of Labourers, servants, whose wages were paid in commodities, were compelled to take ten pence in lieu of a bushel of wheat, if tendered by their masters. This shews that the bushel of wheat, if tendered by their masters, was estimated at tenpence in the year 1350, which would be 2s. 6d. of our money. But this was in a year of scarcity when the labourers were struggling for an increase of wages. That the average price of wheat, during the greatest part of the period to which Fleetwood's tables extend, was no more than 6s. 8d. the quarter, is manifest from this; that by the statute of the 25 Hen. 6, c. 2, corn was allowed to be exported without license when wheat was at 6s. 8d. the quarter, and barley at 3s.; and that by the statute of the 3rd Edw. 4, c. 2, the importation of corn was prohibited unless the quarter **[282]** of wheat exceeded 6s. 8d. This price, therefore, of 6s. 8d. the quarter may be considered the medium or average price at those periods; and it continued so, as appears by divers subsequent statutes, till after the year 1562, when by an act passed in the fifth year of Elizabeth the limit was raised to 10s. the quarter. These observations appear to me to dispose of the argument drawn from Fleetwood's tables. Then comes a formidable argument derived from the price of wool, which it is said appears by an instance in Maddox's History of the Exchequer to have been for forty-five sacks taken for customs at Hull, 225 marks, which, according to Mr. Boteler's calculation, make the price somewhat above 2½d. the pound. Now it is to be observed that this price must have included the King's duties. The amount of those duties I have not been able to ascertain precisely, but there is strong reason to conclude that they very much exceeded 40s. the sack. For by the 27 Edw. 1, c. 7, the King released his toll called the "male toule" on wool, amounting to 40s. for every sack, but received all his other duties on wool. This duty of 40s. alone is nearly equal to one half the alleged price of Mr. Chamberlaine Jervis's wool, taken at Hull, which upon computation sold for 81s. 6d. the sack. Again, these sacks were probably of foreign wool, the price of which was greater than that of British wool, and which besides paid upon importation a higher duty than the toll taken upon English wool. In proportion, as the duty was higher the value of the wool when first taken from the sheep would be reduced. Thus, the force of Mr. Boteler's argument is, if not entirely subdued, in a great measure reduced. At all events, the value of the carcase of the sheep must have been very little when compared with the present times. For we find that in the 24th year of the reign of Henry 8, when the value of the coin was much degraded, it was thought expedient to prevent the evils of a great scarcity of food by reducing the price; and there-**[283]**-fore an act of Parliament was passed, c. 4, in that reign, to restrain butchers from taking more for a pound of beef or pork than a farthing, and for a pound of mutton or veal more than a farthing and a quarter.

I would take the opportunity of correcting an error which I find in the report of the former case, where I am supposed to have referred, or probably by mistake did actually refer, to the reign of Edward the Third, when I ought to have referred to that of Edward the First, when the pound sterling consisted of twenty shillings. This will appear by a document in the thirty-first year of his reign, published in Pickering's Statutes, under the title of Tractatus de Ponderibus et Mensuris. In fact, it is supposed that the increase of the number of shillings in the pound of silver began in the time of Edward the Third.

THE REV. THOMAS KNIGHT, Clerk, *Plaintiff;* AND THE MARQUESS OF WATERFORD AND OTHERS, AND GEORGE ADAM ASKEW AND OTHERS, *Defendants.* Dec. 17th, 1839; Feb. 3rd, 4th, 5th, 6th, 7th, 8th, April 6th, 7th, 8th, 9th, 30th, May 14th, 18th, June 6th, July 6th, 7th, 1840; January 8th, 1841.—To a rector's bill for an account and satisfaction of tithes, the defence was that the lands in the defendant's occupation comprised the manor of F. which was in the rectory of F., and that from time immemorial the owner for the time being of the manor of F. had paid to the rector of F. the yearly sum of £40 for maintenance of Divine service there, for and in lieu and in contentation of all manner of tithes arising within the manor, and that the owner for the time being of the said manor, or his assigns, had, from time immemorial in respect of the said yearly sum, used to have and ought to have the tenth of all titheable things arising within the said manor: Held—1st. That, considering the prescription as laid to be double, the first branch of it was an assertion of an ordinary district modus which, in pleading, would not be vitiated by the addition of the latter branch, and might be supported by the usual evidence; but that here the evidence was inconsistent with such a modus, because it tended to shew that the lord of F. received the tithes in kind; and a modus in lieu of tithes is inconsistent with the receipt of tithes in kind by any one.—2ndly. That considering the prescription to be of a compound nature, it was doubtful whether it could be supported consistently with the authorities or with reasons of convenience. Because, first, though a layman may prescribe in que estate to have tithes as appurtenant to a manor, upon the ground that before the time of memory the lord may have bargained with the parson to pay him a pension and receive the tithes of the manor, yet this prescription has never been extended to the lord and his assigns, i.e. the assigns of the tithes simply; and, secondly, if such a prescription were allowed, the parson might have nothing left out of which his pension could be secured. The Court, however, would not determine that such a prescription was bad in law, or that the improvidence of the bargain, on which it must be presumed to be founded, was a conclusive objection to it, but held that in this case the evidence was sufficient to shew that no such bargain could have been made.—Where the lord of a manor of F. claimed for himself and his assigns, by prescription, the tithes of the manor, in consideration of an immemorial payment of £40 a year by the owner of the manor for the time being to the parson, and, on a bill filed against him by the rector, proved receipts for that sum (described as a "modus," &c.) under the hands of the whole series of rectors from 1649 to 1822; and also proved by depositions in former suits that a payment of £40 per annum to the rector existed before 1690; and likewise produced deeds, from which it appeared that the lords had, at various times, from the year 1658 to the present time, dealt with the tithes by mortgaging and conveying them; and there was no evidence, except as to trifling articles, that the rector had ever received tithes in kind within the manor, except for a small district called C., which had been many years back aliened by a lord of the manor, and had since paid tithes: Held, nevertheless, that the rector was entitled to an account; for that, coupling the fact that tithes had been paid for C., with the fact proved by the rector that £40 payments had been rendered for the district of H., which was in the parish but not in the manor of F., and taking these facts in connection with the form of some of the receipts, which treated the £40 as paid for "the estate" of the person paying it within the manor of F., there was a strong probability that the £40 was really paid as a compensation for the tithes of the estate of the person paying it, if within the manor of F., or, in other words, that a lease had been from time to time granted, and continually renewed at the same rent, by the rectors to the owners of the tithes of their estate for the time being. The Court, however, decreed the account on this further ground, that during the period of the Commonwealth, while the rector was under no control of the patron, he received £60 a year; but that, on the contrary, during the greater part of the period covered by the £40 payment the rectors were under bonds of resignation to the lords of the manor as patrons of the living, and consequently were not in a situation to resist the exactions of the lords.—The rankness of a modus is not, strictly speaking, an objection to it in point of law. If there could be produced the original

deeds containing the agreements, made at the proper period, and executed by the proper parties, such a modus would be valid. But Courts of Equity, judging both of the fact and the law, determine from the gross absurdity of the bargain that no such bargain was ever in fact made. And the same principles may be applied to an agreement alleged to have been made between a layman and a rector before the time of legal memory for the purchase of the tithes by the layman, in consideration of an annuity payable by him to the rector.—Proof that an instrument is in the hands of the opposite party does not amount to a notice to produce the instrument, so as to authorize the Court to receive secondary evidence of the contents.—Entries in a steward's books, made in his favour and not connected with other entries made against him, are not evidence of the facts mentioned in such entries.

[S. C. 10 L. J. Ex. Eq. 57; 5 Jur. 88. Disapproved, *Reg.* v. *Exeter Guardians*, 1869, 10 B. & S. 436. See p. 590, post.]

Bill by the rector of Ford, in the county of Northumberland, against the defendants, as owners and occupiers of certain lands within the rectory of Ford, for an account and satisfaction of the tithes of those lands.

The defence set up by all the defendants was the same; **[284]** but by reason of the infancy of the Marquess of Waterford when the answers were put in, the answer of himself and his tenants was distinct from that of Askew and his tenants.

The defence was as follows:—That the parish of Ford, mentioned in the said bill, is a rectory, and comprises within its bounds or precincts (amongst other lands) the manor of Ford, and that the said manor of Ford has al-**[285]**-ways, as these defendants believe, from time whereof the memory of man is not to the contrary, contained within its boundaries upwards of 8000 acres of land altogether, of great value, and produces, as these defendants believe, an annual rental of £10,000 and upwards. That the whole of the said 8000 acres of lands, contained in the said manor of Ford, has always been, from time whereof the memory of man is not to the contrary, and is now situate, lying, and being within the parish of Ford. And that from time whereof the memory of man is not to the contrary, there has been, as these defendants believe, always payable by the owner of the said manor of Ford for the time being, and such owner for the time being has, as these defendants believe, always, until the time hereinafter mentioned in that behalf, paid in equal proportions at two days or times in the year, that is to say, at Lady-day and Michaelmas-day in each year, or so soon after as the same was demanded, to the parson of the said parish of Ford for the time being, the yearly sum of £40 for maintenance of Divine service there, for and in lieu and in contentation of all manner of tithes arising, growing, renewing, or increasing within the said manor of Ford, and that the owner of the said manor of Ford for the time being, or his assigns, has, as these defendants believe, always, from time whereof the memory of man is not to the contrary, used, in respect of the said yearly sum of £40 so paid to the said parson of the said parish, to have, and of right ought to have, the tenth of all manner of titheable things, arising, growing, renewing, or increasing within the said manor of Ford, or any part thereof.

The defendants further stated that the lands in their occupation were comprehended in the manor of Ford, and they set forth in the schedule to their answer the different districts or townships of which they alleged the manor to consist, namely, Crookham, Kimerston, Heatherslaw, Catford Law, and Ford.

[286] The counsel for the plaintiff having relied on the common-law right of the rector, the counsel for the defendants laid their case before the Court, and put in documentary evidence, which was in substance as follows:—

1. Court rolls of the manor of Ford, commencing in 1658, and proceeding downwards to the present time. The object of this was to prove the extent of the district, the names of the lords and tenants of the manor, &c. It appeared from these documents that the manor successively belonged to the families of Carr, Blake, Delaval, and the Marquess of Waterford, who had also the patronage of the living.

2. Deeds relating to the dealings of the successive lords of Ford, with the tithes of the different districts therein as

(Kimerston).—July 2, 1624. Mortgage of tithes of Kimerston by Sir John Carr, lord of the manor, to Sir John Selby. Several transfers of that mortgage.—18th of April, 1670. Bargain and sale of the third part of the tithes of Kimerston:

John Carr, of Ford Castle, and Sarah his wife, to W. Carr.—9th February, 1739. Grant of annuity charged on the tithes of Kimerston, &c. &c. Various leases of these tithes by Blake, &c.

(Crookham).—Conveyance (1633) of tithes of Crookham by Few to Archbold.—9th of October, 1757. Grant of an annuity to Bannister, charged on the tithes of Crookham.—9th of October, 1657. Lease to Simpson of Crookham demesne and the tithes thereof.—1700. Lease of lands and tithes of lands, and tithes of Crookham: Blake, to Carr and Granger, attested by the rector.

(Ford).—Lease 1681. Blake to Browning. Demesne lands and tithes of Ford.—1694. Blake to Raston. Moiety of lands in Flodden, and tithes.—January, 1756. Francis Blake Delaval to Biscoe and another, demise of the castle and manor of Ford, and the tithes.—1761. Conveyance by F. B. Delaval to Edward and Thomas Delaval of the manor of Ford, and the tithes, &c. &c.

[287] (Heatherslaw) 1751. Blake to Thompson, lease of tithes of Heatherslaw, Flodden, &c.

3. Receipts by several of the rectors of payments on account of an annual sum of £40 in lieu of tithes. It should be premised that the rectors, from about the beginning of the 17th century, were as follows:—

Clark to	1616
Rotherham to	1631
Edminstone to	1649
Pringle to	1660
Scott to	1676
Davidson to	1689
Chalmers to	1722
Marsh to	1760
Marsh, jun., to	1795
Workman to	1811
James to	1819
Knight.	

The following were some of the receipts:—1690. Receipt by Chalmers, from Sir Francis Blake, of Ford Castle, of £20 for a half-year's payment from Michaelmas, 1689, to Whit Sunday, 1690, for all manner of tithes for the lordship of Ford.—1690. Release from the same rector on a settlement of accounts, whereby he owned himself satisfied, and further acknowledged his sassen or modus at the rate of £40 a year for Ford lordship, and that he was fully satisfied to that date.—1697. Receipt for £40 in full modus for all the tithes within the lordship of Ford, for one whole year.—1700, 1702, 1704. Receipts for a two years' modus of all tithes.—7th of October, 1730. Received of Francis Blake Delaval, Esq., by the hands of Joseph Blenkinsop, the sum of £20, being a half-year's rent due at Midsummer, 1729, as the customary rent for tithes of his estate in the parish of Ford, in the county of Northumberland, and payable to me as rector of the said parish.—Several similar receipts in the time of Marsh, father and son, except **[288]** that in the later ones the word "customary" was dropped. In 1761 the words "ancient modus" were adopted. In some of them the ancient modus was said to be for the tithes of all the estates of Sir F. B. Delaval and Sir John H. Delaval in the lordship of Ford. The form of the receipt first given by Marsh, the son, was as follows:—"After having properly informed myself with regard to the living of Ford, I do hereby declare that, upon the most strict inquiry, I find that, by way of a modus, £40 a year has been paid to the rector of Ford in lieu of tithes. My father never received a larger sum, nor indeed any other, for thirty-eight years; and indeed I have seen Dr. Chalmers's receipts for the same sum as a modus." (*a*) Mr. James's receipts purported to be for half-a-year's payment for an ancient modus for all the tithes in, or in lieu of tithes of, the estate of Ford. Four receipts of the same nature had been given by the present rector.

4. Bills and receipts for the repairs of the church, &c.(*b*) Receipts for land tax,

(*a*) See this commented on post, p. 314.

(*b*) The arguments drawn from this part of the case are omitted as comparatively immaterial.

poor rates, and church cess, paid by persons farming lands and tithes of Sir F. Blake, in Heatherslaw, &c.

5. The decree, bill, answer, and depositions for the defendant in the cause of *Davidson* v. *Blake*, in which the bill was filed in 1676. And the decree, bill, answer, and depositions for the defendant in *Jenkins* v. *Blake*, of which the bill was filed in 1683.

The substance of these suits was as follows:—In the former, the bill was filed by the rector against the lord of the manor, for an account of the tithes in Ford, and to restrain an action on a certain bond of resignation which the plaintiff had given to the defendant. The defendant by his answer claimed a modus decimandi for all his lands in the parish of Ford. He admitted the bond, but stated [289] that it had been given to secure the rector's residence, and that he had put it in force on the rector's acceptance of the living of Lewisham. This suit was compromised; and it appeared from the plaintiff's evidence that Davidson remained rector till his death.

In *Jenkins* v. *Blake* the bill was filed by Jenkins as lessee of the tithes of Ford, under a lease granted by Davidson, dated the 21st August 1678, against Blake and Davidson, alleging that, notwithstanding such lease, Blake took away the tithes under a pretended lease to him from Davidson, and praying to be relieved against Blake's pretended title. The defence set up by Blake was similar to the defence in the present suit. He alleged himself entitled, as joint lord of the manor with his sister-in-law, Mrs. Winckle, to the tithes, insisting on an immemorial payment of £40 in lieu of tithes to the rector. Davidson, on the other hand, alleged by his answer that he did not believe there was any modus payable to the rector, though he had accepted £40 payment in lieu of tithes. He insisted, however, that he had never alleged to the plaintiff that he had a good title; but on the contrary told him he was to struggle as well as he could. Evidence was entered into, the cause was heard, and the bill was dismissed without costs.(*a*)

From the parol evidence in these suits it appeared that no tithes in kind had ever been taken by the rector from the lands in the manor of Ford, with the exception of the district called Catford Law, which, since the purchase of it by the family of Carr, had paid tithes to the rector. There was evidence, also, that a district called Etal, within the parish, but not within the manor of Ford, paid tithes to the rector, but that tithes in kind of the manor of Ford had been taken by the lord of Ford. There was evidence, also, of a reputation that the lands of Ford had been discharged of [290] tithes to the rector, upon payment of a certain sum; but upon this last point the testimony was contradicted by the depositions read for the plaintiff. W. Carr, of Etal, who was present at discussions between Scott and Blake as to the tithes, never heard of a modus (see post, p. 311). And Robert Ogle, who had known the rectory upwards of fifty-two years, never knew of a modus or of any constant sum payable by the lord of the manor of Ford to the parson: "but that the said lord, being patron, did make the said parson content oftentimes with what allowance he pleased," though tithes in kind were due, &c.

6. Final concord of a fine of 2 Geo. 2, levied by Sir Francis B. Delaval and his son, of the tithes of Sir F. Delaval, and of the tithes of the manor of Ford.

7. Terriers of 1792 and 1806, stating a modus of £40 per annum to be payable to the lord of Ford.

The plaintiff's documentary evidence was in substance as follows:—

1. Ancient valuations of the rectory; which were produced to rebut the presumption of an immemorial £40 payment (post, p. 308). Amongst others, an inquisitio post mortem of Isabella de Ford, 39 Hen. 3 (1255), stating that "she has the advowson of the church of Ford, which is worth fifty marks."—Pope Nicholas's Taxation (1291), containing "the taxation of the city and diocese of the bishop of Durham. The rectory of Ford, worth 180 marks." (86l. 13s. 4d.)—Writ of 12th of June, 11 Ed. 2 (from the Tower), to have a new taxation arising out of the mischiefs done by the Scots.—Nova Taxatio in consequence, in which the vicar of Ford is mentioned, but no sum.—Mandate, 1320, to collect according to the new taxation—1322. Document directing two years' levy—1380. Mandate for taxation of benefices, and return

(*a*) For further particulars of this suit and comments thereon, see post, pp. 296, 312, 313.

stating that several of the parishes, amongst which was Ford, were too impoverished to pay—**[291]** 1408. Mandate for taxation, to pay the expenses of ambassadors to the council of Pisa; the untaxed parishes to contribute in thirds.—Return (1409) in which the taxation of Ford is valued at £20.—Further mandate, 1410.—Mandates 1422, 1462.—Ecclesiastical survey, 26 Hen. 8 (1532), in which Ford is valued in all profits at £24.—Parliamentary survey; stating that "the parish of Ford is a parsonage; Thomas Carr, Esq. patron. Mr. John Pringle serveth the cure there, and hath paid him yearly by the said patron, £60; the patronage being of the value of £250."

2. Records relating to the manor, produced principally with a view of shewing that tithes were not named in ancient transactions relating to the manor. Among these were the before-mentioned inquisitio post mortem of Isabella de Ford. Plea of 12 Edw. 2, by Mary, widow of William Heron. 13 Edw. 3, final concord of fine between "William de Middleton, parson of Ford, and William, son of Roger Heron, and Isabella his wife, of the manor of Ford, &c., &c."

3. Ancient documents shewing that Heatherslaw and Ford were originally separate manors; particularly the before-mentioned inquisitio post mortem of Isabella de Ford, in which she is stated to have had the profits of a bedelry, and other possessions in Heatherslaw, of the king, by the service of one knight and one-third part of one knight. "She also held of Lord William de Huntercombe, Ford, Crukum, and Kevermasdiston, by the service of one knight, where there are demesne lands," &c. Another document was the testa de Neville, 34 Hen. 3, stating that "of the same Robert de Muschamp holds Odinell de Ford, Ford, Crucum, Kymarston; and Odinell de Ford, junior, holds Heatherslaw in frank-marriage" (see post, p. 309)—21 Edw. 1; quo warranto—8 Edw. 2; ad quod damnum—14 Edw. 2. Grant of **[292]** free-warren—22 Rich. 2. Inquisitio post mortem of Philip D'Arcy—6 Hen. 6. Ditto, of William Heron, which finds that he was seised of the castle of Ford, and of two parts of the manor of Ford, the advowson of Ford, with the hamlet of Crookham and Kimerston, and two parts of the manor of Heatherslaw.

4. Ancient documents from the Chancery of Durham, shewing the chancel of Ford to have been originally repaired by the rector.

5. Documents to explain under what circumstances the £40 payment was made in more modern times. 14 Car. 2. Judgment in the action of *Scott* v. *Carr*. Release 20th of October, 1675, Scott to W. Carr, Francis Blake, and the tenants of Etal, of all claims and demands. 8th of October, 1679. Bond by Davidson to Blake (see post, p. 311, 312). Depositions for the plaintiff in the suits of *Davidson* v. *Blake* and *Jenkins* v. *Blake*, the purport of which will appear from the arguments.

In the course of the cause the depositions of Robert Ogle in the suit of *Jenkins* v. *Blake* were tendered for the defendants. He knew that Alexander Edminstone, about the year 1633, was presented to be minister and rector of the rectory, by Thomas Carr; and Carr, upon presenting Edminstone, got a bond or security from him that, after he was actually parson or rector of the said rectory, he should make a lease of all the tithes of the said parish or rectory to the said Thomas Carr, or whom he should appoint, for £30 per annum.

Alderson, B., said it appeared to him that no part of that deposition was readable. It was attempted to give the contents of a bond by parol evidence, without giving notice to the opposite party to produce the bond.

[293] Mr. Simpkinson, for the plaintiff. Supposing in a suit instituted against Carr that it was proved without reference to anything else that a bond was given by Edminstone to Carr on his presentation to the living; the proof of this instrument being in the hands of Carr would be equivalent to notice to produce that instrument: *Wood* v. *Strickland* (2 Mer. 461), *Lyne* v. *Lockwood* (2 Molloy, 321), Phill. Ev. vol. 1, p. 442. Here, it is true, Carr is dead; but the suit is brought against a party claiming through Carr, and the Court will presume of this bond as it would of a title deed, that it was handed down from Carr to the person who succeeded him.

Alderson, B., said that the case of *Wood* v. *Strickland* went a great length, and he doubted the correctness of the parallel drawn by the Master of the Rolls between the circumstances of that case and those of an action of trover for a deed, or of an indictment for stealing a bill of exchange; because in the two latter cases the defendant, by the form of his plea, denies the possession of the instrument, and therefore it would be useless to give him notice to produce it. Without reference, however, to that case it did not appear here that the witness ever saw the bond. His information

that such a bond existed might be merely from hearsay; and considering that circumstance, and that this was not a suit against Carr himself, his Lordship was disposed to reject the evidence.

The plaintiffs' counsel did not press the point farther. The Solicitor General afterwards, in the course of his reply, referred to Daniell's Chan. Prac. vol. 2, p. 440, and the cases there cited.

In order to shew that former lords of the manor had **[294]** been liable for land tax and poor rates on the tithes, the defendants' counsel proposed to put in certain steward's accounts, containing entries for and against himself, the entries in his favour being in the nature of deductions from those to his debit, but appearing as separate items, though dated about the same time. Thus, on one side of these accounts was, "April, 16th, received of Thomas Watson, Esq., for half-a-year's rent for the corn and petty tithes of Heatherslaw, due at Whitsunday, 1759, £30." On the opposite side was an entry in discharge of the former item, by payment or allowance to Thomas Watson of 13s., for land tax and poor rates on the tithes.

Mr. Girdlestone contended that this latter entry was receivable in evidence for the defendants. He said that if, instead of being placed on the opposite page, the 13s. had been merely deducted from the former item by the use of the words "after deducting 13s.," the entry in that shape would clearly have been receivable in evidence for the defendants as proof of the balance, and there could be no difference between receiving one entry in that shape, and the two in the manner proposed. He cited *Stead* v. *Heaton* (4 T. R. 669), *Bullen* v. *Mitchell* (2 Price, 399, 413), *Williams* v. *Geaves* (8 Car. & P. 592), *Doe d. Lord Teynham* v. *Tyler* (4 M. & P. 377).

ALDERSON, B. The payment of the half-year's rent is a simple fact stated. In *Stead* v. *Heaton* the matter stated referred to something else; it required that other thing to be read, in order to explain the fact as stated. There is a material distinction between the one case and the other. I think *Stead* v. *Heaton* goes to the extreme verge of the law. If, in this case, the sum charged was stated to be a sum less by the deduction on the opposite side of so and **[295]** so, possibly, according to *Stead* v. *Heaton*, you might have referred to the opposite side. In *Bullen* v. *Mitchell* the decision was right, without taking into consideration all the reasons given for it. I think I cannot admit this evidence.

Upon the general merits of the cause,

Mr. Boteler opened the case for the plaintiff, stating that he relied on his common-law right.

The Solicitor-General, Mr. Swanston, and Mr. Purvis, for the defendant, Lord Waterford. There is clear evidence on behalf of the defendant of a dealing with these tithes, as property possessed by the lord of the manor, from the earliest period at which any documentary evidence connected with the manor and the title of the lord can be obtained. For it is to be borne in mind that at various times, from about the year 1585 to the time of the Commonwealth, when these deeds commence, Ford Castle was sacked, and most of the muniments of the lords, which were then in existence, were destroyed. The question therefore is whether the evidence which the documents now in existence afford of a dealing with the tithes, coupled with the evidence derived from the suit of *Jenkins* v. *Blake*, is not sufficient to support the lord's claim.

Now, making allowance for those variations in the evidence which will ever be found to attach to causes of this nature, where witnesses are speaking of transactions after a long period of time, some of them from reputation and others from their own knowledge; yet there are certain facts which appear plainly and distinctly from the depositions in that cause.

It appears perfectly plain that there were some sums of money paid by the lords of the manor, as far as the memory of any of the witnesses extend, to the rector. Some of those witnesses do not remember the precise sum, but **[296]** there is nothing whatever to shew that there was any variation in the sum. The sum was definite and certain, whatever it was; though some of the witnesses are unable to speak with absolute certainty as to the amount. They speak of it as a sum of about £40. But that there was a specific sum constantly paid is the fair result of the whole of that evidence. Then great weight is to be given to the length of time which is covered by the evidence. Some of the witnesses are old persons themselves, seventy or eighty years of age, who not only speak to the whole period of time which their personal

recollection covers, but at the same time give to your Lordship the reputation in the parish founded on the declarations of persons who, at the time of making those declarations, were as old as themselves, and who therefore carried back the statement to a very long period. The result is that a certain payment is proved to have been made from the commencement of the period, covered by that testimony; which would take it back to 1560 or 1570: there being positive evidence of a reputation of such payment from that time, which reputation is in this case confirmed and strengthened by the absence of any evidence of tithes in kind ever having been taken by the rector. And there is also an entire absence of evidence of any omission in the payment of those annual sums. Upon this evidence the bill in *Jenkins* v. *Blake* was dismissed.

Now, if the deeds are consistent with the usage, and the usage is consistent with the reputation; if the evidence in the cause throughout presents no period at which there is not an annual stipend paid by the lord of the manor to the rector, and no period at which the rector receives the tithes; if, under such circumstances, the defendants' title is not safe, we can hardly imagine a case in which persons can with any safety rely on a title of this nature. And here it is clear that the title must have been investigated over and over again. The tithes were in several instances **[297]** made securities for large sums of money. There were mortgages, family settlements, and a variety of deeds and documents, which must have brought this title under the consideration of legal persons from time to time, and the covenants accompanying those securities are such as are incident to an absolute indefeasible title; therefore, when in 1684 or 1685 the suit of *Jenkins* v. *Blake* is dismissed, under the circumstances which have been mentioned, the defendant certainly appears to present a very strong case for the consideration of the Court.

In addition to these considerations, it may be asked what is there in this case to repel the very natural presumption that the lord of the manor, being the patron of the living, probably at a very ancient period, was desirous of securing to the parish the benefit of a resident clergyman, and agreed to give £40 a-year, taking upon himself the tithes which might arise and grow within the manor? Rankness can be no objection in such a case. A sum of money given under such circumstances cannot be compared to an ordinary modus. This is a case between patron and rector; and the question is whether a reasonable motive could exist for such an arrangement. The hostile incursions which were made in this part of the country, and the great destruction of property which took place from time to time, rendered it desirable that the clergyman should have a certain income adequate to his maintenance; and it is fair to presume that the lord of the manor, in making this payment, might be guided by motives beneficial to the Church; motives, which the ownership of a large property in the neighbourhood, and of his being patron of the church, would give him. The arrangement, therefore, is by no means such as may not be contemplated very reasonably to have been made; and there will be found circumstances connected with the relation in which the parties stood and the locality, which **[298]** will draw into the case many considerations which do not belong to the ordinary case of a modus.

Then, can the defendant's case be supported in point of law? The title which we allege is a title to the tithes of the manor. In a modus decimandi the modus is the tithe; as much so as when the tithe is taken in kind. But this payment of £40 is not the tithe, but the consideration or purchase-money for the tithe. The rector is not the owner of the tithe. He became, by a contract entered into at a time when such contracts had validity, entitled to the annual payment, and ceased to be owner of any portion of the tithes; and of that tithe the lord of the manor is owner. It is immaterial, therefore, by what name this payment is called.

There are various authorities to shew that the lord of the manor may prescribe, in consideration of an annual payment to the rector, to take the tithes, or the tenths: *Pigot* v. *Heron* (Cro. Eliz. 599; Moore, 483; 1 E. & Y. 135). In that case the word used is "tenths," which means the same thing as, when paid to ecclesiastical persons, is called "tithes." There is no other distinction between the two expressions. [Alderson, B. I think *Pigot* v. *Heron* only amounts to this, that there may be a modus decimandi in respect of a manor.] It is submitted that that case goes much further. There is nothing in law to prevent the lord of a manor being a portionist of tithes. Before the disabling statutes, the rector might have parted effectually with any portion of the rights of the church of which he was rector. Suppose an ancient instrument

brought to light, executed between the rector and the lord of the manor, whereby, for a valuable consideration paid by the lord to the rector, it was agreed that the lord should hold the manor, either exempt from tithes, or that he should become the owner of the tithes, or that he should take all the profits of the manor in as free and **[299]** absolute a manner as if there never had been any demand of tithes relating to the manor, would there be anything to prevent that being a valid transaction? But the case of *Pigot* v. *Sympson* (Cro. Eliz. 763; 1 E. & Y. 148) is a strong authority on this point. There it was expressly held by the Court that the lord might prescribe to pay a sum in discharge of all the tithes within the manor; and it is added, "that when the lord gave the tenancies to hold of him, and always afterwards used to have the tithes of those lands and tenements, it is a very reasonable prescription: for now he has no more than what he had before; for he had them before by retainer and now he takes the tithes themselves." That is the proposition now contended for. The cases which have been cited are recognised in *The Bishop of Winchester's case* (2 Rep. 45; Hob. 42), in which the same point was in effect decided. Again, in *Dykes* v. *Thompson* (1 Wood, 513; 1 E. & Y. 692), the Court decreed that the plaintiff as lord and owner of the manor of Warthole, and of the demesne lands thereto belonging, and his heirs, paying the prescription rent of £6 yearly to the rector of Plumbland, as formerly had been done and accustomed, was in respect thereof entitled to have, take, and receive all the tithes within the said manor and demesne lands to his own use.

Considering, then, that a presumption may be made of the legal origin of the transaction between the rector and patron, it is submitted that the defendant's title is such as is capable of being confirmed by judicial decision, and acquiescence, and long possession; and consequently that the defendant is entitled to all those presumptions which the Court makes in favour of other titles so founded. *Scott* v. *Airey* (Gwill. 1174; 2 E. & Y. 342) shews the difference founded on mere non-payment of tithes, and a claim supported by evidence of actual enjoyment of pernancy of tithes. The latter **[300]** title not being unlawful, long possession is evidence of it. *Scott* v. *Airey* is supported by the succeeding case of *Strutt* v. *Baker* (2 Ves. jun. 625; 2 E. & Y. 421) and *Bacon* v. *Williams* (3 Russ. 525; 3 E. & Y. 1105), and the observations of Lord Redesdale and Lord Eldon in *Norbury* v. *Meade* (3 Bligh, 232, 251). [Alderson, B. In *Scott* v. *Airey* the claim was for a portion of tithes. Now, as I understand it, a portion of tithes is where the right to the tithes of a particular part of the land does not belong to the church, but to some other person. But here you pay tithes, or a sum in lieu of tithes, to the rector.] We contend that it was a purchase of the tithes at a time when the purchase was valid; but instead of paying the money down, an annuity is provided as a permanent subsistence for the rector. [Alderson, B. The portion of tithes is never purchased from the church or the rector.] It is submitted that such a purchase might originally have been made. Suppose in the case put by Mr. Justice Willes in *Musgrave* v. *Cave* (Willes, 326) that the bishop being lord of a manor, and having immemorially granted away the lands of the manor, reserving to himself the tithes, afterwards granted away the manor, reserving a rent of £40, the tithes being appurtenant to the manor would pass by the grant, while the rent remained in the bishop.

Such being the origin of the defendant's title we contend that it is confirmed by the judicial decision in *Jenkins* v. *Blake*, and acquiescence ever since. The decree in that case was pronounced on argument, and upon a judicial decision of the Court. If that decree is explained away, it is impossible to see how any decree can maintain its authority. It is dated in 1688. There is no suggestion of collusion; but, on the contrary, it is made in a hostile suit. Ever since that decree there has been an uninterrupted enjoyment of the tithes by the lord of the manor, until the institution of this suit. During the **[301]** space of a century and a half the tithe has remained undisturbed, and sales have taken place on the faith of it. The title of the Askews is derived from this source. It is remarkable that in the deed of conveyance to the Askews there is a clause of indemnity to the purchaser, not against the acts of the rector, but against those of the vendor and his ancestors, and those claiming under him. That refers therefore only to the £40 payment, and not to the tithes.

Under the circumstances of this case it is submitted that the most the Court will do for the plaintiff is to allow him to proceed at law. The present defence is that of a customary payment in the nature of a modus with the additional circumstance of the

party paying the money having the pernancy of the tithes, and dealing with them as a lay fee. In such cases the authorities go this length, that in none of them has an account of tithes been decreed, and in very few of them has a trial been directed; and length of time operates favourably upon this mode of defence. In the case of an ordinary modus the Court, in judging of the propriety of directing an issue, is guided by considerations as to the length of time, during which the alleged modus has subsisted: *Chapman* v. *Smith* (2 Ves. sen. 506; 2 E. & Y. 141), *Jee* v. *Hockley* (4 Price, 87; 3 E. & Y. 816), *Bree* v. *Beck* (1 Younge, 211), *Dent* v. *Rob* (ante, vol. 1, p. 1). So here it will take into consideration the length of time for which the tithes have been taken. In *Berney* v. *Harvey* (17 Ves. 119; 2 E. & Y. 585) Lord Eldon, in distinguishing a case of this nature from a mere defence de non decimando, observed that pernancy alone for a great length of time, without even the production of any deed or the evidence of any deed having existed, was sufficient to shew that such a claim had a good origin; for instance, either that the portion may have belonged to a monastery and been granted out into lay hands, or may have belonged to **[302]** the bishop, and thence been granted into lay hands. Lord Eldon, speaking of *Scott* v. *Airey*, said that "the Court there took the distinction, that if in the case of a lay impropriator it appeared that the defendant had lands which never paid tithes, and had made them the subject of lease and conveyance under colour of title, coupling the fact of retainer and the colour of title, they considered that a sufficient ground for sending the case to law; but if no more was alleged than a mere case of retainer and prescription in non decimando, they would not send that to law." The case of *Hughes* v. *Davies* (5 Sim. 331) proceeds upon the same principle, and in that case the Court left the plaintiff to pursue his remedy at law. In *Bacon* v. *Williams* Lord Lyndhurst evidently thought that these were questions which ought to be decided at law.

Lastly, supposing the main ground of defence fails, the plaintiff is barred by the fines of 2 Geo. 3 and 11 Geo. 3. The fine would take effect against the rector at the time when it was levied, subject to the rector's right of re-entry within five years; and if he omitted to enter or to take any effectual proceedings against the fine before the expiration of the five years, he would personally be barred. And although upon the new incumbency the successor would not be barred by the laches of his predecessor, the fine would have the same effect as to him, if he suffered the time to elapse: Preston. Conv. vol. 1, p. 235; Plowd. Rep. p. 538. And this doctrine is admitted by the learned Judges in *Runcorn* v. *Doe* (6 Barn. & Cres. 696).

Mr. Girdlestone, for the defendant Askew. The case of this defendant is, if possible, stronger than that of the Marquess of Waterford, as his title is derived from a purchaser for a valuable consideration of lands expressly contracted to be sold tithe-free. The claim he makes is to hold an estate called Pallingsburn, which was purchased under the **[303]** deeds of 1760 and 1768, discharged altogether from the payment of any tithes to the rector; and, in fact, discharged altogether from the payment of tithes to anybody, as the tithes were purchased under those deeds, and the whole of the property so purchased is in the manor of Ford. We claim to be the owners, and to take the tithes of these lands under a title derived from the lord of the manor of Ford, whose title, we say, is derived through an ancient grant from the rector, not produced or proved in evidence, but to be presumed from long enjoyment and the mode of dealing with the tithes; and that grant made in consideration of a payment by the lord of the manor to the rector, of an annual sum of £40.

Generally speaking, it may be considered as a matter of admitted and recognised law, that a layman cannot prescribe for tithes unless he bases his title upon some grant from a spiritual person, subsequent to legal memory; but it is equally clear that antecedently to legal memory (or rather to the disabling statutes) there was no restriction on a parson or rector from alienating the tithes, but that at common law he might convey the tithes either to the owner of the land, or in any other way he pleased: *Slade* v. *Drake* (Hob. 297, "Now temporal persons" &c. 1 E. & Y. 316). It is submitted that in this case the lord has acquired such a title to the tithes; and that the principle contended for holds equally, whether the right of the lord is such as would simply discharge the tithes as against the rector, or whether it would give him the right to hold them as a several inheritance, distinct from his interest in the land, in which case there would be no merger arising from unity of possession; a consequence which your lordship seemed to anticipate. *Sherwood* v. *Winchcombe* (Gwill. 164; 1 E. & Y. 106), *Phillips* v. *Prytherick* (1 Gwill. 1125; 3 E. & Y. 1273), *Pigot* v. *Sympson*

(supra, p. 299). In the latter cases the principle is distinctly recognised that the cir-[304]-cumstance of the lands being discharged from tithes in the hands of the lord, as against the rector, does not operate so as to create a merger of the tithes in the land, but that the lord may retain them as long as he chooses to retain them in his own hands, or grant them out to others. So that he may even sue for the tithes in the Spiritual Court.

As to the effect given by the Court to the circumstance of non-payment of tithes for a long lapse of time, the observations in *Atkins* v. *Lord Willoughby de Brooke* (2 Anstr. 397; 2 E. & Y. 406) and *Wynniatt* v. *Lindow* (3 Jurist, 51) are very important. In the latter case the Lord Chancellor speaking of a composition real says, "Where the occupier has long retained that which by law he ought not to retain, and yields to the parson that which by law he is not bound to yield, this mutuality of loss and gain, acquiesced in for a great length of time, is strong corroborative evidence of such an agreement having been executed by the necessary parties." Now in this case there is not only a total absence of evidence of payment of tithes in kind, but a clear proof to the contrary, except with respect to Easter dues; there being actual receipts for the £40 payment by successive rectors from 1690 to 1822. At all events the plaintiff's claim is barred by the fines and they need not be pleaded: *Davies* v. *Lowndes* (1 New Ca. 597).

Mr. Boteler, Mr. Simpkinson, and Mr. Lowndes, for the plaintiff. Before entering into the main facts of the case there are some preliminary objections to be made to the pleadings in this suit. In the cases which have been cited the defence has uniformly been that the lord of the manor, and all those who had his estate in the manor, have taken the tithes; here it is alleged that the lord of the manor for the time being, or his assigns, have taken the tithes. The [305] defendant's case rests on the power to assign the tithes from hand to hand ad libitum, so that the lord of the manor should no longer hold them. This is a variance from former cases, which is not merely of form but of substance, and will not be allowed to prevail. The cases seem to have established this, that the lord of the manor may prescribe to pay an annual sum to the rector of the parish in satisfaction of the tithes of the manor, and he and all those who have his estate in the manor are entitled to receive the tenth garb or the tithes of the manor. The cases certainly seem to establish that whether it is the tenth garb considered as not having a spiritual existence, or whether it is the tithe being a spiritual thing—in either case it is something that may exist in the hands of the lord.

But although the cases seem to go this length, yet as it is inconsistent with the principles of law that the ownership of a temporal profit issuing and arising out of land, and of the land itself should belong to the same person, this anomaly is a strong ground for arguing that the tithes in such a case exist separately as a spiritual, and not as a temporal, profit out of the lands. And this was clearly the opinion of Lord Coke (*Bishop of Winchester's case*, supra, p. 299) and of the Judges in *Pigot* v. *Sympson* (supra, p. 299), in which the explanation of the Court's opinion in *Pigot* v. *Heron* is agreeable to Lord Coke's report. It is clearly recognized in *Pigot* v. *Sympson* that the remedy for the lord might be in the spiritual Court; and from Lord Coke's report it may be inferred that he thought it could only be had in that Court. These cases undoubtedly proceed on the ground that originally, when the contract was made, all the lands were in the lord's hands; but still the contract was that he should have the tithes of the land as a profit to take out of them, and not as a discharge. But it is an argument to be drawn from the very allowance of that state of things that the tithes [306] remained spiritual. If they did not remain so, how could they be recovered in the spiritual Court? If it had been a mere agreement to receive money in lieu of tithes, it could only have been the subject of an action in the temporal Court. In addition to those which have been already cited, there are other strong authorities supporting this view of the case: *Winchcombe's case* (supra, p. 303), Degge, ed. 1681, p. 313; *Dykes* v. *Thompson* (supra, p. 299); *Phillips* v. *Prytherick* (supra, p. 303).

Then, supposing the tithes are spiritual, and the lord parts with them, the consequence must be that they exist in his assignee as tithes in gross. But is not that a fatal objection to the whole claim? It is admitted on all hands that where tithes are of a spiritual character, a layman cannot prescribe in gross. Yet here the prescription set up is a claim to hold tithes in gross in the hands of a layman, long antecedently to the statute of Henry 8, the first statute enabling laymen to hold tithes.

Now *Pigot* v. *Heron* and that class of cases (*d*) depend on this reasoning, that it [307] is the same thing whether the lord of the manor has the tithes by retainer or by pernancy: but it is admitted in those cases that, the case of the lord of the manor being entitled to tithes in pernancy, is an exception to the general rule of law; for that it is on the principle that a layman is not so entitled that he is not allowed to prescribe in non decimando. But if he is not allowed to prescribe in non decimando, would it not be inconsistent for him to prescribe, so as to entitle himself to tithes in gross? And here the effect of such prescription may be that the recompense may be paid to the clergyman, by a party who has no connexion with the land, and no connexion with the person claiming the tithes in pernancy.

Other anomalies will arise from holding these tithes to be capable of assignment. First, would not the rector be in a worse situation than under the prescription set up in *Pigot* v. *Heron*? Admitting that the lord parts with his lands or his services; yet if he retains the tithes, the £40 may be raised by execution in some shape or other: but if he parts with the tithes, the rector's security is gone; he cannot sue the assignees. If the contrary be sup-[308]-posed it should have been pleaded. Again, the defendant alleges that the manor of Ford comprehends the townships of Heatherslaw, Crookham, and Kimerston; but the plaintiff's evidence is that when the prescription is alleged to have begun, those were distinct manors. If, then, the prescription be allowed, this extraordinary result will take place, that the payment by the lord of Ford will operate as a discharge, not merely of the tenants of the manor of Ford, but of those of Heatherslaw, &c.

With respect to the general merits of this suit, there are two points on which the plaintiff mainly rests his case. First, he produces ancient documents bearing upon various parts of the case, which are quite inconsistent with such a usage and such a state of things as this prescription supposes—documents which are open to no suspicion whatever. Secondly, he gives a complete and satisfactory explanation of

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(*d*) The following manuscript cases were cited in argument:—*Richardson* v. *Fallowfield*, B. R., M. T. 15 Car. 2, MS. note of Mr. Willes. A prescription to have tithes out of land, in consideration of an annual payment to the parson, is not good, unless he shews that the land hors de que le disme arises is holden of him.

S. C. Ward's Reports, temp. Car. 2, fo. 76 (Lin. Inn Library). A. seised of a tenement says that he and all those whose estate he hath in the same tenement have used, time whereof &c., to pay to the parson 3s. annually for one-fourth of the tithes of an acre of which a stranger was seised in the same parish; and that in consideration of this payment he and all those &c., have used to have &c., one-fourth of the cocks of hay on the said piece of land: Held, that this prescription is not good, because it does not appear that there is any tenure between the tenant of the acre of land and him who made the prescription; but if the lord of the manor had made such prescription, it would have been good.

Wilkinson v. *Richardson*, B. R. Trin. T. 16 Car. 2; Ward's Reports, fo. 133; S. C. 1 Keb. 684; 1 Sid. 258; 1 E. & Y. 441. One, a customary tenant of the manor of Morland, alleged a custom in the manor, of which manor the Dean and Chapter of Carlisle are seised, and also the proprietors of the rectory, that each customary tenant of the same tenement of which he is now seised, hath used, time &c., to pay 13s., and 4d. for his rent, and the fourth part of the tithes of hay growing on the close of another man in the manor, and ratione inde they took the fourth crop according to the prescription, and it was held a prohibition would not lie; for he who will prescribe for discharge of tithes, or to have tithes, must shew a satisfaction to the parson; and for this, if a man prescribe to pay 10s. to J. S. and ratione inde to be discharged of tithes, it is nothing worth; and therefore here this prescription to pay 13s. and 4d., as well for rent as for tithes, cannot discharge the tithes; for if this rectory should be disappropriated, it is uncertain what the parson shall have. Also this prescription here in pernancy is not good; but they agree that if the lord of a manor will allege a prescription that he had paid such a sum to the parson in discharge of the tithes of the land in the manor, and that ratione inde he had taken the tithe, this might be good enough; but he could not by any prescription discharge the tenants from tithes, quoad the parson without some satisfaction for it, and he cannot allege such prescription as to another manor.

those proceedings in the time of Car. 2 and Jac. 2, which are given in evidence and relied upon on the other side; and he shews throughout the whole of the period of what is called the acquiescence in this payment, such a series of oppressions and ill practices on the part of the lords of the manor of Ford, that it will be quite impossible for the Court to establish this prescription. In short, we contend that the £40 has never been honestly paid; and that during two incumbencies, those of Pringle and Scott, it was not paid at all.

First, as to the effect of the ancient documents. Of the several mandates and taxations which have been put in, all afford strong evidence, and those in which Ford appears not to be taxed at all afford conclusive evidence, against the £40 payment. The benefice of Ford was not taxed, because it appears the country was wasted by the Scotch. But if the £40 was regularly provided by the lord for the support of the rector, why was it not taxed? It is stated on the other side that the lord had other possessions, and [309] was quite capable of paying this sum. The omission, therefore, to tax this sum, if it were really paid, is unaccountable, particularly as at that time this sum was very great.

Again, there are a variety of documents relating to the manor of Ford, particularly the inquisitio post mortem of Isabella Ford and that of William Heron, in which these parties are stated respectively to be lady and lord of the manor of Ford and to be owners of various possessions within that and other manors, and to be the owners of the advowson of Ford, and yet nothing whatever about tithes is said in these or in any other documents down to the time of Hen. 8.

Again, the plaintiff produces documents to shew that at the time of the commencement of legal memory Heatherslaw was not part of the manor of Ford as stated in the schedule to the defendant's answer. In the Testa de Neville, Heatherslaw is mentioned with Ford and other places, but in the writs of Edw. 2 and Edw. 3 those places are expressly called manors. That Heatherslaw was a separate manor is likewise clear from the before-mentioned inquisitions. Now this prescriptive payment of £40 is laid in the answer as covering the tithes of all the lands within what is called the manor of Ford; that manor being represented as comprising the townships of Ford, Crookham, Kimerston, and Heatherslaw. But if the plaintiff's evidence shews, as it does, that, at the time of the commencement of legal memory and for some centuries afterwards, the manor did not comprise those townships, but that they formed distinct manors, then it follows both that the modus is laid viciously, and that the evidence in support of it cannot be depended on, inasmuch as it applies equally to Heatherslaw as to Ford. It is possible that when the four manors became united in one person, the lord might call his tenants in the other manors to do suit and service in that where he resided, and therefore in [310] process of time they might acquire the reputation of being one manor. But that is not enough for the purpose of this prescription. It is incumbent on the defendant to shew that at the time of the commencement of legal memory those four manors or townships constituted one manor.

The plaintiff having thus proved by ancient documents that no such prescription could have existed for three centuries after the time of legal memory, insists, secondly, that no such prescription ever did prevail during the time in which the defendant alleges it to have prevailed; and more especially that no prescription ever prevailed to pay any definite sum of £40; that being the precise payment which the defendant is bound to establish from time immemorial in order to support the prescription. On the contrary the plaintiff contends that, although some payments were made in lieu of tithes, they were irregular, unequal, and the result of force and oppression on the part of the patrons.

This part of the plaintiff's case, down to the time of Davidson, depends on inferences drawn from the following transactions in the times of the successive rectors who preceded Davidson:—

1. The remarkable conduct of Carr, lord of the manor of Ford, towards Rotherham; shewing the dependent situation of the latter.

2. The release, purporting to be made by Carr and Edminstone, of the tithes of Etal, to Robert Carr; the will of Edminstone referring to this release, and bequeathing the arrears of his stipend for serving the cure; which stipend is stated in the will to be £30 a-year secured by the bond of Robert Carr.

3. The statement in the ecclesiastical survey respecting the sum received by Pringle, which corresponds with his testimony in *Jenkins* v. *Blake* that during all the time

of his remembrance there was not any constant custom or modus decimandi in the rectory.

[311] 4. The action brought by Scott against Carr on the statute for the tithes, and his subsequent release to William Carr, Francis Blake, and the tenants of the lands of Etal, of all claims and demands, coupled with the evidence of W. Carr in the suit of *Jenkins* v. *Blake*, shewing that the consideration for this release was the sum of £500 for arrears of tithes to the close of Scott's incumbency. Carr's deposition is to the effect that after a struggle on the part of Scott for the tithes, an agreement was come to by the deponent and Blake with Scott, in 1675, for a settlement of the arrears; when at last they agreed to pay him £500 for the arrears, of which the deponent contributed for Etal and Catford Law, 166l. 13s. 14d.; but that during the treaties on this subject Blake never mentioned or pretended that there was a modus of £40 in lieu of tithes.

From this evidence it is obvious that the defendant has no right, from the fact of the payment of £40 to Davidson and in subsequent times, to carry the inference or presumption of such payment to any period before that of Davidson. Then under what circumstances was the payment made by Davidson? There is evidence of a declaration by Blake, who was then lord of the manor, that if Davidson insisted on tithes in kind, he would take a bond of resignation. A general bond of resignation is then given; and upon Davidson's claiming the tithes the bond is put in suit. Then follows the suit of *Davidson* v. *Blake*, for an account of the tithes, and for an injunction to restrain the action on the bond. That suit was compromised. An agreement was entered into between Davidson and Blake in the course of the cause which is lost, but a bond was given for its performance by Davidson in the penalty of £2000; and it also appears from Blake's answer in the subsequent suit that the terms of that agreement were that Davidson was to take the arrears of tithes, and to receive £40 a-year in future, and to make **[312]** common cause against Jenkins, who stood in the situation of Davidson's lessee under the circumstances next mentioned.

Pending the suit of *Davidson* v. *Blake*, Davidson granted a lease of part of the tithes to Jenkins; but on the compromise of that suit he assigned his rights under that lease to Blake with power to sue Jenkins in his name. Jenkins then, as might be expected, having failed in his demand for tithes against Blake, filed his bill against Blake and Davidson; and, on the other hand, Blake in the same term filed his bill in the name of Davidson against Jenkins. By these proceedings Davidson was placed in a very remarkable situation. He could not conscientiously say that he was not entitled to tithes in kind; therefore, by his answer in *Jenkins* v. *Blake*, he alleges that he does not believe that there was such a custom or modus as pretended in the bill, in lieu of tithes, but that the lords of the manor of Ford were liable to pay tithes in kind to the parson; although he, the defendant, agreed with the patron for £40 per annum for all tithes within the manor, which he, the defendant, would not have done if the plaintiff had paid him rent according to the lease. On the other hand, in the bill filed in his name by Blake, he admits the right to tithes claimed by the lord.

This, then, is the real origin of the defendant's claim; but the Court will not allow a claim to be established on so unjust a foundation. Here is a clergyman who gives a general resignation bond—who files his bill to enforce payment of tithes in kind—who abandons that claim, and executes a bond to his patron in a penalty of £2000, to perform the conditions of the agreement by which that claim is abandoned—who, while this bond and the resignation bond are hanging over his head, assigns over to his patron the benefit of a lease which he has made of the tithes with power to sue the lessee—and who states on oath in his answer his belief that the rector is intitled to tithes in kind, while, in a bill filed contemporaneously with this answer, **[313]** he is made to state his conviction that he is not entitled to tithes but only to £40 a-year. Can there be a stronger argument for the propriety of the decision in *The Bishop of London* v. *Fytche* than such a case as this?

But it is said on the other side that *Jenkins* v. *Blake* was a suit in which the modus was put in issue, that it was proved and the bill dismissed. It is impossible, however, looking at the whole proceedings, to say that that was the ground of dismissal. The defendants, in their answer to Jenkins's bill, bring forward the point expressly that he took the lease from Davidson pending a contract between Davidson and Blake. They state expressly that Davidson gave Jenkins to understand he was to struggle through it as as well as he could. What is this but maintenance for which a court of equity

would dismiss the bill? Besides, the plaintiff himself had not complied with the terms of the lease. It was likewise impossible that justice could be done in two such inconsistent suits. If it be alleged against this view of the case that the bill was dismissed without costs, the answer is that there was a material defect of parties in the absence of the co-tenant in common of the manor, which, together with the other circumstances of the case, leads to the conclusion that the bill was not dismissed on the merits.

It is remarkable that the witnesses in this suit who speak to the £40 payment, with very few exceptions, state it to have been made for tithes within the "parish." And there is nothing in the whole suit which does not fall in with the idea that the claim of the lord originated in a lease of the whole rectory. It is a striking circumstance that the lands and tithes of Catford Law, which is within the manor of Ford, were conveyed for a valuable consideration to the father of Carr of Etal. Is it credible, then, that Carr of Etal, unless he had been thoroughly convinced that the rector was entitled to tithes in kind, and that there was no prescription for Catford Law, would give up his claim to those tithes?

[314] To proceed to the events which have occurred in more modern times. The rectors who succeeded Davidson certainly appear to have received a fixed payment from the lord in lieu of tithes. But the principal evidence on this point is derived from a series of receipts which vary from each other in every possible way. Some are in the shape of deeds rather than receipts; and many of them vary in their statements as to the nature, and even as to the times, of the payment. It is remarkable that the receipt given by Marsh the son, though intended to convey an impression in favour of the lord's claim, is when strictly examined quite in accordance with the plaintiff's case. It is, indeed, strictly and literally true; but not therefore less cogent evidence for the plaintiff.

When we come to the time of Lord Delaval, we find that in the proceedings which he took jointly with the rector Marsh to substantiate the £40 payment, he considered himself as impropriate rector. He does not claim the tithes by such prescription as is now alleged, but he treats them altogether as lay property.

As to the fines, the stat. 32 Hen. 7, c. 7, does not apply, as the tithes here are spiritual and not the object of the statute. That statute only related to those tithes which came into lay hands, and became or were made lay fees on the dissolution of the monasteries.

Upon the whole, the case of the defendants rests on their evidence of possession evidenced by their own title-deeds and by their dealing with the tithes. That evidence would be very strong if it did not exceed the purpose for which it is to be used. But if by evidence of acts of ownership (for the deeds say nothing about it) they prove that this £40 has been immemorially paid, and the lords have therefore been immemorially entitled to the tithes, they ought not to prove, which they do, that the **[315]** lord has alleged himself to be rector, and that they have been in possession of the rectory; they ought not to prove that Heatherslaw is part of the manor of Ford. The same evidence which proves possession and ownership of the tithes of Ford proves possession and acts of ownership of the tithes of Heatherslaw. The same evidence which proves the landlord's title to the tithes proves his title to the rectory. The fines are levied of the rectory; and in one instance there is a conveyance of the advowson of the vicarage of Ford. How can these documents be received as evidence when they clearly shew that the lords were dealing with much more than they now admit they had the right to do? Besides, the defence is that all the tithes of the manor belonged to the lord, and yet the parol evidence and the terriers shew that there are many of the tithes which are taken in kind, and are sub modo, and not under this modus or any modus paid to the rector. That has frequently been held an objection to such a defence. Lastly, it is admitted that the tithes of Catford Law are taken by the rector.

The Solicitor-General, in reply. The prescription as pleaded consists of two parts: first, of a discharge of the lands from tithes as against the Church; secondly, of the claim of the lord to receive the tenths of the produce of the land in respect of the compensation which he has paid to the Church, for the discharge which forms the first part of the prescription. The first part alone is material to the plaintiff: it contains a full and perfect answer to the plaintiff's case, both in law and fact. In answer to his bill claiming tithes in kind, it alleges that time out of mind, in con-

sideration of £40 a-year paid by the lord of the manor of Ford, the lands have been discharged from all manner of tithes. This is a complete answer to the plaintiff; but the answer proceeds to state further that which, whether true or not, does not affect the right to the Church to receive tithes, namely, **[316]** that the lord of the manor or his assigns have immemorially, in respect of such payment, used to have and of right ought to have, not the tithes, but the tenths of all manner of titheable things arising, &c., within the manor. The two parts of the prescription are totally distinct in their legal effect, and are the result of distinct contracts made with distinct persons. The first part as pleaded contains every legal requisite of a good discharge of the land as against the Church: it is stated to have been in consideration of a proper compensation to the Church, and the amount paid and the discharge of the land from tithes are averred to be immemorial. According to the precedents, if in point of fact averments are made which in substance constitute a claim to the whole tithes, it is immaterial by what form that is done. Now the cases recognise distinctly claims similar to the present, and recognise them as being well alleged as the holding of tithes in gross. It is clear, in speaking of transactions before the time of legal memory and before the time of legal restraint upon alienation, that two modes of arrangement with the Church might have been adopted. The claim of the Church to tithes may have been destroyed, either by agreement upon good consideration that the lands should be discharged, or by alienation with the concurrence of proper parties. That is clear from the argument of Moore, and the judgment of the Court in *Pigot* v. *Heron*, which was a case of two prescriptions like the present. Speaking of the first prescription, namely, that the lord of the manor had used to pay £6 in satisfaction of all the tithes of corn and grain within the manor, Moore said it was reasonable, "for it may be intended that when this manner of tithing began, all the lands of the manor were in the hands of the lord in demesne before the grant of any freeholds or copyholds, in which case it was reasonable that he should pay money in satisfaction of all tithes of all corn and grain within the manor, &c." So, in the present case, there is nothing to repel the presumption that, during the time that Ro-**[317]**-bert de Muschamp was possessed of the manor of Ford and of the whole land of the manor, such arrangement was made with the Church as is put upon this record: and looking at the history of tithes, and considering the situation of this county as a border county, liable to continual devastation, such a course was extremely probable. Now, in *Pigot* v. *Heron* the justices were of opinion that both prescriptions were good, though the second was not material; that is, not material to the plaintiff; and the observations of the justices, as reported in Croke, are particularly applicable to the present case. When they say, however, that a layman cannot have tithes by prescription, all that is meant is that a layman cannot prescribe to have tithes without shewing special matter; that is to say, without shewing in what manner he is connected with them, and that the Church has received valuable consideration for them. In the subsequent case of *Pigot* v. *Sympson* the question related to the same manor, and the pleadings were much the same; and it was again argued that a layman is not capable of tithes, and that none can prescribe in a thing in gross per que estate. But the Court held the contrary; and were of opinion that it was a very reasonable prescription for the lord to pay a sum in discharge of all the tithes within the manor, and in respect thereof to have all the tithes of the manor; for it must be intended that originally he had all in his hands, and when he gave the tenancy he took the tithes instead of holding them by retainer as he had before done.

It appears from these cases, therefore, that the discharge of the land is supposed to take place when the lands are in the hands of the lord; and it is not until the lord grants them out that he acquires the right to the tenths. And he may grant out the lands at different times and to different persons; and in some he may reserve the right to the tenths, and in others not; such reservation operating not strictly as a reservation but as a new grant, by reason of **[318]** the tithes not being actually in existence at the time of the grant. The mode, therefore, adopted in *Pigot* v. *Heron*, of treating these two prescriptions as separate, seems to be the proper and sensible mode of dealing with them; and the result of that case was that the Earl of Northumberland, having the first possession, was held entitled to maintain that possession against all who had not a prior right, and that as the lands were discharged from tithes, Pigot, the plaintiff, in his character of rector, had no right. In short, that case, after undergoing the strictest scrutiny from that most acute of lawyers,

Lord Coke, stands thus: that the tithes, under the word "tenths," passed under the word "hereditaments," that they passed by a grant in gross, that the prescription in discharge of the Church and the prescription of the lord's title were distinct, and that the latter, whether good or bad, did not affect the validity of the former. The case of *Pigot* v. *Heron* is corroborated by those of *Dykes* v. *Thompson*, *Wright* v. *Wright*, and *Phillips* v. *Prytherick*.

Next, as to the fine. It is submitted that the fine and non-claim, with proclamations, is a good bar, not to the Church, but to the plaintiff. It will not bar the next incumbent, but it will bar the plaintiff; and it is no answer to that to say that the plaintiff, who was inducted in the year 1819, did not find out his real title until lately, but acted under a misapprehension of his rights. If the defendant received them on an assertion of title in himself—a title on which the plaintiff knew that his predecessor had been acting, and that the defendant had been acting—the effect of that would be to quiet the defendant in his possession, and the fine would be a good bar if the subject were such as a fine could be applied to. Because, in truth, the object of a fine is to establish doubtful titles and to quiet possession.

But it is said that tithes are things of which a layman could not be possessed, and of which a fine could not possibly be levied. Now, I contend that the power which lay-[319]-men had before the 18th Edw. 3 to sue for tithes in the temporal Courts is restored by the 32 Hen. 8, c. 7. Selden, c. 14, s. 5; F. N. B. 38. That statute is not confined to tithes which belonged to the suppressed monasteries, but the effect of it is to revive the old state of the common law which had been temporarily suspended, in reference to all tithes. In *Pigot* v. *Sympson* the tithes were not derived from a monastery; and the party could not have sued in the temporal Court, except by force of the stat. 32 Hen. 8; and yet it was there expressly held that he could sue either in the temporal or spiritual Court. Again, in *Ridley* v. *Storey* (Daniell, 157; 3 E. & Y. 918), a layman claimed tithes derived from a title antecedent to the suppression of the monasteries; and it was argued that, on that account, the statute of Henry 8 would not enable him to sue in the temporal Court; it was held, however, that the statute was not so limited, but that the party was entitled to sue in the temporal Courts. The suppression of the monasteries may, no doubt, have given rise to the act of Parliament, but there is nothing to warrant the argument that the statute was limited to the circumstances which gave rise to the enactment.

Then, if the statute of Henry 8 revived the common law remedies with respect to tithes, the question arises as to the effect of a fine and non-claim as against a rector or vicar: upon that point there are clear and decisive authorities—Shep. Touchst. 22; *Croft* v. *Howell* (2 Plowd. Rep. 538), *Fanshaw* v. *Rotherham* (1 Eden, 276; 2 E. & Y. 158), *Runcorn* v. *Doe* (5 Barn. & Cr. 696): and the result of those authorities is given in Preston's Conveyancing, vol. i. pp. 235, 236, from which it may be deduced that where an adverse possession is submitted to for five years, ecclesiastical persons are as much bound and estopped in regard to their ecclesiastical rights, by fine and non-claim, as lay persons are in regard to their rights. And it is sub-[320]-mitted that under the circumstances of this case, the lord of the manor of Ford has clearly such a title by possession, as against the rector, as a fine can operate upon. The lord acquired a title to the tithes, adversely to the parson, the moment the £40 a-year was paid on the footing of a discharge.

Supposing that this argument as to the fine does not avail the defendant, the Court will be charged with the burden of deciding on the larger question, whether this case has been established in point of fact.

First, there is no ground for saying that the parson has ever received tithes in kind from the lands within the manor: on the contrary, there is strong evidence to shew an actual possession of the tithes by the lord for at least 300 years. It is said, indeed, that all the deeds do not mention tithes; but none of them are inconsistent with the lord's right, and many of them are made with reference to other objects. But, coupling the parol evidence with the deeds—parol evidence given about 1678, and speaking of reputation which then existed—is it not strong evidence of the lord's title? and can it be supposed that the mortgage (with which the defendant's documentary evidence commences, and which was dated before 1660) would have been taken of the tithes, if there had been reputation that the tithes belonged to the Church, and not to the person who made the mortgage?

Then, with respect to the suits. The case of *Davidson* v. *Blake* appears to have been compromised; but the state of feeling between the parties which led to that compromise is misrepresented on the other side. Notwithstanding the compromise, the rector, by a lease executed after the compromise, but antedated, demises a portion of the tithes to Jenkins. Was that done to assist the patron? Was he not, on the contrary, procuring a champion in the person of Jenkins? And what ground is there for suggesting that the subsequent suit of *Jen*-**[321]**-*kins* v. *Blake* was compromised; that there was any amity between Jenkins and the lord of the manor; or that the bill was dismissed without costs, on the ground of champerty rather than by reason of the establishment of the lord's modus? The violent proceedings which took place at the same time shew the contrary; and during all this time, and afterwards, till Scott brings his action, the lord of the manor continues to collect and receive the tithes, the clergyman taking the £40 a-year.

In 1663 Scott brings his actions. After so long a possession by the lord, the clergyman appointed at the Restoration, and under no bond of resignation, brings his actions and recovers verdicts for tithes; and what is the result? Is the modus put an end to? His right must have acquired considerable publicity, and there is no reason why the conduct of the parties should not correspond with the right so established; and yet, with the exception of a period of Scott's incumbency, during which the £40 were not paid, that payment to the rector has gone on to this day, and not a sheaf of corn has been received by the rector. The release given by Scott will not explain this; for, taking £500 to be the consideration of it, that will not cover the £40 payments for fifteen years due for the manor of Ford, to say nothing of the value of the tithes of Etal during that period. Besides, it is evident, from the parties to the release as well as the consideration, that it could not have related to the tithes of the manor of Ford.

These transactions of Davidson and Scott are the only circumstances on which the plaintiff can rely as shewing interruptions of the prescription. So far, however, from materially aiding the plaintiff's case, they shew that the law exercises a wise and sound discretion when it relies on acts of prescription, and does not permit those acts to be cut down by circumstances of a doubtful and equivocal character; circumstances which are not followed by any **[322]** interruption of that course, the illegality of which they are adduced to prove.

With respect to the argument, upon the resignation bonds, it must be remembered, that before the case of *The Bishop of London* v. *Fytche*, it was no unusual thing for the most respectable noblemen and patrons in this county to take such bonds; and therefore no real objection lies on that score to the conduct of those through whom the defendant claims.

Of the several documents which have been put in evidence by the plaintiff, Pope Nicholas' Taxation affords a fair inference in regard to value in favour of the defendant. On the other hand, the return of 1381 is too vague and uncertain to be acted on against him. Then follow the Valor Ecclesiasticus and the Parliamentary Survey, which respectively put the value of the living at £24 and £250. There is, undoubtedly, great inconsistency in the value stated by these documents; but what is there to repel the money payment of £40 a year? On the contrary, the Parliamentary Survey expressly shews that the whole revenue of the clergyman was derived from the lord of the manor, and that there were no tithes in kind. These documents, however, after all, are of very questionable authority; and their reception in evidence has arisen rather from habit than in conformity with the strict rules of law. The accuracy of these documents is impugned by the Judges in *Tamberlain* v. *Humphreys* (Gwill. 1345; 3 E. & Y. 1367), *Short* v. *Lee* (2 J. & W. 464; 3 E. & Y. 1013), *Drake* v. *Smith* (8 Price, 692; 3 E. & Y. 1012), *Robinson* v. *Williamson* (9 Price, 136; 3 E. & Y. 1038), *Jee* v. *Hockley* (4 Price, 87; 3 E. & Y. 816), and *Atkins* v. *Drake* (1 M'Clel. & Y. 213). [Alderson, B. The Parliamentary Survey is considered very accurate; and in *Bullen* v. *Mitchell* (4 Dow, 297; 3 E. & Y. 757), Lord Eldon and Lord **[323]** Redesdale relied on Pope Nicholas' Taxation.] The Parliamentary Survey has certainly been considered accurate; but, in general, in modern times, these documents are not much relied on: Phill. Ev. vol. 1, p. 404.

The next question is whether, consistently with the evidence on the part of the plaintiff, Heatherslaw is to be taken as part of the manor of Ford. The defendant insists on a modus or payment covering the manor of Ford, of which he alleges

Heatherslaw to be a part. Suppose it turns out not to be a part of Ford; is the modus on that account ill laid, or is the defendant not entitled to the payment claimed by the answer, so far as it applies to what really is the manor? *Uhthoff* v. *Lord Huntingfield* (1 Price, 237; 2 E. & Y. 649) decides that, under such circumstances, the modus is not destroyed, and that the defendant is entitled pro tanto; and there are many cases in which a variation from the principal modus has been treated by the Courts as not destroying the main and principal modus: Eagle on Tithes, vol. 2, p. 362.

But upon the whole evidence it must be presumed that Heatherslaw was part of the manor of Ford. The defendant indeed does not rely on any evidence previously to the release of 1658; but it has been proved that in 1650 the castle was sacked and the papers taken away. In 1658 the owner of Ford and all the tenants of the manor of Ford treat Heatherslaw as part of that manor. If by any possibility that could be a legal course of dealing with it, is it not to be presumed that such a course of events existed as placed it in that situation? Why is the defendant to be called upon, against the modern evidence, to account for the course of events? But take the evidence of the earlier times as stated by the plaintiff. The manor belonging originally to De Muschamp, it appears that Heatherslaw was granted in frank-marriage by De Muschamp to Odinell de Ford the younger, who married **[324]** De Muschamp's daughter; and the manor of Ford was granted to Odinell de Ford the father. Suppose de Muschamp had, in the first instance, conveyed all the manor excepting Heatherslaw to Odinell de Ford, and had then conveyed what he had retained or reserved of that manor, namely, Heatherslaw, to the son; what is there to prevent that? Would it not be in conformity with a vast variety of cases to be found in the books, to the effect that when part of a manor has been conveyed by the lord to one person, and other part to another, both have acquired the reputation of manors? Would it even be inconsistent with law that they should be treated as distinct manors? Would it have been inconsistent with law, if that had occurred of which there is not the slightest evidence of having occurred in this case, namely, the holding of distinct Courts? Yet, in these cases, the reputed manors would again become one entire manor when reunited in the same person. There are many cases where the conveyance of part of a manor has led not only to both parts having the reputation of manors, but to both being treated as manors and both parts holding Courts; and yet upon returning to the same proprietor they would become one again: *Shears* v. *Crease*,(*a*) *Steel* v. *Prickett* (2 Stark. 471), Com. Dig. Copyholder, 21, Scriv. Cop. 10, *Braggs's case* (Godb. 135), *Smith* v. *Bonsall* (Goldsb. 117), *Harris* v. *Nicholls* (Cro. Eliz. 19), *Morris* v. *Smith* (id. 38), *Denny's case* (2 Leon. 190). Taking these cases into consideration, the fact that some of the documents speak of Heatherslaw, Crookham and Kimerston as separate manors is immaterial. In fact the plaintiff's own evidence on that subject is extremely weak; for not a single court roll of the manor of Heatherslaw has been produced, and the inquisitio post mortem of Edward Heron (13 Edw. 3), actu-**[325]**-ally speaks of Kimerston as part of the manor of Ford. Connected with this part of the case is to be considered the important fact that Heatherslaw has never paid tithes in kind.

With respect to Catford Law, the payment of tithes for it by the party who held it after its separation from the manor 180 years ago, is not a circumstance sufficiently strong to counteract the effect of the evidence of the payment covering the whole manor.

Upon the whole it is submitted that a decree being consequential only on a clear legal right, the present plaintiff is not entitled to that relief. It is impossible to come to the conclusion that a clear undoubted legal right is established in this case. There is nothing unusual in the stipendiary payment here set up, more especially if regard be had to the part of the country in which it has been made. From the earliest period there is a reputation of such payment, without any interruption except in times of general disturbance. Your Lordship has early deeds, you have early reputation, you have a long course of perception, and you are asked to disturb this and to decide against it upon conjecture, upon surmise, upon ingenious reasoning applied to a state of facts involved in considerable uncertainty, and pertaining to a time concerning

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(*a*) Not reported.

which correct information cannot be obtained. The existence of the perception on which the defendant relies stands for a sufficiently long period of time free from doubt and question. During the whole course of time embraced by this cause there are but three resignation bonds, and yet there has occurred in this case what is very seldom witnessed, the most faithful exhibition of every record, paper and document in the possession of the party making the defence. There is not a scrap of paper that might be injurious to his interest which has not been produced, whether consisting of cases laid before counsel, correspondence with his attorney or any other documents calculated to lead to injurious con-**[326]**-clusions against him; and that too in a case in which the defence necessarily depends on long usage—a species of defence liable to the introduction of uncertainty from the ignorance of parties of the manner of defending their rights. In the present case the long course of usage is attempted to be disputed by arguments the most refined, and by evidence of every little fact and circumstance which has occurred in the long period of years embraced in this case. To allow a case to be defeated on any such evidence would be contrary to the course of authorities and contrary to the rules which are essential to the security of property. No facts are offered in evidence against this modus, but such as necessarily arise from the effluxion of time. In conclusion, the judgment of Mr. Justice Littledale in *The Queen* v. *Archdall* (3 Nev. & Per. 696), embraces the true principles on which the present case ought to be decided for the defendant.

Jan. 8th, 1841.—ALDERSON, B. This case was argued before me at the last sittings in Serjeants' Inn Hall, at great length and with distinguished ability and learning. And I have to express my thanks to the learned counsel, who appeared on that occasion, for the great assistance which they have rendered to the Court.

The plaintiff, Mr. Knight, has filed his bill, claiming an account of tithes from the defendants. He is the rector of the parish of Ford. The defendants are occupiers of lands within the rectory; and they admit his title as rector and their liability to the account, unless they are able to substantiate affirmatively in point of fact, and to support in point of law, the validity of the defence which they have put upon the record.

That defence may be thus stated: they say, first, that the manor of Ford is, and from time immemorial hath **[327]** always been, situate within the parish of Ford. They then aver that from time immemorial there has been payable by the owner of the manor of Ford for the time being, to the rector of Ford, the sum of £40 annually, by two equal payments at Lady-day and Michaelmas, in lieu of all tithes; and, further, that from time immemorial the owner for the time being of the manor of Ford, or his assigns, have been accustomed to have, and in respect of that sum of £40 so paid to the rector ought to have, the tenth of all titheable things arising within the manor.

This prescription is the foundation of the defence, both of the Marquess of Waterford and his tenants, and of Mr. Askew and his tenants. The former set up the title to the tithes now claimed by the rector, as being in the marquess as owner of the manor of Ford. The latter, as to part of their lands, set up a title to the tithes in Mr. Askew, derived by express conveyance from Sir John Hussey Delaval, a former owner in fee-simple of the manor, executed in the year 1768, to Mr. Askew's ancestor; and as to the residue, rely on the title of the Marquess of Waterford, with whom they say they have accounted for the tithes due. Both aver the immemorial and continuous payment of the £40 down to the period when the present plaintiff refused to receive it, namely, in 1822.

The first point which was argued before me is whether this prescription, as stated on the record, is valid in point of law. The authorities on this subject have all been brought before the Court. The prescription, indeed, is double: the first branch of it is, in fact, the assertion of an ordinary district modus in lieu of tithes; and, if the evidence laid before the Court established that position, I apprehend that the addition of the other branch would not vitiate it. But the difficulty is that all the facts of the case are inconsistent with this conclusion. A modus in lieu of tithes is inconsistent with the receipt of tithes in kind by any one. All the evidence on the part of the **[328]** defendant, however, is calculated to shew, if it shews any thing, that the lord of Ford immediately received the tithes, and that the rector did not—that he has sold the tithes and conveyed them—as the ancestor of the Marquess of Waterford did, to the ancestor of his co-defendant, Mr. Askew.

This defence, therefore, fails in fact; and the question must arise and must be

determined upon the compound prescription, including both branches; for the evidence certainly supports nothing else.

The first question, then, arises as to the validity in point of law of such a defence. No case certainly has, as yet, gone to this extent. The cases of *Pigot* v. *Heron*, *Pigot* v. *Sympson*, and *Phillips* v. *Prytherick*, which were cited, establish this proposition—that a layman may prescribe in a que estate to have tithes as appurtenant to a manor or to lands. And this, in the case of a manor, is stated in the books to depend upon the supposition that before time of memory, the lord, being seised of the manor, may have, with the assent of the patron and ordinary, lawfully entered into a bargain with the parson, to pay to him a certain pension, and in lieu thereof to have the tithes of the land within the manor; and that either by retainer he may himself enjoy, or by a prescriptive bargain with his tenants, he may take from them the tithes of their lands within the manor. The same supposition may be made in the case of the proprietor of land; and so tithes may be lawfully appurtenant to a manor or to land. But no authority has been cited which goes any further, and which establishes that there has ever been allowed a prescription for the lord of the manor or the proprietor of land, and his assigns (meaning the persons to whom he may assign the tithes), to take the tithes from the terre-tenants. For the effect of this would be to make the right of taking the tithes assignable from one layman to another, and would make a layman capable of tithes in gross. I entertain, **[329]** therefore, great doubts on this ground as to the validity, in point of law, of this prescription. But, independently of this difficulty, which is a question of law, another point was made in the course of the argument, tending to the same result. It was suggested that a very great inconvenience might follow from such a prescription, if allowed. For the lord of the manor might alienate all the lay possessions of the manor; and then the parson, if the tithes also were assignable, might have nothing left out of which his pension could be secured. But inasmuch as the parson, patron, and ordinary, had the absolute power in ancient times of disposing of the tithes, they had the right to make, and may have in fact made this bargain, however improvident such an arrangement must have been for the Church. And, therefore, I entertain some doubts whether, strictly speaking, that argument raises a difficulty in point of law. Thus a modus is said to be invalid if it be rank; but I conceive that the rankness of a modus is not, strictly speaking, an objection in point of law to it. If there could be produced the original deeds containing the agreements, made at the proper period, and executed by the proper parties, such a modus would be valid. But the truth is that a Court of Equity, judging both of the fact and of the law, determines from the gross absurdity of the bargain that no such bargain was ever in fact made, and does not think it necessary to subject such questions to further investigation. And so such questions, being habitually determined by the Court, have come to be considered questions of law and not of fact, to which latter class, however, they, more correctly speaking, belong. Here, therefore, if the prescription set up involves circumstances which induce this Court to come to the conclusion that no such bargain could ever have been made, this Court may act on these circumstances, using them as criteria for its decision in point of fact alone.

And this it will be, perhaps, most judicious to do on **[330]** the present occasion. I shall therefore not consider myself bound, by this latter difficulty, to hold that this is an illegal prescription, but shall allow that objection to have its weight in the course of the examination which it will be my duty to make as to the facts of the case. If the result of the whole should be that the Court thinks the proper inference from all the facts is that reasonable persons, acting on the one side and the other, have in fact made this arrangement before time of legal memory, then I propose to decree that the bill should be dismissed with costs, subject only to the plaintiff's privilege of having an issue in case he is advised to claim it. And, on the other hand, if the inference be that this is a mere usurpation, arising out of arrangements made at a comparatively modern period, the plaintiff will be entitled to an account, and to have the costs of this suit.

The defendant's case, therefore, must first be stated; and it depends, in the first place, mainly on certain uniform payments to the parson, which are traced back by receipts as far as the year 1690, the first receipt being of that date, and signed by George Chalmers, then rector of the parish, for half a-year's payment, and stated to be for all manner of tithes. These receipts are produced in such numbers as to be, coupled with the evidence of payment from the steward's books, very fairly considered

as proving a sum of £40 continuously paid from 1690 to the year 1822, at the time when the present dispute arose. They vary, indeed, in some important particulars, both as to the nature of the payment, the periods of payment, and the description of the district for which the payment is made. The payment is called a modus or seisin, and in some cases a rent. The times of payment are certainly not uniform. And the district is sometimes described as the estate of the person paying situate in the "parish" of Ford, a description by no means unimportant, when the other circumstances of the case are looked at. In other receipts the district is **[331]** called "the lordship of Ford," which accords better with the defendant's present pleadings. But no doubt much weight is due to this body of evidence; and I have on former occasions expressed, and still retain the opinion, that much of obscurity and somewhat of variation may fairly be expected to be found in cases like the present, where the evidence extends over a long period of time, without greatly detracting from the importance of the proofs.

In addition to this body of evidence, the defendant incidentally, by the depositions produced in the suits in equity, which have been laid before the Court, has shewn that a payment of £40 per annum certainly existed at a period earlier than 1690.

The other branch of the defendants' prescription depends mainly on the proofs of the lord of Ford having dealt with the tithes—having sold them—having made them securities for money, and the like. These dealings, which are numerous, extend back to 1658; and are proved by the deeds coming from the custody of the defendants.

Then come the suits in equity, which may be considered as applicable to the two branches of the prescription taken together. The earliest of these suits is that instituted by Davidson against Blake in 1676; and certainly no one in reading through that document alone would have supposed that the prescription as now pleaded was then in existence. For Davidson having, in his bill, claimed tithes in kind as well as relief from the suit upon the resignation bond, Blake, in his first answer, claims merely a modus decimandi for his lands in the parish of Ford of £40, which he explains in his further answer as being a modus for the demesne lands of the manor of Ford.

The later suits, however, set up the present prescription in both its branches; and, indeed, in the same terms almost as it is now pleaded. But the evidence produced **[332]** before the Court on those occasions, and the facts deposed to of very material variations in the amount paid, which are by no means satisfactorily explained, and the apparent collusion between the parties, do not, I think, entitle this part of the evidence to much, if to any weight, in favour of the defendants. On the contrary, it has appeared to me, on examining it as carefully as I can, to throw considerable light on the plaintiff's case.

The plaintiff's counsel make several points in answer to the defendant's case.

First, they say that, from a series of ancient documents, they can shew that this payment of £40 could never have existed at so early a period as the reign of Richard the First.

It is very difficult to determine cases on conclusions drawn from such sources. These documents certainly shew that the value of the living, during the time of the wars of the border, was reduced to almost nothing. But some of them also shew that at an earlier period it was much larger—sufficiently large indeed to have included this payment of £40 as a portion of it. And all that we can, I think, fairly infer from the later documents is that it is somewhat more probable that the whole value was of a fluctuating description, likely therefore entirely to be affected and wasted by the ravages of border wars, rather than that it consisted of a fixed salary as to part, and a fluctuating profit as to the residue. On the other hand, if the fixed salary were payable by the lord, and his whole property, as well as the residue of the tithes, were wasted and destroyed by the same wars, it might perhaps be considered that the lord might be unable to pay, and that his inability to pay the fixed portion might fairly account for the description of the rector's whole income as destroyed and wasted by the hostile incursions. Much weight, therefore, cannot be given to these documents.

[333] The next point made is that the manor of Ford did not originally include the manor of Heatherslaw; and to shew this, a variety of ancient documents have been laid before the Court. It is not my intention to examine these in detail. I think the result of the whole is that the manors were originally separate, and that they did not unite under the same lord till the 6 Henry 6th, a period long after legal memory

But this alone does not entitle the plaintiff to my judgment, except as to the lands of Heatherslaw.

The prescription is for the manor of Ford; and though Heatherslaw is not a part of it, it may still be good for that which is included within Ford itself.

But, in one point of view, the separation of Heatherslaw from Ford is a circumstance of which the plaintiff is entitled to avail himself. Some of the receipts put in by the defendants speak of the £40 as paid for the estate of the person paying it in the parish of Ford; and the original answer of Blake, in the first suit, claims the modus for all his lands in the parish of Ford. Now we find that Catford Law, which is in the lordship of Ford, has paid tithes; and this has been done, it may be fairly said, looking at some of the evidence in the suits in Equity, ever since Catford Law ceased to be part of the estate of the ancestors of the Marquess of Waterford. And again, it appears that Heatherslaw, which was not part of the lordship of Ford, and not originally in the possession of the owners of Ford lordship, did, under the £40 claim, and at some period when it was in their possession, obtain exemption from tithes; and the same may be also said of other portions of land since included in the same estate. These facts, coupled with the wording of the receipts, and of the original answer, look as if the £40 was really paid as a compensation for the tithes of the estate of the person paying it, howsoever circumstanced, if within the parish of Ford, and would seem to point to a lease from **[334]** time to time granted and continually renewed, at the same rent, by the rectors to the owners of the tithes of their estate for the time being, as the origin of the whole.

Certainly, the payment of tithes for Catford Law is a very strong fact for the plaintiff. It may be said that the lord of Ford had no power over the proprietor of Catford Law after he sold him the land and the tithes. It is not entirely clear to me that he did sell to him the tithes; and if he did not, he had the right to take these tithes himself, supposing this prescription well founded. But, supposing that he did, by the deeds he executed, pass the tithes from himself to the owner of Catford Law, it is a very strong fact against his having that right, that a person in 1658, well acquainted with all the facts as they really existed, to whom the tithes had been conveyed, should, from that time, have surrendered so valuable a right, and yielded these tithes to the usurping rector. Such a thing is highly improbable; and when I find that this person who yielded had no power over the rector, and that the person who resisted was the patron holding the rector under bond of resignation—a state of things uniformly kept up almost to the present time—I own the fact of the continued payment of tithes for Catford Law seems to me a very strong fact in favour of the plaintiff's right. We must add to this fact the variations in the amount of the payment proved in the course of the suits, and which occurred almost at the same period of time when this separation took place. The clergyman appointed during the usurpation, not being under the control of the patron, received £60 and not £40. Indeed, it seems as if the moment the power of the patron ceased to have weight, that the £40 is either varied or tithes in kind claimed and paid. There are also other objections to the defendants' claim. It includes all tithes, and, in truth, the defendants' documents speak of all tithes. Yet, it is clear that the rector has received some kind of tithes of small **[335]** amount in the lordship of Ford, and even from that part of it which belongs to the defendants.

I shall make few observations on the documents disclosed by the bill of discovery.(*a*) They shew an apprehension of the weakness of the defendants' title entertained at the time, and a great readiness on the part of the clergymen presented to give up the right of the Church without due inquiry. They exhibit the evils of lay patronage, especially where the proprietor of the lands subject to the tithes is the patron; and, pro tanto, they diminish the value of the series of receipts signed by the clergymen so conducting themselves. But, in general, I think, we are apt to place too great reliance on apparent manœuvering, and to consider that to be actually fraudulent, which perhaps may have been only an indirect proceeding of a weak person in order to improve a case which he thought not sufficiently clear before.

Upon the whole, however, considering all the facts of this case, and reverting to the observation before made, that the prescription itself set up is of a very improbable

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(*a*) As to this suit, see ante, vol. 2, p. 22.

nature, and therefore requiring very clear proof, I have come to the conclusion that the defendants have not made out satisfactorily such a prescription in point of fact.

If I saw that any further advantage could be obtained by the oral examination of witnesses, I would direct an issue to determine these points. But the question depends on documents almost entirely. There is indeed no disputed fact raised by the depositions of the witnesses; and it would, I think, be absurd to send to a Judge and jury at Nisi Prius, to determine off-hand a mere question of fact, which depends on a careful investigation of documents which I have myself reviewed, and which have required a long lapse of time for me to read over and carefully weigh.

The defendants made, however, one other point, to which I shall shortly advert. They contended that the plaintiff's [336] right was barred by the fine which has been levied. But I think it was not. These tithes remain spiritual, according to the view I take of the facts of this case. They have been always received under what must be considered in the opinion of the Court to have really and legally been a composition of £40 for them. If this view of the facts of the case be correct, the fine can have no operation: and if the opposite view be correct, it is not material to consider the question; for the foundation of the decree will fail.

Upon the whole, I have arrived at the conclusion that I ought to decree for the plaintiff an account of the tithes due and the costs of the suit.

Decree accordingly.

ANDERSON *v.* WALLIS.(*a*) Dec. 17, 1840; Jan. 12, 1841.—A testator bequeathed certain leaseholds to A. for life, with remainder to his children, and directed that A., whom he made his executor, should from time to time, and at the proper periods, renew the leases. He also gave an annuity to B., which he charged on the residue of his personal estate. Some years after the testator's death, B. filed a bill against A. to enforce payment of the annuity, and also as next friend of the infant children of A., praying that the leases might be renewed for their benefit: Held, that B. and the infants were improperly joined as plaintiffs, their respective interests being wholly unconnected with each other; and the bill was on this account dismissed at the hearing.—Semble, that where one of several partners, plaintiffs, dies, the suit survives to the others.

[S. C. 10 L. J. Ex. Eq. 9; see p. 590, post.]

R. Marsh by his will gave and devised all his messuages, lands, tenements, and hereditaments, situate at Westwick, in the county of Durham, and held by several leases under the Dean and Chapter of Durham, to William Wallis and Maria, his wife, who was the testator's daughter, and George Marshall, their executors, administrators, and assigns, for and during all the testator's estate and interest therein, upon trust to do every act that might be necessary for obtaining new leases of the premises from time to time, as often as the said William Wallis and Maria, his wife, or the survivor of them, or the trustee for the time being of the same premises should think proper, and by and out of the rents and profits of the same premises, to pay the rents reserved to the Dean and Chapter, and to perform the covenants contained in the present and all future leases [337] of the premises, and also to pay the fines payable on renewals of such leases; and subject thereto, upon trust to pay to or permit and suffer the testator's daughter, M. Wallis, to receive the rents and profits for her life, and after her decease, upon trust for the benefit of her children, as therein mentioned. And the testator gave the residue of his personal estate to his daughter, Maria Wallis, subject to an annuity of £25 to his sister, Hannah Anderson. And he appointed Wallis and Marshall executors of his will; but he afterwards, by codicil, revoked the appointment of Marshall.

Upon the testator's death in 1827, Mr. and Mrs. Wallis took possession of the leasehold premises.

The bill was filed by Hannah Anderson, and the infant children of Mr. and Mrs. Wallis by Hannah Anderson, their next friend, against Wallis and his wife, alleging that Hannah Anderson's annuity was in arrear, and also that Wallis and his wife had fraudulently omitted to renew the leases for the benefit of the infants; and it prayed

(*a*) See *Davies* v. *Quarterman*, ante, p. 257.

an account of what was due to the plaintiff, Hannah Anderson, in respect of the annuity, and that the arrears might be paid, and that a proper sum might be invested in the funds to secure due payment of the annuity in future, and that the defendants might admit assets sufficient for this purpose, or that the usual accounts might be taken of the testator's personal estate, and that it might be applied in a due course of administration, and that Wallis and his wife might be decreed forthwith to procure renewals of the leases at their own expense, and for an injunction to restrain them from receiving the rents, and for the appointment of a receiver.

On 11th May, 1840, the plaintiffs moved before the Lord Chief Baron for a receiver, but the motion was refused. A suit was then instituted in the Court of Chancery on behalf of the infants, by another next friend, under which an order, dated the 15th June, was obtained, refer-**[338]**-ring it to the Master, to inquire whether it would be for the benefit of the plaintiffs that any and what renewed leases of the premises should be obtained.

The present cause now came on for hearing; and a motion was at the same time made on the part of the defendants, that it might be referred to the Master to inquire whether the cause in this Court, or that in Chancery, was most for the benefit of the infant plaintiffs. This motion was opposed on the ground of lateness of the notice of motion; the notice not having been given until after this cause had been set down for hearing; but as the bill in this Court was dismissed, it became unnecessary to decide upon the motion, except as to costs.(*a*)

Upon the hearing of the cause, a preliminary objection was taken for misjoinder of plaintiffs.

Mr. Stuart and Mr. Faber, for the defendants, in support of the objection. The plaintiff, Hannah Anderson, and the infants, have no common interest. Parties filing a bill must have a common interest as plaintiffs; and legatees are no exception to the rule. It may be said that both parties claim under the will, and that if the testator had given £1000 to Mrs. Anderson, and £1000 to the infants, they might have joined. We do not deny that they would then have had a common interest. But specific legatees cannot join pecuniary legatees; because the rule as to abatement of legacies has no place between them. Hannah Anderson does not pray that her annuity may be paid out of the leaseholds: has she then any interest in compelling a renewal? Again, have the infants any interest in the annuity? The payment or non-payment of it can produce no benefit or inconvenience to them. This case is analogous **[339]** to *Cholmondeley* v. *Clinton* (4 Bligh, 123). There the heir and devisee sued as plaintiffs, having entered into an agreement to cure the vice of misjoinder; but Lord Redesdale said that it was impossible that any decree could be made upon that bill, because the co-plaintiffs had opposite interests. Besides, if the plaintiff in equity dies, it is generally an abatement of the whole interest. There is an exception in the case of joint-tenants. [Alderson, B. As partners, for instance. If one dies, I apprehend that the suit would survive to the others.] That would depend on circumstances, the contract with partners being several as well as joint. It is unnecessary to state the authorities which have been so recently before the Court. Mrs. Anderson has not only a distinct interest from the other plaintiffs, but she sues the defendants in distinct characters. She seeks payment of her annuity out of the residue, and for this she charges them as executors; and at the same time she seeks to enforce against them a distinct trust for the benefit of the infants, proceeding on the ground that the disposal of the leaseholds has been assented to.

That the objection for misjoinder may be taken at the hearing is clear from *Cholmondeley* v. *Clinton*, *Bill* v. *Cureton* (2 Myl. & K. 503), *Leonard* v. *Flight*,(*c*) *Sigel* v. *Phelps* (7 Sim. 239).

(*a*) See post, p. 344. On the argument of the motion, *Murray* v. *Shadwell*, 17 Ves. 353; *Nalder* v. *Hawkins*, 2 Myl. & K. 243; and *Fox* v. *Suwerkrop*, 1 Beav. 583, were cited.

(*c*) [4 L. J. Ch. 225.] In Chancery, 7th June, 1835; on appeal to the Lords Commissioners from the decree of the Master of the Rolls. In the course of reading the evidence, a discovery was supposed to have been made that one of the plaintiffs had no interest, and the Court stopped the argument to have this fact looked into; it appeared, however, in a few moments, on further examination of the documents in the cause, that the plaintiff in question had an interest; and the appeal was then pro-

Mr. Simpkinson and Mr. Pigott, contrà. It is only when **[340]** parties have conflicting interests that they cannot join as plaintiffs. We deny that pecuniary and specific legatees cannot join as plaintiffs. There is no conflict between them. Either a specific or a pecuniary legatee may join a residuary legatee as plaintiff. Both have an interest in having the instrument under which they claim carried into execution. Formerly all legatees were parties. Afterwards, on a bill by one legatee, all the legatees came in before the Master. Suppose the bill had been filed by the residuary legatees only, would there not be an account of all the legacies? Perhaps there is no case in print in which the question whether a specific or general legatee can join with a residuary legatee has been much discussed. In *Campbell* v. *Mackay* (1 Myl. & C. 603), where the demurrer was for multifariousness, it appeared that one of the co-plaintiffs was in fact a specific legatee, but it never was thought of objecting to him on that ground; and certainly it has never been held that a specific legatee and a residuary legatee cannot join as plaintiffs. Lord Redesdale's observations in *Cholmondeley* v. *Clinton* apply to the case where one plaintiff has no interest, or both have conflicting interests, and the objection is taken by demurrer. Those observations are commented upon by Lord Eldon (Turn. & R. 114). Here there are no conflicting interests. It might as well be said that different creditors cannot join as plaintiffs. But the Courts have gone so far as to allow both creditors and legatees to join. In *Stagg* v. *Cox* (in Chan. 8 Feb. 1773) the bill was brought against executors by a bond creditor on behalf of himself and all other the creditors, and by a legatee on behalf of himself and all other the legatees. Such bills are frequent; and such was the frame of the pleadings in *Salvidge* v. *Hyde* (5 Madd. 138; Jac. 151). That case came on appeal before Lord Eldon, who over-ruled the decision; but it was on the ground of the purchaser not being made a defendant. It is clear **[341]** therefore that a creditor and legatee may join as co-plaintiffs; and yet, what interest has the creditor in the legacy? None. If he is paid, the suit is at an end as to him. Then what difference is there if a general and specific legatee are joined plaintiffs in one bill? Although the defendants may admit that all the debts are paid, yet there may be some unpaid, and the creditors may come on the specific legatee. If a general and specific legatee cannot join, there can be no direction in a suit by a general legatee for payment of a specific legacy. Yet in Seton (Seton on Decrees, 62) there is an instance of such a direction. It is clear that both general and specific legatees have an interest in the account, that is, to clear away debts; otherwise they would be liable to refund. If so they may be co-plaintiffs: *Beddington* v. *Harwood* (Turn. & R. 477), *Rhodes* v. *Warburton* (6 Sim. 617), Story Eq. Pl. 320. [Alderson, B. Suppose there is one defendant against whom two plaintiffs file a bill for different causes, one to set aside a deed, and the other to make him account as executor; can the objection for misjoinder be taken at the hearing?] We submit that it cannot. [Alderson, B. Then it is a matter of discretion with the Court whether the cause shall be heard. Suppose the Court heard the cause, and decided it against one plaintiff and for the other, and the losing plaintiff did not acquiesce, on appeal he would carry the other man before the court of appeal.] The answer to that would be that the plaintiff in favour of whom the Court had decided could not complain, inasmuch as he had married himself to the other for the purposes of the suit.

Supposing the Court should be of opinion that this is a misjoinder, the objection should have been taken by demurrer or answer, so as to enable the plaintiffs to amend their bill: *Raffety* v. *King* (1 Keen, 601), *Wilkinson* v. *Parry* (4 Russ. 272), **[342]** *Lambert* v. *Hutchinson* (1 Beav. 277), *Mortimer* v. *West* (3 Russ. 370), *Story* v. *Johnson* (ante, vol. 2, p. 591, 598). The same has been held in cases of clear multifariousness, and not mere misjoinder: *Ward* v. *Cooke* (5 Madd. 122), *Wynne* v. *Callandar* (1 Russ. 293), *Whalley* v. *Dawson* (2 Sch. & L. 367), *Robinson* v. *Somes* (1 Y. & J. 578).

Mr. Stuart, in reply. The ordinary cases as to demurrer for multifariousness have no application here. The pleading of the plaintiffs is essentially vicious. The infants as one set of plaintiffs, and Mrs. Anderson as another, come upon a record so framed

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ceeded with. In this case Lord Commissioner Shadwell said that if one of two co-plaintiffs appear to have no interest, no decree can be made; and if this appear upon the face of the bill, a demurrer will hold. And see *Page* v. *Townsend*, 5 Sim. 395.—From Mr. Faber's note.

that the Court will give no decree. No doubt a creditor may join a legatee in a suit for the administration of assets. This, however, is not a suit for administration. It proceeds on the ground that the parties are in possession of their legacies. The object is not to recover a legacy, but to act on the covenants contained in the instrument, which is the subject of the specific gift. As regards the infants, the plaintiffs say that the assets are collected and the estate is clear, and that there is no pretext for not obtaining a renewal of the leases; and even as regards Mrs. Anderson, it is not asked that her legacy may be paid, but that a specific sum may be set apart for payment of it. This is quite apart from asking that the debts may be cleared away, and the assets ascertained. Then it is said that the objection should have been taken by demurrer; but that is not necessary if the Court, at the hearing, sees that the bill cannot be sustained without great inconvenience. Suppose Mrs. Anderson dies, would it not be extraordinary that the whole suit and proceedings for the renewal of the leases, with which she has nothing to do, should abate?

ALDERSON, B. The question which has been discussed **[343]** is one to which I have given a good deal of attention, but I shall nevertheless take time to reconsider it.

The plaintiffs' counsel were then heard upon the merits, but the cause proceeded no farther; for the Court, as will be seen from the judgment, dismissed the bill on the question of pleading.

Jan. 12th, 1841.—ALDERSON, B. It is not, I think, necessary to hear the counsel for the defendants upon the merits of this case; as, after consideration, I have come to the conclusion that this bill must fail upon the preliminary objection which has been fully argued.

It is not necessary for me to state again at length the principles which seem to me to govern these questions, as I have so lately stated them in the case of *Davies* v. *Quarterman* (ante, p. 257). Applying them, however, to the circumstances of the present case, it appears to me that the misjoinder of the plaintiffs, in a case like the present, prevents me from making, with justice, a final decree. Here, in fact, are two suits wholly unconnected with each other. One plaintiff seeks relief, in which the other is neither directly nor indirectly concerned; and, which is an additional circumstance of inconvenience, the plaintiff who claims relief for herself in one suit is claiming another relief, as the next friend of infants, in the other. If she dies, the suit will abate, though, as to that portion of it which she has instituted as next friend, it would not abate but for the misjoinder. Again: supposing the Court to decide her own suit in her favour, and the other branch of it against the infants, I do not see in what way the infants can procure redress, in case the plaintiff, as next friend, refuses to take any further steps; or, if the reverse were to take place, the infants might be delayed in the redress awarded to them by an appeal interposed by their own next friend, on her own behalf.

[344] It was said that these inconveniences arise to the plaintiffs from their own act of misjoinder of suits, and ought not to be relied on. This, if true as to some cases, is not, however, applicable to this in which infants are interested.

On the whole, it is admitted that this objection is one in which it is for the Court to exercise its discretion; and, as no case can be cited in which such a joinder of plaintiffs has been allowed, and as many inconveniences will follow from allowing it to affect the decree which the Court would be in this case likely to pronounce, I think I shall best exercise that discretion by dismissing this bill. And as there was at the time when this bill was filed, a bill pending in the Court of Chancery, under which Mrs. Anderson, by the agreement stated and argued on by her own counsel, would, as it seems to me, have obtained all the relief she personally requires, I think it must be dismissed with costs.

As to the bill filed by another next friend of the infants, I do not rely on that further than to observe that I am quite satisfied that under it the infants will be fully protected, either by the case as it now stands before the Master, or by those who here represent their interests intervening in that suit, in case they have any well grounded facts to shew that that suit is at all collusively conducted. So that the dismissal of this bill will not really injure their interests, if those interests be in truth the motive for its institution, upon which I have some doubt.

As to the motion made by the defendants, and which was heard with the cause, the present opinion expressed by the Court makes it unnecessary to decide it. On

the one hand, I should not in any event have allowed them the costs of it, on the ground of the lateness of the period at which it was made; and on the other hand, I am not so satisfied with the affidavits of the plaintiffs, in answer to the defendant's case, as to think them entitled to the costs of the motion. This bill must therefore be dismissed with costs. But neither party must have the costs of the motion.

[345] PLUMBE *v.* PLUMBE. Jan. 11th, 1841.—A general charge that a defendant claims an interest in the matters in question in the suit is insufficient to avoid a demurrer.—A bill in Equity in the form of an equitable ejectment bill against one person, and a bill to redeem as against another, is multifarious.

[S. C. 10 L. J. Ex. Eq. 33. See p. 592, post.]

The bill stated that Thomas Plumbe, formerly of Skelmersdale in Lancashire, and afterwards of the Havannah, was in his lifetime, and at the time of his decease, seised of an estate in fee-simple, or some other estate, in 20 acres of land called Spencer's, an estate called Prescott's, and 11 acres of land called Eleven Acres, part of which had been purchased by him after the others, and the other part allotted in respect of Spencer's and Prescott's. That Spencer's and Prescott's were subject to a mortgage debt for £316; that the 11 acres were not included in that mortgage, but that the legal estate therein was outstanding in the defendant, Ann Plumbe, or some other person as trustee for the plaintiff. That Thomas Plumbe died abroad in 1817, leaving John Plumbe, his eldest son and heir-at-law, who died very shortly after the news of the death of his father reached this country, leaving the plaintiff his heir-at-law, and also heir-at-law of Thomas Plumbe. That John Plumbe died without having executed any deed, or doing any act affecting the estates, and that the plaintiff thereupon became entitled to them, subject, except as to the 11 acres, to the mortgage. That the plaintiff being very young at the time of his father's death continued for a time to reside with his mother, Ann Plumbe, on the estate. That Ann Plumbe was authorized by Thomas Plumbe to receive the rents of the estate; and owing to the youth of the plaintiff, continued to receive the rents after the death of Thomas Plumbe and John Plumbe. That the plaintiff being of a wandering and unsettled disposition, enlisted as a private soldier in the Guards in 1819. That the plaintiff's right accrued in 1819; but that being of a careless character, he never until lately inquired into his rights, and permitted Ann Plumbe to remain in possession; but that having lately ascertained his rights, he required her to give up the premises. **[346]** That Ann Plumbe, however, alleged herself to be the assignee of the mortgagee, and refused to give them up till all arrears of the mortgage money were paid. That the plaintiff was desirous to redeem the premises, being entitled as heir-at-law of the mortgagor, and that he had made frequent applications to Ann Plumbe to convey and assign the premises to him, he being ready and willing to come to an account, &c.; but that the defendant, Ann Plumbe, combining and confederating with her son, the defendant, Thomas Copeland Plumbe, who claimed to be interested in the premises, and with her daughters, the defendants, Ann Plumbe and Ellen Plumbe, and with the defendant, James Ashurst of Lancaster, refused to comply with such applications; and as an excuse for such her refusal, the said Ann Plumbe pretended that Thomas Plumbe was not dead; whereas the plaintiff charged that she had received a letter from the Havannah in 1817, containing particulars of the death of Thomas Plumbe, and that she gave herself out as his widow, &c. And the plaintiff further charged that Thomas Plumbe was in the enjoyment and possession of Spencer's and of Prescott's from 1792 to the day of his death; that the defendant, however, pretended that he had executed some settlement of all the estates, and that she was in possession under the settlement, whereas the plaintiff charged the contrary, and that the settlement which was made upon the marriage of the defendant, Ann Plumbe, in 1788, embraced only the fortune of the defendant. That the defendant pretended that, in 1809, she sold a leasehold estate to Thomas Plumbe, in consideration of his executing a settlement of the estates in question; and that, consequently, by indentures of lease and release, dated the 7th and 8th December, 1809, and made between Thomas Plumbe of the one part, and one Draper and the defendant Ashurst of the other part, the said Spencer's estate, and also the Eleven Acres were conveyed to Draper and Ashurst and their heirs, in trust for Ann Plumbe **[347]** and her assigns during her life, with remainder to Thomas

Plumbe and his assigns during his life, with remainder to trustees to preserve &c., with remainder to John Plumbe, Ann Plumbe, Thomas Copeland Plumbe, and Richard Plumbe, as tenants in common in fee: whereas the plaintiff charged that no such indentures were ever made or executed by Thomas Plumbe; or if made, they were not made for any valuable consideration; or, at all events, that the said indentures were void as against the plaintiff, and if not void, comprised only the Spencer's estate, and not the Eleven Acres. That Ann Plumbe had procured the legal estate in the Eleven Acres to be conveyed to herself or to some trustee for her. That Ann Plumbe, at other times, pretended that, by virtue of certain indentures of August, 1832, the mortgage was assigned to the defendants Jane and Ellen Plumbe, in trust for Anne Plumbe, whereas the plaintiff charged the contrary; or if Ann Plumbe obtained such assignment, she was enabled to do so with the plaintiff's money, &c. The bill then charged that the said James Ashurst alleged that he was the surviving trustee under the said settlement.

The bill prayed that the plaintiff might be at liberty to redeem the mortgaged premises, or in case it should appear that Thomas Plumbe did execute the settlement, then that the mortgage might be apportioned, &c.; also that the legal estate in the Eleven Acres might be conveyed to the plaintiff.

To this bill Thomas Copeland Plumbe, who was made a party by amendment, demurred for want of equity and multifariousness, and also for want of parties.

Mr. Sutton Sharpe and Mr. Follett, for the demurrer. There are a variety of objections to this bill. First, it does not state the exact time when John Plumbe died, upon the happening of which event the plaintiff's title accrued. But supposing the plaintiff's title to have accrued in 1819 **[348]** (and uncertain averments must be taken most strongly against the pleader, the plaintiff is barred as against this defendant by lapse of time: 3 & 4 Will. 4, c. 27; *Fyson* v. *Pole* (ante, vol. 3, p. 266). Secondly, the bill shews no right to come into this Court for the Eleven Acres; all the equity alleged as to that being comprised in a mere general statement, that the legal estate is outstanding in trustees. Then as to this particular defendant, there is no averment whatever, except that he is a confederate, and that he claims an interest. How or why he claims an interest does not appear. The bill, indeed, charges that another defendant pretends that this defendant executed a settlement of Spencer's and the Eleven Acres; but it does not allege that he actually did so; on the contrary, it charges expressly that no such settlement was ever made. [The Lord Chief Baron. And even if the bill alleged that it was made, it does not say that Thomas Copeland Plumbe relied on it.] Precisely so. This case comes within the principle of *Flint* v. *Field* (2 Anstr. 543). There it was decided that if a person is made a party as claiming under an instrument, you must aver in a specific manner that he does so, and not that he pretends there is such an instrument, and aver the contrary.

Again, the bill is multifarious. It is a redemption bill as to Spencer's and Prescott's, and an ejectment bill as to the Eleven Acres. Now in *Attorney-General* v. *The Goldsmiths' Company* (5 Sim. 675) Sir Lancelot Shadwell says, "It is not competent for A. to unite in his bill against B. all sorts of matter wherein they may be mutually concerned. If such a mode of proceeding were allowed, we should have A. filing a bill against B., praying to foreclose one mortgage, and in the same bill praying to redeem another." This is much the same case; the plaintiff prays to redeem one estate, and beings ejectment as to the other.

Lastly, it is clear that if Thomas Copeland Plumbe is a **[349]** necessary party, Richard Plumbe is a necessary party. So also is Draper; for it is not alleged that he is dead, but only that Ashurst pretends that he, Ashurst, is the surviving trustee.

Mr. Simpkinson and Mr. Dixon, for the bill. The statement in the bill as to the assignment of the mortgage to Ann Plumbe in 1832 gives the plaintiff a right to treat her as a mortgagee, and removes the objection as to lapse of time. Then as to multifariousness, all the property, whether in mortgage or otherwise, may be treated as the subject of one bill; for the defendant is alleged to claim an interest in the premises generally, which he may well do, although the settlement of 1809 comprises a part only of the premises. After all, a portion only of the Eleven Acres is not covered by the mortgage, and therefore the whole may fairly be considered as under mortgage. Now suppose there had been no mortgage, but an outstanding term comprising the whole property; could it have been contended that on a bill filed for the removal of that term all the present parties should not have been parties? And yet this bill

is in substance the same. It is immaterial, however, that part of the property is not in mortgage. It is a mistake to say that because there is some part of the subject-matter of the suit in which a party is not interested, therefore a demurrer by him will lie: *Campbell* v. *Mackay* (1 Myl. & Cr. 603), *Attorney-General* v. *Cradock* (3 Myl. & Cr. 85). But it is said that the allegation in the bill, as to this defendant's claiming an interest, is insufficient, being only general. [The Lord Chief Baron. The defendant might claim an interest wholly unconnected with any other party. Suppose he claimed an interest under his grandfather paramount to this; what right would you have to join him in a bill to redeem a subsequent mortgage?] On the face of the [350] bill he claims an interest under the settlement; and it is sufficient to say that the defendant pretends such an interest, and to charge the contrary. It is not necessary to admit the truth of the indenture. Mitf. Pl. p. 43, 3rd ed. The statement in substance is this: that if the indenture exists, the defendant claims an interest under it.

THE LORD CHIEF BARON. Nothing is to be taken as admitted by this defendant which is not properly pleaded; and some of the statements of the bill are so vague as to date, time, and other circumstances, that it seems to me impossible to sustain it. I take it that if a man claims an interest in the subject-matter of a suit by resisting the plaintiff in his possession or otherwise, and this appears by the bill, in such case you are not bound to set out the particular claim which he alleges, or to give it any colour. But where a party is made a defendant, and it does not appear that he obstructs a right, or that he claims under any deed, but the bill merely alleges that he claims some interest in the matters in question, such a general allegation will not do. Here, if the plaintiff had charged that this defendant claimed under the deed of settlement, it would have been another thing; but it is his mother who sets up that deed, and not he. Then, does he claim as mortgagee? No; the bill does not state that he claims any interest of that sort with his mother; and if he is in possession of any claim inconsistent with his mother's claim as mortgagee, he has, according to the settlement, been in possession since 1809. There is no allegation, however, that he claims under that settlement.

Demurrer allowed.

Simpkinson then applied for liberty to amend the bill.

THE LORD CHIEF BARON said that the plaintiff must state the nature of the proposed amendments.

[351] Jan. 13th.—On a following day the application was renewed, but the proposed amendments being unsatisfactory to the Court, leave to amend was refused; the Lord Chief Baron at the same time observing, that he could not accede to the proposition then contended for, that you could join an equitable ejectment against one person, and a bill to redeem against another.

JONES *v.* MOORE. Jan. 22nd, 1841.—Certain consignments of oil were made from Columbo to certain persons resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together and sold in one mass by the captain, in the course of the voyage, for £750. The consignees then agreed to share the proceeds in proportion to their respective losses: Held, —First, that a bill in equity was sustainable by the consignees against the shipowner for an account of the oil lost and the oil sold.—Secondly, that in an action brought by the shipowner against an individual consignee for freight and average, the latter could not set off his share (as ascertained by the agreement) of the monies arising from the oil sold; consequently, that he could maintain a bill in equity to establish a right of equitable set-off.—Thirdly, that several actions having been brought by the shipowner against the consignees to recover freight and average, they might all join in one bill against him for an account and equitable set-off.

[S. C. 10 L. J. Ex. Eq. 11. Applied, *Spence* v. *Union Marine Insurance Company*, 1868, L. R. 3 C. P. 437.]

The bill stated that in 1839 the defendant George Moore fitted out and sent a vessel, called the "Dorothy Gales," to the port of Columbo in Ceylon. That the

vessel arrived at Columbo in July, 1839; and that shortly after its arrival it was advertised to take in cargo. That while at the port, John Bampton, as agent for the defendant, received on board for the plaintiffs, and for the purposes of the plaintiffs at London, divers quantities of oil in casks, namely, 16 butts for the plaintiff John Jones; 30 pipes for the plaintiff John Buckthorne; 22 butts for the plaintiffs Bell & Co.; 60 hogsheads for the plaintiffs Forbes & Co.

That the bills of lading for these were shipped on board, and were duly signed by Bampton the agent, &c.

That the vessel sailed from Columbo on the 15th May, 1839, and arrived in England in 1840.

The bill then stated that the plaintiffs had discovered that during the voyage several of the casks had leaked, and **[352]** that large quantities of oil had from time to time escaped from the casks. That some part of the oil was wholly lost, but that the greater part thereof was pumped up by the crew, and disposed of by the order of Bampton in empty water-butts. That the oil so spilt was sold partly at the Mauritius and partly at St. Helena by John Bampton for £750, and duly accounted for to the defendant by Bampton. That only such parts of the oil as had leaked had been sold, and that the rest was delivered according to the consignment.

That the plaintiffs, not knowing to what parts of the oil they were respectively entitled, agreed that the whole should be sold, and that the proceeds should be apportioned between them, in proportion to their respective losses. That the plaintiffs had applied to the defendant to apportion the monies receivable by each out of the £750; which he had refused to do. That the defendant had commenced an action against John Jones for the recovery of freight for oil, shipped upon his account, and for average; and also an action against Scott & Co., for the recovery from them of like freight payable by them, and like average; and also an action against Forbes & Co. for like freight, payable by them, and also for the freight for twenty bales of cinnamon shipped on their account and for average; and that he threatened and intended to bring an action against John Buckthorne for the recovery of freight for oil shipped on his account.

The bill charged that the plaintiffs were desirous to set off, in respect of the average, the loss sustained by the leakage, &c., but that by reason of the monies not having been apportioned, the plaintiffs were unable to avail themselves of the set-off in the action. That the monies received by the defendant for oil exceeded the amount of those in respect of which he brought his action. That it would be contrary to equity if he were allowed to recover the freights on the said consignments, and the average, **[353]** without the plaintiffs being allowed to set off the monies received in respect of the oil. That the plaintiffs were accountable only for the amount actually delivered to them. That the defendant is in embarrassed and insolvent circumstances, and that he ought to be restrained, &c. That he ought to make out an account, &c. Usual charge as to books, papers, and documents.

The bill prayed that the plaintiffs might be declared entitled to the monies so received, being the proceeds of the oil and casks so as aforesaid sold; that an account might be taken of such monies, and that they might be apportioned in manner aforesaid, and paid to the plaintiffs respectively; the plaintiffs being willing that the monies due for freight and average should be deducted and retained by the defendant. That if necessary an account might be taken of the several consignments of oil; that the defendant might be restrained by injunction from proceeding in the actions, and for a commission to examine witnesses abroad, &c.

To this bill the defendant demurred; first, for misjoinder of plaintiffs; and secondly, for want of equity.

Mr. Romilly, for the demurrer. There is no relief prayed by this bill which might not be obtained at law. The plaintiffs might have filed a simple bill of discovery; or, if they had one common right, it might have been determined at law. There are no mutual accounts; no receipts on one side and payments on the other. If the plaintiff is wrong in his action, that is a question which your Lordship would determine on the other side of the Court. The set-off might be had at law. The mere circumstance of the captain being obliged to sell part of the oil does not give this Court jurisdiction. The bill prays a commission, but that also might be had at law. Besides, there is not a sufficient offer to pay what is actually due from them: *Mason* v. *Gardiner* (4 Bro. C. C. 436).

[354] Again, there is a misjoinder of plaintiffs. Three distinct actions are brought against the plaintiffs, and another action threatened, not relating to the same matters. In one of them additional freight is sought to be recovered. [The Lord Chief Baron. The action for cinnamon includes average.] The defendant may have a clear case against one of the plaintiffs, and not against the others: or one may be tied up until the account is settled with the others. [The Lord Chief Baron. The set-off consists in the rights they have in common.] Though they may have some common interest, their having distinct claims would prevent their coming into equity: *Harrison* v. *Hogg* (2 Ves. jun. 323), *Cholmondeley* v. *Clinton* (Turn. & R. 116). The case of *Kensington* v. *White* (3 Price, 164), which has been much doubted, is the only authority on which the plaintiffs can rely. That case is remarked upon by the Chancellor in *Campbell* v. *Mackay* (1 Myl. & C. 624), and is opposed to *Shackell* v. *Macaulay* (2 S. & S. 79), which is a strong authority against the present bill: *Dilly* v. *Doig* (2 Ves. jun. 486). It is sufficient to enable these parties to maintain separate bills that they have agreed to divide the oil lost pro ratâ.

Mr. Simpkinson and Mr. Lewis, for the bill. During the voyage from Columbo to England several of the casks (of each of the consignees) leaked, and a portion of the oil was totally lost. The remaining portion was pumped up by the captain, and put together and sold. Now in what proportion were the plaintiffs entitled to the oil pumped up? That must depend upon the quantity lost by each shipper. But how can that be tried at law? The oil pumped up must be taken to have belonged to the present plaintiffs. In what proportions is uncertain: it would depend on the quantity lost. To avoid this difficulty the plaintiffs, one or all of **[355]** whom are entitled, agreed that the oil pumped up shall be divided according to their original interests. They have a common interest in the oil pumped up, both before and after the agreement, though neither law nor equity without the agreement could decide what share each had of that. Then they call on the defendant for an account of the oil—what was pumped up and what sold; offering to make all allowances for freight and average. They are clearly entitled to this account, and in that view alone the bill is sustainable.

But, again, the plaintiffs ask for the assistance of a Court of equity against the sums recoverable at law, alleging that the proceeds of the oil are greater than any demands for freight and average. If there was an ascertained and apportioned sum due to them for the proceeds, they might set it off at law; but having no ascertained share, they ask for equitable set-off. In *Clerk* v. *Court* (*a*) Messrs. Clerk, the plaintiffs, who were merchants at Leeds, were indebted to a party for work and labour done. That party was indebted to Messrs. Clerk, and also to Mansfield. The Clerks bought Mansfield's business, and the debt due to Mansfield was assigned to them. The debtor having become bankrupt, his assignees brought their action against the Clerks to recover the amount of their debt. The Clerks not being able to set off in the action the debt which had been assigned to them, applied for equitable relief in the Court of Chancery. The Vice-Chancellor thought that Court could not interfere; but the Lord Chancellor was of a contrary opinion, and granted the relief. Courts of equity, indeed, have gone farther than this, for they have given a party the benefit of a legal set-off, where, in point of form, he could not avail himself of it at law: *Williams* v. *Davies* (2 Sim. 461).

Lastly, as to the objection for misjoinder. The de-**[356]**-murrer alleges that distinct matters are contained in the record. It is impossible, however, for the plaintiffs to distinguish their rights. They have a unity of interest, a unity of liability, and they seek a unity of relief. The case of *Knye* v. *Moore* (1 S. & S. 61) is opposed to that of *Harrison* v. *Hogg*; but in the latter case one of the co-plaintiffs had no interest in the subject-matter. *Kensington* v. *White* is supported by your Lordship's decision in *Mills* v. *Campbell* (ante, vol. 2, p. 391). In *The Attorney-General* v. *Merchant Taylors' Company* (5 Sim. 288; 1 Myl. & K. 189), the Attorney-General in effect represented distinct interests. *Campbell* v. *Mackay* (1 Myl. & C. 603).

Mr. Romilly, in reply, cited *Jones* v. *Garcia del Rio* (Turn. & R. 297), and referred to Mr. Justice Story's observations (Eq. Pl. ch. 10, § 538, n.) on *Kensington* v. *White*. In *Campbell* v. *Mackay* the parties were in the whole of the demands made, though there were several demands. Here the demands were not all alike. Besides, there

(*a*) Not reported.

might be improper stowage in one case and not in another. In *Knye* v. *Moore* the mother and children were interested in the whole demand.

THE LORD CHIEF BARON. I do not myself think that all the things claimed in the bill are properly joined together: but if there is one thing in which the plaintiffs claim an interest, and for which all are entitled to join in suing, I cannot allow the demurrer. Now they have a joint interest in the oil which was sold, and of which a common mass was made when it was pumped up. To that they are entitled as tenants in common, and you cannot ascertain how much belonging to each was lost or thrown overboard. All that was saved was sold in one mass; and it would be impossible at law to distinguish the shares of the parties.

[357] I recollect a case of trover (*a*) for a quantity of oil. A party purchased ten gallons of oil from oil in the vat, and afterwards sold those ten gallons to another person. The buyer brought trover against the person who had the vat, for his share of the oil. The Court entertained great doubts whether the action would lie, but as it was clear that ten gallons were sold, the Court allowed the claim. The doubt, however, would have been stronger if any had been lost, and less than ten gallons had come to the party's share. So, here the party could not bring trover for the oil sold. The defendant would say, how do you know that the whole of your oil was not actually lost? The proof would be almost impossible at law. I do not say it would be much more easy in equity; but in equity you can have all the parties before you.

Then the defendant's actions are brought against each set of plaintiffs, and you cannot have set-off at law. Suppose there was no question as to set-off for freight and average, and the only question was how they were to recover the proceeds of the oil sold. It would be difficult to get an account at law; and suppose they agreed for their proportions and he refused to pay them, that would not give them a new title against him at law. No action could be properly maintained in such a case; but even if they brought their action and he chose to resist it, they could not give in evidence the agreement between themselves. He would say, you do not know it was yours. The agreement would not advance their rights. It might make it a proper case for a Court of equity. But even there, if one alone brought his bill to enforce his rights, it seems to me that the others would be proper parties. Unless all the parties to the agreement were before the Court, I do not see how it could be settled in equity.

The plaintiffs have become, by the course of events, **[358]** tenants in common of the oil sold. Under these circumstances it seems to me that they have a right to the account which they seek.

Demurrer overruled.

MIDDLETON *v.* SHERBURNE. Jan. 13th, 16th, 28th, Feb. 23rd, 1841.—A court of equity has no original jurisdiction to try the validity of a will either of real or personal estate; but where on a bill filed for the removal of terms, or for other equitable relief, the validity of a will of real estate incidentally comes in question, the Court will proceed to investigate that question, and will, generally speaking, for the purpose of informing its conscience, direct an issue devisavit vel non.—Where a bill is filed by an heir at law against a devisee to try the validity of a will of real estate, the Court, under special circumstances, will direct an issue devisavit vel non, on motion before the hearing.—And semble, that under special circumstances, it will appoint a receiver of the real estate.—The cases of *Kerrich* v. *Bransby*, 7 Bro. P. C. 437, and *Andrews* v. *Powys*, 2 Bro. P. C. 504, are no authorities for the proposition, that a Court of equity has no jurisdiction to try the validity of a will of real or personal estate.—A bill in equity will lie to set aside a will made under the influence of superstitious terrors.—A strong case must be made out to set aside a will on the ground of undue influence; but where a person, acting as the spiritual adviser of a testator, takes advantage of that situation to become the agent and manager of the testator's temporal affairs, and while holding those opposite characters, becomes a donee of very large gifts under the testator's will, there is strong ground made out for inquiry as to undue influence.

(*a*) *Whitehouse* v. *Frost*, 12 East, 614.

[S. C. 10 L. J. Ex. Eq. 75. Applied, *Lancashire* v. *Lancashire*, 1845, 9 Beav. 263; *Boyse* v. *Rossborough*, 1837, 6 H. L. Cas. 41; *Egmont* v. *Darel*, 1863, 14 Ir. Ch. R. 564. See p. 593, post.]

The plaintiffs, Mrs. Middleton and Mrs. Eastwood, were the nieces and co-heiresses at law, and also the next of kin of William Heatley, who died intestate on the 21st of July, 1840. Thomas Sherburne, the principal defendant, was a Roman Catholic priest, and claimed to be devisee of certain portions of Heatley's real estates, and also residuary devisee and legatee of Heatley. The other defendants were Mr. Eastwood, the husband of one of the plaintiffs, Thomas Youens and Richard Thompson, Roman Catholic priests, John Briggs, Vicar Apostolic of the Yorkshire District, and James Teebay, late steward to Heatley.

These defendants, except Eastwood, were made parties in respect of certain gifts of money and lands made to them by Heatley, partly by deeds inter vivos, and partly by will, upon the same understanding and with the same view as the estates devised to Sherburne.

The object of the bill was, first, to have an opportunity of trying the validity of the will as a legal instrument, upon the ground of incapacity in Heatley, and undue influence obtained over him by Sherburne, by means of superstitious terrors wrought upon Heatley by Sherburne **[359]** in his character of confessor to Heatley. Secondly, supposing that ground should fail, and that the Court should be of opinion that there was no incapacity in Heatley, then that it might be declared that the several conveyances, devises, and bequests to Sherburne and the other defendants were made upon certain secret trusts, for charitable, religious, and superstitious purposes connected with the Roman Catholic religion, and not being duly inrolled in Chancery were void; or, at all events, that the superstitious uses were void; and, consequently, that there was a resulting trust in favour of the plaintiffs. The bill proceeded on the ground that there were outstanding terms affecting the devised premises, which prevented the plaintiffs from trying their action of ejectment; and it prayed for the removal of those terms, and, if necessary, for an issue or issues to try the validity of the devises and assurances, an injunction to restrain the setting up the terms in bar of an ejectment, a receiver of the personal estate during the litigation of the probate by the plaintiffs in the Ecclesiastical Court, and a receiver of the rents and profits of the real estate.

A motion was now made that two fit and proper persons might be appointed receivers of the real and personal estate, pursuant to the prayer of the bill.

In support of the motion, affidavits were read to the following effect:—That the father of the plaintiffs died in 1800, and their mother in 1802. That on their mother's death the plaintiffs went to live with Heatley, and did so till 1818, when Heatley's mother, who resided with him, died. That in the mean time, Sherburne, who, in 1806, had returned from Spain, where he had been educated, obtained great influence over Heatley's mind, and upon the death of Heatley's mother, prevailed upon Heatley to expel the plaintiffs from his house. That he soon afterwards became the confessor of Heatley, and that with the exception of an interval between 1822 and 1825, when **[360]** he was in Spain, he remained Heatley's confessor until the year 1832. That, in consequence, as the deponents believed, of the influence which Sherburne had over Heatley as his confessor, Heatley, in 1824, made a will in Sherburne's favour, and appointed him his executor. That Heatley's income was about £10,000 a-year, and that the deponents believed that he was induced by Sherburne and the other defendants connected with him to execute a conveyance of certain parts of his property to some of the defendants without any consideration. That he was also induced to give to Sherburne £10,000, of which about the sum of £9000 was laid out by Sherburne in the purchase of an estate at Carlton, the contract being in his own name, but the conveyance to the other defendants in trust for him. That he was also induced to pay into the hands of some of the other defendants £12,500, which still remained in their hands. That he also purchased canal shares in the names of these parties. And that, finally, he was induced by the undue influence of Sherburne to make in Sherburne's favour a will, dated the 16th February, 1829, and two codicils dated respectively the 12th of August, 1835 and the 3rd of June, 1836, which were the will and codicils sought to be impeached. It was also sworn that upon Heatley's death Sherburne, who came avowedly to search for Heatley's will, though he at first

affected ignorance of any will having been made by Heatley, yet afterwards pointed out the exact part of Heatley's bureau in which the will and codicils were found. It also appeared that, within a quarter of an hour after Heatley's death, a number of papers were burnt by Elwood the butler, in the presence of Mr. Smith, a Roman Catholic priest, without the knowledge of the next of kin.

The several wills and codicils left by Heatley were to the following effect:—

By the will of 1824 he devised and bequeathed to Sher-**[361]**-burne his whole property, real and personal, with the exception of two legacies of £6000 each given to the plaintiffs, and made Sherburne his executor. This will, according to Sherburne's admission, was delivered to him upon his return from Spain in 1825, and he kept possession of it until he deposited it in the Ecclesiastical Court after Heatley's death.

By the will of the 16th of February, 1829, Heatley devised his house called Brindle Lodge, together with the household furniture, and the cottages and lands belonging to it, to the plaintiffs, equally, during their respective lives, with remainder to their children. And he gave and devised all his lands, monies, and other property at Preston, and his estate called Salmesbury, and all and singular other his freehold, copyhold, and leasehold estate whatsoever and wheresoever, or over which he had any control or disposition, unto and to the use of his good friend Thomas Sherburne (the defendant), his heirs, executors, administrators, and assigns, according to the nature of these estates. And he gave all his money and securities for money, and all his personal estate not thereinbefore disposed of, to the defendant Sherburne, and appointed him sole executor of his will.

By the codicil, dated the 1st of August, 1835, which was in Sherburne's handwriting, and written, as he said, at Heatley's dictation, Heatley left a small piece of land near Brindle Lodge to the plaintiffs; directing that they should enjoy it in the same manner as the mansion-house mentioned in his will.

By the codicil of the 3rd of June, 1836, which was partly in Sherburne's handwriting, Heatley gave to the plaintiffs a farm, and certain other property specified; and then, after reciting the gifts made to them by the will and former codicil, declared that he meant his nieces and their children to take and enjoy the premises in the same manner as the former gifts. Then followed this paragraph:—

[362] "It is very probable that the circumstance of my having given a considerable part of my property to my friend, the Rev. Thomas Sherburne, may give dissatisfaction to my said nieces and their husbands, who have expressed themselves to the effect that they had a moral right to the whole thereof after my death. Now, in order as far as possible to prevent any vexatious proceedings which such dissatisfaction might occasion, and to the intent that my will and codicils may have full effect according to my intention as expressed therein, I direct that my said nieces or their representatives do, within twelve calendar months after my death, confirm my said will, and execute to Sherburne or his heirs a release of all the estates devised to him, and all claim and interest which they may have in the same. In default whereof I revoke the devises of the estates made to my said nieces, and I devise the same to the said Thomas Sherburne, his heirs and assigns, for ever; and I confirm my said will in all other respects."

In order to shew that Sherburne had worked upon the mind of Heatley by means of superstitious terrors, various circumstances were stated in the affidavits of the plaintiffs and others, which were either denied or considerably qualified by the answer and affidavits of Sherburne; such as Heatley's being continually at prayer with Sherburne, in his chapel, at the Willows (a residence of Sherburne's)—a tomb being built for Heatley, of which Sherburne, in conversation and otherwise, continually reminded him as matter for his constant reflection—and the employment of a young woman to preach on religious topics at Brindle Lodge. On the other hand, it appeared from several of Heatley's letters that he was more than ordinarily impressed with a belief in the efficacy of masses for the salvation of souls. On the envelope in which the second will and codicils were found, was the following memorandum in Heatley's handwriting:—"I wish the rents of the **[363]** estate at Carlton which I purchased, but which is conveyed to others, to be at the disposal of Dr. Youens, to be applied for as many masses as £100 will give. Not to go beyond the Lancashire district."

The influence which Sherburne had actually gained over Heatley, whether by religious means or otherwise, was shewn by these facts—that the parties were constantly together; that Sherburne corrected or wrote the letters of Heatley; that

he was consulted by Heatley on various secular topics, and, amongst others, as to the propriety of bequeathing away property from his relations; and, lastly, that he advised Heatley in the preparation of his second will and codicils. It was admitted by Sherburne that he had been Heatley's confessor from 1826 to 1832; and that in consequence of Heatley's disapproval of Mrs. Eastwood's marriage, he, Sherburne, had been directed by Heatley to compel the plaintiff to leave the house.

That Heatley stood in considerable fear of Sherburne seemed evident from the fact that when he was at Sherburne's house, the Willows, where he had been staying some weeks, he procured a person to watch Sherburne while taking a walk, and then took the opportunity of ordering his gig, packing up his luggage and leaving Sherburne's house by stealth.

The several gifts and devises to the defendant Sherburne, and to the other defendants acting with him, have been already partially alluded to, and are commented upon in the arguments and judgment, and therefore it is unnecessary to make a particular statement of them here. It appeared that one of the purposes to which the defendant Sherburne intended to apply these gifts was to the augmentation of a fund raised by the secular clergy of the district of Lancashire for their support, and the promotion of the views and interests of the Roman Catholic Church. By the agreement entered into by these clergy, which was **[364]** drawn up in Latin, each priest was to celebrate mass every month, for the benefactors of this stock; and besides general recommendations, they were to celebrate specially, once for him who should give £10 to the stock; twice for him who should give £20, &c.

Mr. Simpkinson, Mr. Sutton Sharpe, and Mr. Rolt, for the motion. The question is whether these enormous gifts can be supported consistently with the known rules of this Court. The greater part of them were made while the defendant was, by his own admission, the regular confessor of Heatley. Some of the estates, as those of Salmesbury and Walton, were conveyed directly to the defendant; and with respect to the Carlton estate we insist that it was purchased with Heatley's money, and therefore that there is a resulting trust for the plaintiffs. The £10,000 were obviously paid to the bankers for the purchase of this estate; and the admission of the defendant that no trust has been declared of it, coupled with the direction given by the testator on the envelope containing the last will and codicils, clearly shew under what circumstances and for what purposes this estate was bought. Then there is Teebay's bond given for £3500, lent by Heatley, and of which Sherburne is the obligee. How can such a transaction stand? The degree of influence which this defendant acquired over the mind of Heatley may be judged of not only by the results, but by all the attendant circumstances of the case: the expulsion of the plaintiffs—the retired manner of Heatley's living, except as far as Sherburne and his friends were concerned—his practice of consulting Sherburne upon all matters of secular interest, even to the extent of trusting him with writing his letters—the transaction at the Willows; and lastly, the very peculiar circumstances under which the will and codicils were found. The question is whether the influence so gained has been fairly gained. We submit that it has not, and that there **[365]** is every ingredient in the case for the interference of the Court. As, however, it would be useless to decide upon the gifts of inter vivos till the validity or invalidity of the will is established, it is submitted that, for the purposes of justice, the Court will at once direct an issue devisavit vel non, and appoint a receiver. It must be admitted that it is not the practice to appoint a receiver in these cases, except under very strong circumstances; but this is a strong case, and the numerous dicta on the subject, as well as the decision in *Podmore* v. *Gunning* (5 Sim. 485), are quite sufficient to justify the interference of the Court.

Then, what is the nature of the influence which has been employed? Heatley was a person evidently under strong religious feelings. He was a good and religious man. The papers which are in evidence shew how essential to salvation he considered the saying of masses and giving of alms. His feelings on these subjects evidently became stronger while the defendant was his confessor. The defendant says he contracted a warm intimacy with Heatley; but their habits of intimacy cannot be attributed to their being in the same situation in life, or being brought up at the same college, or to any circumstance which ordinarily leads to intimacy. No cause can be assigned for the intimacy between these parties but religious intercourse. Can the gifts made while such a relation existed between the donor and donee be supported?

In the analogous cases of guardian and ward, and attorney and client, gifts made under similar circumstances are not allowed to stand. In *Morton* v. *Relly* (2 Eden, 286) and *Huguenin* v. *Baseley* (14 Ves. 273) the gifts were set aside on the ground of religious influence. *Dent* v. *Bennett* (7 Sim. 539), in which the agreement was between a medical man and his patient, was a still stronger case. But can any case stronger that the **[366]** present be imagined? This defendant, holding the situation which he did, was employed to turn the testator's nieces out of the house. He was also consulted as to the disposal of the testator's property. Was he an attorney? Was he a land agent? His education at Valladolid would only qualify him as a spiritual adviser. When we find these clergymen with bonds and title-deeds in their hands, we have a right to make the strongest remarks on their conduct. When we find them taking advantage of their religious character to interfere in the secular affairs of those under their spiritual charge, we have a right to comment on their motives, and even on their religious persuasion. It is impossible also not to remark upon the rule which the secular priests of North Lancashire have established for themselves, and with which the conduct of these defendants is in accordance. By that rule, which is drawn up in Latin for their special guidance, they agree to obtain as large benefactions as they can from their spiritual clients. They are to procure alms to be given to them as a corporation. But it is the rule of this Court to set aside gifts so made to ecclesiastics. It is creditable to the Protestant Church that the rule is not fortified by authorities; but in the absence of authorities, if none can be found, the Court will not shrink from establishing such a rule. Public policy and public morality require it. In all Roman Catholic countries the case of a confessor is likened to those ordinary cases of fiduciary relation which have been already referred to: Pothier, Traité des Donations Testamentaires, chap. 3, art. 3; Merlin, Répertoire de Jurisprudence, tit. Confesseur, art. III. And Pothier carries it so far as to say that in some cases the convent or body to which the confessor belongs cannot take a gift or legacy from the party whom he confesses.(*a*) If these rules are prevalent in Roman Catho-**[367]**-lic countries, à fortiori they must be applicable here. This is a case of religious enthusiasm, to which the language of Lord Nottingham in *Norton* v. *Relly*, and of Sir Samuel Romilly in his celebrated reply in *Huguenin* v. *Baseley* are peculiarly applicable. If that language was appropriate to the cases then before the Court, in which Protestants were concerned, how much stronger does it apply where the party using the influence is furnished with all the resources of the Roman Catholic religion. Here the whole previous bent and inclination of the party making the gifts was to his religion, and his confessor was almost his only companion. It was a mixed case of want of capacity and undue influence. [The Lord Chief Baron. Every man makes his will under some influence or another. In the case of General Yorke (and see 9 Ves. 185), who left his property to his groom, Mr. Justice Chambre, who tried the cause and who was the best lawyer of his day, told the jury he hardly knew what undue influence was. The jury found for the defendant, and that verdict was confirmed. Again, in *Lord Trimlestown's case* (*Trimlestown* v. *Lloyd*, 1 Bligh, N. S. 427) it was said that the will had been obtained by his wife's influence, and the jury found a verdict against the will. But the verdict was afterwards set aside in the House of Lords. No doubt the cases of guardian and ward and attorney and client stand on different principles; and you now present for the first time, as analogous to those, the case of the confessor. He certainly has the highest species of influence, and that influence may be fraudulently used.] We contend that the influence in this case is what Lord Hardwicke called in *Hylton* v. *Hylton* (2 Ves. sen. 549) a good influence unfairly used: *Bridgman* v. *Green* (Wilm. 58).

Lastly, although this application is made under very strong circumstances, this is not a case in which the Court **[368]** is called upon to require more than a degree of presumption against the validity of the will. This is not the case of a distant or unknown relation coming to be relieved against the will after a long lapse of time. It is the case of near relatives, putting forward their claim immediately, offering a strong case to the Court, and not disturbing the other party in the enjoyment of the property, because in fact he is not in possession. It is also to be remarked that

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(*a*) Des Donations entre Vifs, sect. 2, art. 11. And see Van Leuwen's Commentaries, book 3, ch. 3, s. 13.

danger to the property is not necessary to induce the Court to appoint a receiver in a case where an instrument is sought to be set aside: *Huguenin* v. *Baseley*.

Mr. Bethell and Mr. Walker, contrà. The principal circumstances which are relied upon on the other side, to shew the undue influence of this defendant over Heatley, are the expulsion of the plaintiffs from Heatley's house and Heatley's conduct at The Willows. But the first of these circumstances is completely explained by Sherburne's affidavit, and the second is only sworn to by a discarded gardener. The real reason of Heatley's going to The Willows, namely, that his house might be repaired, is totally suppressed on the other side. There is no evidence whatever that Heatley was a man of weak mind. Was there anything unreasonable, considering his circumstances, that he should devote a large portion of his property to Christian duties? What is to be thought of a case which rests on charity being a sign of insanity? But, notwithstanding the alleged ascendancy of Sherburne, it appears that Heatley desired to benefit his nieces, and, in fact, did do so. What he provided for them by his will of 1824 was small compared with what they took under the subsequent will and codicils.

But it is contended, notwithstanding the strong evidence to the contrary, that the testator had not the free use of his faculties when he made his will, and that the Court will appoint a receiver as against the devisee. Now, **[369]** to decide whether this was a good will or not—whether there was fraud or improper interference in the concoction of it does not belong to this Court—is not a jurisdiction exercised by this Court, but is part of the province of a jury, and exerciseable at common law only. If so, it is impossible for your Lordship to interfere, so far as the real estates are concerned. The hardihood of contending the contrary, in a legal point of view, is equal to the hardihood with which this case has been argued on the question of morality. No receiver has ever been appointed, at the instance of an heir at law, against a devisee. One of the earliest cases on this subject is one of the most conclusive: *Kerrich* v. *Bransby* (7 Bro. P. C. 437). The reasons in that case are remarkable, and were acquiesced in by the House of Lords. That case is a strong authority for the ordinary proposition that the question as to animus testandi belongs to the Courts of common law: *Andrews* v. *Powys* (2 Bro. P. C. 504), *Bennet* v. *Vade* (2 Atk. 324), *Bates* v. *Graves* (2 Ves. jun. 288). A Court of Equity will only appoint a receiver in those cases where it will give relief at the hearing. The appointment of a receiver is an equitable execution: *Davis* v. *Duke of Marlborough* (2 Swanst. 108), *Huguenin* v. *Baseley*, *Pemberton* v. *Pemberton* (13 Ves. 297), *Jones* v. *Jones* (3 Mer. 161). The last-mentioned case is very similar to the present. It was an application by an heir at law seeking to give jurisdiction to this Court to determine the validity of a will. Sir William Grant said, "It is impossible that at this time of day it can be made a serious question, whether it be in this Court that the validity of a will, either of real or personal estate, is to be determined. And although there may have been instances of issues directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet **[370]** I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions that are asked only on the supposition that an issue is to be granted?" His Honor then proceeds to remark that this Court will not grant an injunction to stay waste as between heir and devisee, and he adds, "If the Court will not interpose to stay waste, à fortiori it will refuse to appoint a receiver or to restrain the devisee from exercising other acts of ownership over the property." His Honor, therefore, on these grounds allowed the demurrer to the bill in that case. The plaintiff having thus failed in his suit, brought other bills, with a view to the same relief, both in the Court of Chancery (3 Madd. 1; Jac. 466) and in this Court (7 Price, 665), but without effect. In the case of *Gingell* v. *Horne* (9 Sim. 539), where it was attempted unsuccessfully to obtain relief against the probate of a will of personalty, reference was made to the case of *Podmore* v. *Gunning*, which has been cited in the present argument. But the Vice-Chancellor said that *Podmore* v. *Gunning* did not apply to cases of this nature, inasmuch as the Court, in that case, did not act against the will, but in furtherance of a trust appearing on the face of it. *Podmore* v. *Gunning* depended on this principle, that if a man is induced to make a will by a promise by the devisee to do something which the testator

desires, the devisee is compellable in equity to make good the assurance. There are a series of authorities for that proposition. Such a decision is not against the will, but in favour of it; it involves no question of animus testandi. The principle is that it is improper for **[371]** the devisee not to perform the condition upon which he takes under the will. If the case alleged by the plaintiff in *Podmore* v. *Gunning* had been substantiated, it would have raised a trust. In these cases there is something collateral to and dehors the will. At first the Vice-Chancellor thought there was so much in that case that he appointed a receiver, thinking the plaintiff primâ facie entitled; but that does not justify the proposition that this Court will interfere pending a question as to what is or is not a man's will. [The Lord Chief Baron. If it were res integra, I should have doubted the principle of that case. It is to enforce a contract dehors the will. Suppose you invert it, how does it stand then? There is an old case to the effect that a man, who has done the most important services to the testator in consideration of a promised benefit under his will, can neither file a bill nor bring an action on the ground of being left out of the will. So, conversely, one should have thought that a bill would not have been maintainable the other way.] Whatever be the authority of *Podmore* v. *Gunning*, it has no application. But here, supposing the Court could appoint a receiver, on the ground of danger to the property alone, notwithstanding the state of the title—is there any danger here to warrant such interference? There is no evidence of that sort on which the Court can act. *Tatham* v. *Wright* (2 Russ. & M. 1) was a case which clearly demanded a receiver, and yet no application for that purpose was made.

Independently of the question of jurisdiction there are no merits upon which the present application can be maintained. The argument on the other side depends principally on three objections: the weak capacity of the testator, undue influence used against him, and the relative situation of the parties. No evidence, except one document, has been adduced as to any secret trust. As to incapacity and undue influence the evidence is the slight-**[372]**-est possible. With respect to the relative situation of the parties, there is nothing in the policy of our law which prevents such bequests as these. The case before Mr. Justice Buller (*Doe d. Farr* v. *Hicks*, 3 Esp. 284, cited; 4 Esp. 284), in which a bequest to the attorney who prepared the will was held bad, was never approved of by Lord Eldon.(*b*) In *Ingram* v. *Wyatt* (1 Hagg. Ecc. Rep. 384; 3 Hagg. Ecc. Rep. 466), a very strong case on this subject, the will was supported. Much has been said of the foreign law relating to legacies given to priests; but if the matter were further investigated it would be found that there is a difference in this respect between the regular and secular clergy. Generally speaking, except in cases where the relation of parent and child subsists (Just. Inst. lib. 2, tit. 13), there is no foreign law which relieves a man against disinheritance.

Mr. Simpkinson, in reply. First, as to the question of jurisdiction. No doubt the general rule is that a Court of Equity will not set aside a will of real estate nor interfere between heir and devisee till the validity of the will is settled at law. The greater part of the authorities go to that effect; but in none of those cases were there any legal impediments to the trial of the question at law. Here it is admitted that some of the estates are subject to outstanding terms; and as to the rest, the defendant will not take upon himself to say whether such terms exist or not. That was the case in *Clarke* v. *Dew* (reported on motion for receiver, 1 Russ. & M. 103), in which, upon the hearing, an issue devisavit vel non was directed. The plaintiff has therefore a locus standi quoad the will; and the Court cannot do justice without an issue. *Kerrich* v. *Bransby* was a question of mere legal **[373]** estate; so was *Andrews* v. *Powys;* so was *Bennett* v. *Vade.* In the latter case Lord Hardwicke, so far from repudiating any possible interference by a Court of Equity, said that it would not interfere without previously directing an issue. A similar doctrine is held by Lord Rosslyn in *Bates* v. *Graves* and by Lord Eldon in *Pemberton* v. *Pemberton.* But in that case Lord Eldon is said to have expressed himself to the effect that, after the jury has given a verdict, the Court will act. Similar expressions occur in *Jones* v. *Frost* and *Jones* v. *Jones.* In the latter case Sir William Grant said he could not see a very good reason why the Court which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court should not interfere to preserve

(*b*) See 18 Ves. 475; 1 Bligh, N. S. 449. As to the rules of the civil law, see Dig. lib. 48, tit. X., sect. 15; Hub. Prælect. vol. 3, p. 1542.

real property pending a suit concerning the validity of the devise. Here neither of the parties is in possession. In *Jones* v. *Jones* the demurrer was allowed principally on the ground that the bill stated no impediments to an action. Then, supposing that the Court would give relief at the hearing by the removal of impediments, or by directing an issue, it has equally jurisdiction to interfere by appointing an interim receiver. There is no express authority to this effect amongst the printed cases, but there are many expressions which intimate that the Court has such jurisdiction, and would appoint a receiver in a strong case. These are to be met with in *Mordaunt* v. *Hooper* (Ambler, 311), *Knight* v. *Duplessis* (1 Ves. sen. 324; 2 Ves. sen. 360), *Lloyd* v. *Passingham* (16 Ves. 69), and *Clarke* v. *Dew* (1 Russ. & M. 103), which latter case is at variance with the previous case of *Smith* v. *Collyer* (8 Ves. 89).

There is, however, an unreported case, that of *Buckland* v. *Soulten*,(*g*) which expressly decides that in a **[374]** case between heir and devisee, the Court will appoint a receiver of the real estate; and, further, that on motion for such receiver, it will direct an issue devisavit vel non, although the application for an issue is not included in the notice of motion. The case of *Goulden* v. *Lydiat* (*a*) also shews that an issue may be directed **[375]** as to a simple fact, on an interlocutory motion for a receiver. In *Fullagar* v. *Clarke* (18 Ves. 483) Lord Eldon referred to this case, observing that a simple question of competence was a fit subject for an interlocutory issue, though it was otherwise as to an intricate case of fraud. In that case had the question depended simply on competency, it is clear that he would have granted an issue. A similar principle is contained in *Agar* v. *The Regent's Canal Company* (G. Coop. 77). The present is a very strong case for granting an issue; for the plaintiffs forfeit all benefit under the will unless within a year they release all claims upon the devised estates.

(*g*) *Buckland* v. *Soulten*. In Chan. 20th of December, 1824. R. L. 1824, A. fo. 186. The bill was filed by the next of kin and co-heirs in gavelkind of William Buckland, one of the plaintiffs, being also his heir at law. The bill alleging that the legal estate in certain premises mentioned was outstanding, prayed that an issue devisavit vel non might be directed by the Court to try the validity of an alleged will and codicil set up by the defendant, who was devisee and executor under that will and codicil, or to try the validity of the latter of the said paper writings; and in the event of the issue being found against the validity of the said paper writings, then that the two paper writings, or the latter of them, might be delivered up to the plaintiffs to be cancelled; and in the mean time that a receiver of the rents and profits of Buckland's real estate might be appointed, and an account taken of the rents and profits of the real estate and of the personal estate, and the produce thereof, which, in the lifetime and after the death of Buckland, had been received by the defendant. And the bill, alleging that the plaintiffs had instituted proceedings in the Spiritual Court, and that the suit was still pending, prayed that, pending this suit, a receiver of the personal estate might be appointed, and in the mean time for an injunction.

A motion was made before Lord Eldon, C., for a receiver of the rents and profits of the real estate and of the personal estate, and for an injunction to restrain the receipt of the rents and profits of the real estate, or any part of the personal estate. An application for an issue was not included in the notice of motion.

The motion was strongly contested.

Mr. Hart and Mr. Knight, for the motion.

Mr. Treslove, contrà.

It was ordered that an injunction should issue pursuant to the notice of motion; and that it be referred to the Master to appoint some proper person or persons to receive the rents and profits of the real estate, and to collect and get in the outstanding personal estate. And it was further ordered that the parties should proceed to a trial at law in the Court of King's Bench, at the Sittings in London after Hilary term, on the following issue, devisavit vel non, &c.

(*a*) *Goulden* v. *Lydiat*. In Chan. Bill filed M. T. 1808. The plaintiff, an infant, filed his bill as the only child and next of kin of John Goulden, who died intestate, against his administrator and Robert Goulden, who claimed to be next of kin of the intestate. The defendant Goulden insisted that the plaintiff was illegitimate. On the 16th of July, 1809, on motion for a receiver, an issue was directed by Lord Eldon, C., to try whether the plaintiff was illegitimate. The issue was tried, and

Secondly, as to the merits. Although the affidavits are in some respects contradictory, yet there is amply sufficient to shew that an undue influence was exercised. Can these lavish gifts be imputed solely to the warm friendship and esteem in which this defendant was held by Heatley? Besides, the defendant's conduct, to say the least of it, is evasive. For when he came to Brindle Lodge, after Heatley's death, he at first, upon being interrogated by the plaintiffs, denied all knowledge of a will. Being **[376]** now questioned as to the fact of this denial, the answer which he gives is that he did not deny the existence of a will.

Mr. Bethell. *Mordaunt* v. *Hooper* has nothing to do with a will. In *Knight* v. *Duplessis*, it is laid down by Lord Hardwicke that there is no instance in which the Court has ordered a receiver for the benefit of the heir at law. *Lloyd* v. *Passingham* only determines that a receiver may be appointed against the legal title in a strong case of fraud. In that case it is the fraud that gives the Court jurisdiction. In *Clarke* v. *Dew* the marginal note is at variance with the reported facts. With respect to the issue devisavit vel non, the heir has no right to one, except by consent. To give the heir an issue, without the consent of the other party is, in effect, assuming jurisdiction to try the validity of the will; for this is the only relief which the heir asks in such a case. [The Lord Chief Baron. Suppose there are outstanding terms; he has no relief but in equity.] The relief ends in removing the terms. [The Lord Chief Baron. In *Wright* v. *Tatham* an issue was directed.] That was not opposed. [The Lord Chief Baron. I think it was.(*a*)] The course of the authorities is the other way. As to the case of *Buckland* v. *Soulten*, it is impossible that Lord Eldon could have ordered an issue upon a mere motion for a receiver, except by consent. [The Lord Chief Baron. I certainly think it highly probable that the addition to that order was by arrangement.] If so, that case has no application. Throughout the whole of the cases the issue devisavit vel non is always the subject of decree, and not of interlocutory order. And the removal of terms must be by decree: *Northey* v. *Pearce* (1 S. & S. 420. See *Ringer* v. *Blake*, ante, vol. 3, p. 591.

[377] THE LORD CHIEF BARON. This was a motion to appoint a receiver, for which purpose some parts of the defendant's answer were read, and the affidavits filed on both sides. The object of the bill is to investigate and to procure a decision upon certain proceedings which have taken place between the defendant and a gentleman of the name of Heatley, in Lancashire, who had made a will, and who likewise disposed of his property by several intermediate transactions whilst he was alive, which are sought to be set aside by this bill. The motion was discussed at very great length, and a great variety of learning produced upon it, after which I should pay an ill compliment to the bar did I not advert to the grounds which have been taken both for and against the motion: although I might, perhaps, if it had not been for that circumstance, have arrived at a conclusion by a shorter process than that which, under the circumstances, I have found it necessary to adopt.

It was contended, in opposition to this motion, that one of the principal objects of the bill was to set aside a will; but that as a Court of Equity had no jurisdiction to do this, it followed as a consequence that it could neither appoint a receiver nor grant an injunction: or, in other words, that because the principal object of the bill could not be entertained by a Court of Equity, therefore the collateral consequences, which were incidental only to the original jurisdiction, could not be entertained by

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a verdict had for the plaintiff in July, 1811. A motion was afterwards made for a new trial, but refused. On the cause coming on for hearing, the defendant Goulden again applied for a new trial; but Lord Eldon refused to grant it. His Lordship observed that Master Hollist had frequently said that Court was wrong in directing an issue on an interlocutory motion, but that upon reflection he, the Chancellor, was satisfied he was right; that the sooner the question was tried the better for all parties; that it prevented a failure of evidence; and though the case before him was difficult by reason of its complicated circumstances, though he might differ from the jury, as Lord Ellenborough did, he thought, upon the whole, that they might be the better judges in such a case.

Mr. Horne and Mr. Simpkinson, for the plaintiff.

Mr. Hart and Mr. Blake, for the defendant.

(*a*) Qu. Whether it was not also opposed in *Shewen* v. *Lewis*, 3 Mer. 167, n.; and see the observation of Lord Eldon in *Paine* v. *Hall*, 18 Ves. 475.

the Court. That, I conceive, was the general outline of Mr. Bethell's argument, and his first position was that Courts of Equity had no jurisdiction whatever in trying the validity of a will; no jurisdiction as to a will of personalty, because that belongs to the Ecclesiastical Court, and none as to a will of real estate, because that was a question of law to be decided by a jury.

Now, before I enter into the proposition to the extent to which it was carried, I will refer to the authorities which he cited in support of it; and the first was the case of **[378]** *Kerrich* v. *Bransby* (7 Bro. P. C. 437). Upon looking at that case, there is not the least doubt that the abridgment of it, as given by the reporter at the top of it, corresponds with Mr. Bethell's quotation, because it is this: "A will cannot be set aside in equity for fraud or imposition; because, if it is a personal estate, it may be set aside in the Ecclesiastical Court, and if of real estate it may be set aside at law, on the issue devisavit vel non." That is a very imperfect statement, because an issue devisavit vel non is in truth determined in a Court of Equity. After it is tried, a Court of law can do nothing: it is still before a Court of Equity. However, when you come to look at the case of *Kerrich* v. *Bransby*, it will be found to furnish anything but an authority for that digest of it. It was a case of a bill filed for the purpose, undoubtedly, of setting aside a will and for taking other proceedings incidental to a Court of Equity, and to that bill an answer was put in. The imposition and fraud were denied by the answer, and the cause went to a hearing upon the evidence; and upon the evidence it was clearly established that there was neither fraud nor imposition in making the will. The only evidence of fraud was the declaration of a witness, Mrs. Hartshorn, who stated that the testator was incompetent and did not know what he was about. It was proved by a witness on the other side that he was present when the will was given to her by the devisee to keep, and that she did keep it, and that then she urged no objection and made no remark upon it. Three witnesses were examined; the person who prepared the will was examined, and there never was a clearer or more distinct case in support of a will, notwithstanding Lord Macclesfield, from circumstances which he laid hold of, thought fit to make a decree to set the will aside. A very short and imperfect note of that case will be found in Viner's Abridgment (vol. 8, p. 167). It is evidently the same case, for there is Lord Macclesfield's **[379]** very reasoning; and the reasons he states, as far as you can rely upon that report, are very imperfect to support his judgment. That decision was appealed from to the House of Lords, and upon appeal the House of Lords reversed the judgment and dismissed the bill; upon what ground? Everybody knows that Brown's Reports contain the cases on both sides and the substance of the decisions. When you look at the case in Brown, it is quite manifest that the whole case was heard on the merits. On the merits, therefore, the bill was dismissed; because the will was by the evidence clearly established, and no person who exercised a competent judgment could doubt the propriety of establishing it. The decision, therefore, does not at all involve the question whether or not a Court of Equity will entertain jurisdiction upon such a subject. In short, that case proves anything but the digest of it given by the reporter.

I mention that case because it was much relied upon, probably from the learned person who cited it not having gone through it thoroughly, but relying chiefly upon the digest. And I am not surprised at his doing so; because I find, in a great many subsequent allusions to it, the digest is adopted without reference to the body of the report itself.

The next case cited by Mr. Bethell was that of *Andrews* v. *Powys* (2 Bro. P. C. ed. Toml. 504; 1st ed. 476). Now the case of *Andrews* v. *Powys* proves anything but the proposition for which it was cited; and yet it has been often cited for the same proposition, and I think I can shew the origin of the mistake. It was a very remarkable case of a testator who had made two wills, one of which was made in favour of the plaintiff below, and the other, some time afterwards, in favour of the defendant. The defendant below was Andrews. He had procured the will to be made in his favour, and he had obtained the **[380]** probate of it. The plaintiff Powys filed a bill, having discovered that; and, being in possession of the will which was made in his favour, he took proceedings in the Ecclesiastical Court and obtained a certain monition to be issued for the purpose of revoking the probate; and the case was depending in the Ecclesiastical Court, and that Court had made an order upon the executor, to whom the probate had been granted to bring the money into that Court. From that order

an appeal was made to the delegates, and the order was discharged because the Court had no jurisdiction to direct money to be brought into Court; after which the plaintiff filed his bill stating all the circumstances. To that bill there was a demurrer, and the demurrer was argued on the ground that the Court of Equity had no jurisdiction in the case, but that it belonged exclusively to the Ecclesiastical Court; and, moreover, that the plaintiff had no locus standi in curiâ; for that the defendant was the executor and had the probate, and that the plaintiff had no interest whatever, but that he only pretended to have an interest under a will which was not proved. The objection was very plausible: it was argued on demurrer. The Lord Chancellor, Lord Macclesfield, overruled the demurrer, and afterwards made an order on the defendant, the probate executor, to bring in the money, and enjoined him from receiving any more money. Upon that there was an appeal to the House of Lords, and the House of Lords, so far from dismissing the bill, confirmed the Lord Chancellor's decree. The appeal was dismissed and the orders were all affirmed.

Now this case is usually cited to shew that a Court of Equity will hold no jurisdiction to set aside a will of personalty; yet it may be cited to shew the very reverse. In truth, it proves no more than this, that pending the litigation in the Ecclesiastical Court, as to who shall be executor, the Court of Chancery will grant an injunction and appoint a receiver, if necessary; and order money to be **[381]** brought into Court, if necessary, even by a person who has had probate granted to him until that is decided. That is what that case undoubtedly establishes; but it does not establish the proposition one way or the other, whether this Court has or has not original jurisdiction to set aside or to inquire into the particulars of a will.

Now, it is very remarkable that the first time I find that case referred to afterwards is in one of the cases cited by Mr. Bethell, and of which he made considerable use in his argument at the bar. It is the case of *Bennet* v. *Vade* (2 Atk. 324). Now I would just wish the bar to observe how easy it is for one error which creeps into a report to be propagated by those who succeed, and who do not investigate the fountain, but follow the stream. This case of *Bennet* v. *Vade* was, in the year 1742, before Lord Hardwicke. There is no occasion to state it. The facts of it indeed are not reported; but it was cited for the authority of Lord Hardwicke. He says: "I am of opinion the plaintiff in the original bill ought to be relieved. The principal question must arise upon the original bill. So far as the bill seeks to set aside the will, it is improper; for this Court cannot make a decree of this kind, but only direct an issue devisavit vel non." He is quite right there. "For it is settled, ever since the case of *Powys* v. *Andrews*, upon an appeal from Lord Macclesfield's decree, February 6th, 1723, to the House of Lords, that a will cannot be set aside for fraud and imposition here, because a will of personal estate may be set aside in the Ecclesiastical Court for fraud, and of real estate at law." Therefore he cites what appears to be an abridgment of the case in Brown's Parliamentary Reports; but he cites for it the case of *Powys* v. *Andrews*, which I have just shewn has no bearing on the subject. Now I was led to this inquiry by looking at the cases which were referred to by Mr. Bethell, **[382]** and I found an old note of my own in my volume of Atkyns, in the margin, where the case of *Powys* v. *Andrews* is referred to. I found this note: "He must mean *Kerrich* v. *Bransby*, which proves no such thing." *Kerrich* v. *Bransby* was the case he probably referred to, which had been cited in one or two cases as proving that, and which was in fact the case containing the marginal digest which was said to prove that; but that, as I have just now stated, proves no such thing.

Now look at what Lord Hardwicke says in another case in the very same volume. In the case of *Webb* v. *Claverden*, in the same volume of Atkyns, p. 424, Lord Hardwicke says: "This Court will not determine there is fraud in procuring a will, without a trial at law." There is the true qualification. I take it that this Court does not hold original jurisdiction, and certainly it never can, to set aside a will either of real estate or of personal estate, or to establish a will; but this Court will, where it becomes necessary from the circumstances of the case that its jurisdiction should be exercised, proceed to investigate whether the will was properly made or not, though it will not decree against it, generally speaking, without an issue devisavit vel non. And when that issue has been determined, what is the Court to do? If the Court has no jurisdiction upon the case after an issue found against the will upon an issue devisavit vel non, what is the Court to do? Is it to do nothing? Surely the Court must proceed to do something. The Court will either make an order for the delivery up of the will

to be cancelled, or it will grant a perpetual injunction against the party claiming under it, or vice versâ. Then the principle really comes to this, that in cases where there is no occasion to resort to a Court of Equity—and there are one or two cases of that sort to be found in the books, where there is a simple statement that the will was made by fraud and imposition, or that the testator was incompetent, and there is no impedi-[383]-ment in the way of a trial at law, the bill may be demurred to, because it contains no matter upon which the party is entitled to relief in equity—the heir at law may bring an ejectment, and he does not need the assistance of a Court of Equity. But in cases where he cannot try his ejectment without removing obstacles which are in his way, he may properly apply to the Court of Equity to remove those obstacles. But there is another class of cases where the whole property in question that is litigated is real estate only, and with which a Court of Equity alone can deal. In such a case, I take it to be perfectly clear that a Court of Equity—as, for instance, suppose the case of an equity of redemption—or a case where the parties who are seeking the assistance of the Court, seek only to obtain a declaration of trust in their favour—a Court of Equity is the proper jurisdiction to apply to; and that when, in order to exercise that jurisdiction, the Court is obliged to make a preliminary inquiry, it may do so either by an issue devisavit vel non, or by directing an action of ejectment to be brought. But, in many cases, the best and the proper remedy is an issue; because when an action of ejectment is brought, and a recovery takes place at law, what is then to be done? An action of ejectment will try toties quoties; it is no bar at law. Therefore a Court of Equity must do something. That very often is more conveniently done by directing an issue; for this reason, that in directing an issue, the Court has jurisdiction over the whole case, and it may grant a new trial or not at its pleasure. But in an ejectment, a new trial can be granted only by a Court of law; therefore the Court of Equity in such case, to a certain extent, parts with its power, and gives it to another tribunal: whereas equity may require that the whole matter should be reserved for its own consideration. For example, supposing the Lord Chancellor should be perfectly satisfied that the will was void and ought to be set aside, and he directs an ejectment: the evidence might be [384] still unsatisfactory to him, and the trial at law might be very unsatisfactory, but he cannot grant a new trial. It is, therefore, in many cases more convenient that an issue should be directed devisavit vel non; not that the Court has original jurisdiction to interfere with the will, but it has an incidental jurisdiction, where the party who is seeking to set aside the will has no other remedy but to apply to a Court of Equity; and in that case a Court of Equity has a power to direct an issue to be tried for the information of its own conscience, before it makes a final decree; and that decree, if against the will, must either order the delivery up of the will to be cancelled, or a perpetual injunction against the devisee.

I have stated this with a view to discuss the principle upon which a Court of Equity in such a case acts, and with reference to the arguments which have been urged very properly at the bar; from which I inferred that the object of the counsel was to protest against the jurisdiction of the Court altogether, and to say that an issue could not be directed without consent, but that the party must proceed by action of ejectment, and that all the Court could do was to remove obstacles. I am of opinion, on these principles, that where a party can have no relief at law, and he must seek relief in a Court of Equity, that that Court has a clear power, by way of informing its own conscience before it administers relief finally, to direct an issue to be tried.

Now, having stated thus much, I will proceed to the particulars of this case. There are several very remarkable circumstances in this case, which, if they be true as stated in the bill and in the affidavits, require the interference of a Court of Equity: and relief can be had before no other tribunal. I will mention three instances. One instance is an estate in the township of Salmesbury, upon which it appears that the estate was purchased by Mr. Heatley, the testator; that it was paid for [385] with his own money; that the conveyance, however, was made to Mr. Sherburne, the defendant; that Mr. Heatley remained in possession of the rents and profits up to his death. Now, upon that naked mode of stating the case, the first question that presents itself is, Is Mr. Sherburne the equitable owner of that estate, or is he a trustee for the purchaser? It was purchased with the money of Mr. Heatley; he received the rents and profits during his lifetime. What is there to shew that Mr. Sherburne has any interest in it, except the fact that his name is in the conveyance.

Such a case, nakedly stated, is a case to call upon the Court, unless the use of Mr. Sherburne's name is explained by some circumstance to shew that he is the equitable as well as the legal owner, to interfere and declare him to be a trustee. It is well understood, that if a man purchase an estate with his own money, and has it conveyed to another by his own direction, primâ facie the person to whom it is so conveyed is his trustee until the contrary appears. Now, I cannot assume the contrary here merely upon Mr. Sherburne's statement. The party who seeks to investigate that transaction is not bound to take Mr. Sherburne's statement that it was the intention of the testator to give him the property, and that, therefore, he put his name in the conveyance. His statement alone would not be evidence at law, and ought not to be evidence here unless confirmed by very satisfactory circumstances. Now the same remark applies to another estate situated in Walton-le-Dale, and purchased, I believe, from Sir Harry Houghton and his trustees. That also appears to have been contracted for by Mr. Heatley, and to have been paid for with his own money. In that case the conveyance was made to Mr. Sherburne, but, in like manner, Mr. Heatley received the rents and profits during his lifetime—a fact which is not consistent with the estate belonging to any one else. Now that case, nakedly stated as the other, pre-[386]-sents the same result; and the question to be investigated is whether Mr. Sherburne is a trustee for Mr. Heatley, and therefore for his heir at law, or whether he is the owner of the estate.

Well, then, there is a third question, which is very considerable and very important. It appears on the answer, and on the affidavits—it appears on the answer, at least—that some time before Mr. Heatley's death—how long does not appear, but for some years—an account was opened with a bank at Preston, in the name of Mr. Thompson (another priest) and Mr. Sherburne; and that Mr. Heatley paid monies from time to time—his own monies—to Mr. Thompson, and that Mr. Thompson carried those monies to the joint account of himself and Mr. Sherburne at this banker's, no direction appearing to have been given to Mr. Thompson to do so. It then appears that in the year 1839, the year before he died, Mr. Thompson gave an order on the bank to transfer £12,562, being by conjecture, I suppose, the aggregate of the sums that he had received, or at least a portion of the sums he had received, to the account of a Dr. Youens and Mr. Pratt. Mr. Pratt is since dead, and it stands now in the bank in the name of Dr. Youens, without directions or order whatever. Now, that fact as it is stated nakedly in the answer itself, surely implies that the money was Mr. Heatley's. It was his money originally; no consideration is given for anything that is done with it, and it does not appear that he had given it away to anybody; but the statement simply is that the money was paid by his order to Thompson; and then he ceased to exercise any power over it, for it appears that he ordered Thompson afterwards to pay it to another account. That is not explained. Now, that is a transaction which requires explanation. Is it the property of Mr. Heatley, and does it go to his executors or not? Does it belong to his next of kin, if there was no will, or if there be a will, does it belong to his executors?

[387] Now, there is a fourth transaction, which is also a very singular one. It appears upon the answer that a sum of £10,000 was paid by Mr. Heatley to the account of Mr. Sherburne—paid to Mr. Sherburne; that Mr. Sherburne contracted to purchase an estate for £8914; that the conveyance was made to Mr. Thompson, Dr. Youens, and, I think, another person, by Mr. Sherburne's desire. Mr. Sherburne made the contract, as he states, with the vendor, and by his direction the estates were conveyed to these three persons. What became of the estate? Why, he states that Mr. Heatley received the rents and profits of the estate during his life. But he states another fact; he says that the £10,000 which he received he was to pay bank interest for; and that when the transaction was terminated in the purchase of the estate, he agreed with Mr. Heatley that he should receive the rents and profits as far as they would go for the £8914, and bank interest on the remainder. That is the transaction stated. What is the meaning of it? Does the estate belong to Mr. Heatley, or does it belong to Mr. Sherburne? If the estate belongs to Mr. Sherburne, is he not a debtor to Mr. Heatley for the £10,000? These are very considerable questions which require investigation, and a Court of Equity is the proper place to investigate them; especially if there is a dispute about the ulterior title of persons under a deceased person.

Now, having stated these transactions, I think there is enough in these affidavits

to call for an investigation, without pronouncing any opinion upon what the result of any investigation may be. But of what use would be any investigation—of what use to the parties would be the expense of an inquiry into the subject, if the will which Mr. Sherburne sets up shall be established? because, if that will is established in his favour, all these equities and all these legal rights will be put at rest by the will. If, on the other hand, the will is not established, **[388]** the question whether Mr. Heatley had an equitable estate in those three purchases which I have mentioned, or had a title to treat the £12,562 as his own, becomes a question of importance. I may add, also, that the transaction as to the bond given by Teebay for money advanced by Mr. Heatley, the bond being taken in the name of Mr. Sherburne, is another transaction which might require investigation. All these things are very important, and would manifestly be very important supposing Mr. Heatley had died intestate. If he had died intestate, it would have been a very considerable question—at least it would have been a question which Mr. Sherburne would have a right, if he pleased, to investigate—whether or not these different transactions gave him the money or the land, or whether the heir at law or the next of kin would be entitled. But it is perfectly plain, that if there is a good will it vests the whole in Mr. Sherburne, and all inquiry becomes nugatory. It appears to me, therefore, that the preliminary question is, Was there a will or not? I do not see how I can accede to this motion until the question is determined whether the testator really has made a will in Mr. Sherburne's favour or not. If he has, there is no occasion to put the parties to further expense or to entertain jurisdiction over any one of these subjects'; but if he has not, then it becomes a very serious question between Mr. Sherburne and the representatives of the testator, both real and personal, how these transactions are to be considered, and in whom the equitable interest is now vested. It appears to me, therefore, that I cannot with propriety (I have given the case much anxious consideration) come to any conclusion upon this subject—upon this motion—until I direct an issue to be tried whether a will was made or not; therefore I am disposed to direct that an issue shall be tried, in order to investigate the validity of the will, and of the codicils that were last made.

[389] There is a remark to be made upon that. I wish to pronounce no opinion whatever upon what the result of that investigation may be. I have formed none. It was very much argued before me that the relation in which the parties stood to each other made it difficult even to sustain the will. Now, upon that subject, I am prepared to say that I do not think mere influence is enough to set aside a will. All wills are made under some kind of influence—the influence of affection or attachment, which is perfectly legitimate. If a man makes a will under that influence to exclude his own family and give his estate to a stranger, I do not apprehend such a will could be displaced at law or in equity. The question therefore is as to the degree of influence. It must be such a degree of influence, if you choose to call it by that name, as deprives the testator of being the proper master of his own faculties. A degree of influence, arising from strong fear and from threats or menace, would, I think, be undoubtedly sufficient to set aside the will, and make it void at law; so would a degree of influence arising from partial insanity or delusion upon a particular subject. There was a celebrated case which I remember, though I do not think anybody whom I have now the honour to address will remember it (I am unluckily now one of the oldest in the profession)—there was a case of *Greenwood* v. *Greenwood*,(*a*) where a gentleman, not only of considerable capacity but of extraordinary talent, who had much distinguished himself at Cambridge, having taken a high degree and high honours there, and who also, in general society, was considered a man of considerable learning and acquirements, had taken a prejudice against his own brother. He thought that his brother meant to poison him. There was no other subject in the world upon which he was under a delusion; but it was quite clearly established that upon that subject he was **[390]** so. There were three or four trials about it, and upon one or two occasions the will was set aside. I believe it was afterwards established, the jury not believing that he was under a delusion at the time he made the will; but still it was a case in which it was admitted that, if he had been under a delusion upon that subject at that time, the will would have been bad. That is an instance where a man makes his will under the influence of strong passion, which is altogether unfounded—

(*a*) Cited by Lord Erskine, C., 13 Ves. 89; and see 3 Bro. C. C. 444.

jealousy or fear of another individual—that is, of partial insanity, which, if it governs the man in the act he is doing, ought to make it void. So with respect to a delusion arising—(which is suggested in the bill, though it is undoubtedly answered by the affidavits—it is a matter to be tried)—a delusion arising from superstitious terror. I can easily conceive a case of a man of very strong mind being under the influence of such a superstitious terror or delusion as that he might think it necessary to his salvation that he should give all his money to his priest or confessor. If that was clearly established, I am by no means prepared to say that it would not be a very sufficient ground; and were I the judge directing the jury upon the subject, I should say that if they found it to be such a degree of delusion as to deprive the man of the exercise of his free judgment in what he was doing, it would be sufficient to destroy the will.

A case has been cited for the purpose of shewing that: that of *Huguenin* v. *Baseley*. I remember that case well. I was present when Lord Eldon decided it. I knew the defendant Mr. Baseley. He was a clergyman of the Church of England, and a very respectable man. Mr. Sharpe has quoted very properly the argument of Sir S. Romilly in that case against the will, and he has taken up Sir S. Romilly's suggestion. He has shewn that by the French law, or the law existing over the greatest part of the Continent where the Roman Catholic religion prevails, a gift **[391]** made to a confessor, or even a legacy given to a confessor, would be void by reason of the relation of the parties. Now you will observe upon looking at that case that Lord Eldon altogether evades that part of the subject, though he decreed the gifts made to Mr. Baseley to be set aside. That was during the lifetime of Mrs. Hill. She had married the plaintiff, and joined with him in filing the bill. The Lord Chancellor set them aside; but he put it on the ground that Mr. Baseley had shewn, by his own conduct, that he had acquired the management of her affairs; that he stood in the relation of a confidential agent, having the direction and management of her affairs; and he founded his judgment on a letter which Mr. Baseley had caused her to write to her solicitor, dismissing him. Her former solicitor, who had never misconducted himself, was dismissed by a letter which she wrote, and which had been copied by her from one which Baseley wrote for her, in which she stated that Providence had presented her with a kind friend, a person who was competent to manage her affairs—that she should have no further occasion for her solicitor, and that she wanted to put the whole of her affairs into Mr. Baseley's hands. The Lord Chancellor considered that Baseley had himself caused her to write the letter, and that he had got possession of her affairs, and therefore he brought it within that class of cases which have determined that a gift made under the influence of the confidential manager of a party cannot be sustained, being without consideration.

Now it is to be observed in the present case that Sherburne stood in the relation—during a period which embraced all the transactions that I have mentioned, and which also embraces the time of making the will—he stood in the relation of confessor to Mr. Heatley. But he was more than that: it is plain from the facts stated and obtained from the whole body of the evidence, such as it is, that he had—I was about to say unlimited—but that he **[392]** had very great control over all Heatley's affairs; and the very fact I have mentioned that the sum of £10,000 was paid to him, and that he bought an estate with it; that the £12,562 was paid to an account in which he had a joint interest, and transferred from that account afterwards; and his own admission that letters were written by him for the testator; that the testator, preferring his style to his own, often got him to write letters which he copied: all these are very strong facts to shew an interference in the management of his temporal affairs. Well, then, there is a very extraordinary fact: that one of the codicils contains the handwriting of Sherburne, and that is a codicil which fastens a condition on the plaintiffs, that they shall give a release to Sherburne within twelve months after his death or the legacy shall go over. Now that is a very strong fact. I do not pretend at all to draw any inference from it, but it is very fit that a jury should be allowed to draw their inference from these facts. This gentleman stands in the most confidential relation which can subsist between a clergyman and a layman, namely, that of confessor to his friend, and unites with that character, I should say, the character of confidential manager of his friend's temporal affairs. These are circumstances which require some consideration. If they go to the extent of shewing that the will, or any of the codicils, was improperly made, or that they were all made under that degree of delusion or that

degree of terror which, in the opinion of a jury, might constitute a want of real capability to judge what he was about, then the will and the codicils would be void. If they are established, then there is an end of all further inquiry.

It appears to me, therefore, that this is a fit case to be submitted to the consideration of a jury, and that that consideration must be preliminary to the interference of this Court; it being perfectly plain that in one case all interference here would be vain and profitless, though in **[393]** the other case it might be essential. I therefore think that an issue ought to be tried, and I am the more satisfied in coming to that conclusion; because that I am sure that Mr. Sherburne, who is a man of education and knowledge, whatever his origin may be (for that is no reflection on him), must be aware that it would be a very great advantage to him, as well as to the other parties, that this question, if possible, should be decided before the twelve months expire, which is the time limited in that conditional codicil, which is made partly in his own hand.

I therefore direct an issue in this case to try the validity of the will of 1839 and the codicils; and for the purpose of preventing all delay, I direct thatthe plaintiffs in equity shall be plaintiffs at law. I do this that the plaintiffs may have no delay, having the record in their own power.

Order accordingly.

His Lordship afterwards remarked that he did not think himself called upon to direct issues as to both wills; but if both parties consented he would direct an issue as to the will of 1824 as well as that of 1839.

An issue was ultimately directed as to the last will and the codicils.

The issue came on for trial before Rolfe, B., at the Liverpool Spring Assizes following; but after the case had been opened for the plaintiff, the matter was compromised between the parties.

Upon the subject of wills made under undue influence, see an able summary of the law in Shelford on Lunatics, chap. 7. As to the number of successive issues which the Court will direct, see *Wilson* v. *Baddare*, Jurist, vol. 5, p. 624, and the cases there collected.

[394] POPE *v.* GARLAND. Feb. 18th, June 29th, 1841.—Upon the sale of leasehold property, it is the duty of the purchaser to inquire into the covenants and stipulations of the original lease. Therefore, where leasehold property about to be sold was described in the particulars of sale as being held at a ground-rent of £86 per annum, and it appeared from the lease that the ground-rent was £80, and one-third of the improved yearly rent or value, and there were other stringent covenants in the lease, not noticed in the particulars, such as that no fine should be taken for an under-lease or assignment, except with the consent of the reversioner, &c.: Held, nevertheless, that the purchaser must be held to his contract. —A tenant at will, at a yearly rent, is a tenant from year to year.—An infringement of the rule, cujus est solum, ejus est usque ad cœlum, is sufficient to avoid the contract between vendor and purchaser.

[S. C. 10 L. J. Ex. Eq. 13, 92. Applied, *Spencer* v. *Walsh*, 1847, 10 Ir. Eq. R. 386.]

In pursuance of a decree made in this suit for the sale of certain leasehold estates of a testator of the name of William Law, the property was put up for sale by auction in lots in December, 1839, when Mr. Charles Stevens, a solicitor, attended at the sale and purchased the lot now in question.

A motion was afterwards made that the purchaser might be ordered to pay his purchase-money into Court. This motion was opposed on the ground of several alleged objections to the title; the purchaser stating by his affidavit that his object was to add the purchased premises to an adjacent property of which he had the fee, for the purpose of building; but that the restrictions and conditions with which he found the premises in question incumbered prevented his carrying his object into effect. Upon this motion the usual reference as to title was made to the Master; and the Master having reported in favour of the title, the cause was now heard on an exception to the Master's report.

It appeared from the particulars of sale that the lot in question was parcelled out into small dwellings and gardens, which, with the exception of two, were underlet for long terms, at certain ground-rents. These respective premises, with names of the tenants and the respective amounts of the rents, &c., were stated in a list in the particulars. The two tenements which were not underlet on lease, were described respectively as "A leasehold brick-built house with a garden, containing two bed-chambers, &c., let to Mr. C. Potter, as tenant at will, at £20 per annum," and "a large piece of garden ground containing about 4½ acres, at the back of Park-place, let to Mr. J. Davies, as tenant at will, at the low rent of £20 per annum." At the con-**[395]**-clusion of the whole statement was a paragraph to the effect that all the above premises were held under an original lease, for an unexpired term of forty-nine years from Christmas Day, 1839, at a ground rent of 86l. 14s. 2d., and had been usually let to various tenants at rents amounting in the whole to 120l. 17s. 6d.

The original lease under which the whole property was held was made between Charles Shard of the one part, and the testator William Law of the other part, and contained a covenant in the following terms:—"And it is hereby declared and agreed by and between the parties hereto, that for the better ascertaining of the further or additional yearly rent which is from time to time to be paid to the said Charles Shard, his heirs or assigns, during the said term, beyond the said yearly rent of £80 herein-before reserved, and the terms and conditions of every lease or agreement for a lease which shall be granted or entered into by the said William Law, his executors, administrators, or assigns, of or respecting all or any part of the said piece or parcel of ground, and other premises hereby demised, all leases and agreements for leases of all or any part of the said piece or parcel of ground and premises at any time or times hereafter to be granted by the said William Law, his executors, administrators, or assigns, to or with any person or persons whomsoever, together with the counterparts thereof, shall be prepared by the solicitor for the time being of the said Charles Shard, his heirs or assigns, at the costs of the said William Law, his executors, administrators, or assigns, or his or their under-tenants, the said solicitor making a reasonable charge for the same; and further, that such ground rent shall be laid on every house or parcel of ground, part of said premises, when and as the same shall be allotted out, or divided, or agreed to be leased for building by the said William Law, his executors, administrators, or assigns, as shall be reasonable, according to the judgment of the surveyor for the time being, **[396]** of the said Charles Shard, his heirs or assigns; and that the said William Law, his executors, administrators, or assigns, shall not nor will accept or take any fine, or premium, or gift upon or for granting any lease or leases, or upon or for any agreement for any leases or assignment or assignments of any part of the said messuages or tenements, or piece or parcel of ground (except for the assign-ment or assignments of any house or building which shall have been actually erected, and on which the ground rent shall have been previously ascertained and laid on in manner aforesaid) without the consent of the said Charles Shard, his heirs or assigns, in writing first had and obtained, and that then and in such case the said Charles Shard, his heirs or assigns, shall receive and be entitled to one-third part of such fine or premium."

The exception to the Master's report consisted of several objections, which were in substance as follows:—

1. That in the printed particulars of sale, under which the said lot was sold, the same was represented as held by the vendors under an original lease for an unexpired term of forty-nine years, from Christmas-day, 1839, at a fixed ground rent of 86l. 14s. 2d., and such lot was also represented as having been underlet subsequently to such original lease, to various tenants, at rents amounting in the whole to the yearly rent of 120l. 17s. 6d., so as apparently to yield a clear yearly improved rent of 34l. 3s. 4d.; whereas, by the abstract of the title to the said lot, it appeared that in the original lease (which was dated the 20th of May, 1823, and made between Charles Shard of the one part, and William Law, the testator, of the other part, and which contained a clause of re-entry on non-payment of the rent reserved thereby, or on the breach or non-performance of any of the covenants or agreements therein contained on the part of the said William Law), the ground rent reserved was not a ground rent of 86l. 14s. 2d., but a fixed yearly rent of £80; and such further **[397]** or additional yearly rent or sum of money beyond the said yearly rent of £80 as should be equal to one-third of the improved yearly rent or value, to the said William

Law, his executors, administrators, or assigns, of the premises thereby demised, after payment of the said yearly rent of £80.

2. That no valid and effectual assignment to the said Charles Stevens of the said lot, or at least of the said premises in the said particulars, stated to be in the respective occupations of James Davies and Charles Potter, as tenants at will at the yearly rents of £20 and £20, could be made in consideration of any sum of money without the consent of the person or persons entitled in remainder or reversion to the said premises expectant upon the determination of the said original lease, inasmuch as no ground rent had been ascertained or laid on the said premises in the manner mentioned in the said original lease, and inasmuch as such assignment, so far as regarded the premises in the occupation of the said James Davies and Charles Potter respectively, would be an assignment, in consideration of a fine, premium, or gift, within the intent and meaning of the covenant or agreement in the original lease before particularly set forth; and that no such consent had been given, nor had the said plaintiffs offered to procure such consent, or shewn that they could procure the same, or shewn the title of the person or persons whose consent was necessary as aforesaid, or shewn who such person or persons were, although the said Charles Shard had long since sold and conveyed away all his estate and interest in the premises comprised in the said original lease.

3. That under the circumstances before-mentioned, the purchaser could not have a sufficient discharge for his purchase-money.

4. That there was no evidence that Davies and Potter were tenants at will, but that they claimed to hold **[398]** as tenants from year to year, or for some greater interest.

5. That the covenants in the original lease were unusual and objectionable.

It appeared that the sixth condition of sale contained the usual stipulation, that if any error or mistake were made in the description of the property, the same should not vitiate the sale; but that the vendor or purchaser, as the case might be, should pay a sum by way of compensation to be settled by the Master.

Mr. Stuart and Mr. Stevens, for the exception. According to the particulars of sale the ground rent is 86l. 14s. 2d.; but, in fact, it is £80, plus one-third of the improved yearly rent or value, which being ascertained to be 13l. 12s. 6d. gives the real ground rent at 93l. 12s. 6d. This of itself shews misrepresentation in the value of the property, independently of the objections arising from the strict covenants in the lease. Looking at it as a mere question of rental, the purchaser would infer from these particulars that he had 34l. 3s. 4d. per annum clear. This is not a subject of compensation, because the rents here are not incidents of tenure: *Esdaile* v. *Stephenson* (1 S. & S. 122). The objection is one of title, and is strengthened by the misrepresentation: *Cadman* v. *Horner* (18 Ves. 10), *Bliss* v. *Collins* (4 Madd. 229), *Stuart* v. *Alliston* (1 Mer. 26), Sug. V. & P. vol. 2, p. 161. It may be said that the purchaser having notice of the lease had notice of this objection, and of the other objections arising out of the stringent nature of the covenants. But the authorities which support that view of the case, those of *Hall* v. *Smith* (14 Ves. 426) and *Walter* v. *Maunde* (1 J. & W. 181), have been considered as going too far, and the Court will not follow them. Some limit must be put on the doctrine contained **[399]** in those cases. The former of them was decided on a misapprehension of the decision in *Taylor* v. *Stibbert* (2 Ves. jun. 437). At all events the general rule laid down by those authorities does not apply to a case of misrepresentation. Suppose it were represented that the lease was for years, and it turned out to be for years determinable on lives, would not that be misrepresentation? Misrepresentation exists if a party is not acquainted fully with the interest he purchases. It is not sufficient for the vendor to say, if you look to the lease you will find what you buy. In *Flight* v. *Booth* (1 Bing. N. C. 377) there was nothing that could be called misrepresentation. The particulars of sale, in addition to certain trades which were prohibited by the lease, ought to have stated others, and on that ground alone the contract was rescinded. Tindal, C. J., said: "It is a safe rule to adopt that, where the misdescription, although not proceeding from fraud, does in a material and substantial point so far affect the subject-matter of the contract, that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether." In the present case the object of the purchaser is entirely put an end to. His object was to build; but by the terms of this lease he cannot fix a rent

to the under-tenants of the premises not yet built upon, without the consent of the reversioner.

There is another misrepresentation in regard to Davies and Potter, who are not tenants at will, but tenants from year to year, and therefore intitled to the usual notice to quit. [Alderson, B. A tenant at will at a yearly rent (for that is the description in the particulars of sale) is a tenant from year to year.]

Mr. Simpkinson and Mr. Bacon, contrà. The objections, **[400]** if good, raise questions of compensation only. Mr. Stevens, especially as a professional man, is bound by constructive notice of the covenants contained in the lease. He knew he was buying a lease. In *Hall* v. *Smith* Sir William Grant says, "When a lease is stated, it is the business of the party to look at it and to see whether there is any covenant that may materially influence his judgment as to the value. If the circumstance that the land was in lease had been concealed, that would be a different consideration; but upon analogy to other cases, if the party has notice that the estate is in lease, he has notice of every thing contained in the leases: if, for instance, there is a covenant to renew, the purchaser cannot object that he had no notice of that particular covenant." *Walter* v. *Maunde* and *Barraud* v. *Archer* (2 Sim. 433) are authorities to the same effect. The objection here is that the vendors represented there was a fixed rent of 86l. 14s. 2d.; whereas in truth the rent was £80, and one-third of the improved value. Now the word "fixed" is not in the particulars of sale; but even if it were otherwise, it would not have been a misrepresentation, the party having notice of the lease. [They were then stopped by the Court.]

Mr. Stuart, in reply, contended that this case was distinguishable from those where the fee-simple of the property was purchased, subject to a lease.

ALDERSON, B. I think that the Master has come to the right conclusion and that the exception must be overruled. I agree with the principle, which seems to me to be well laid down in *Hall* v. *Smith*, that where a purchaser has notice of a lease, it is his business to look at the clauses of it, to see whether it materially influences his judgment in the purchase. I see no distinction between this case **[401]** and those where the landlord sells and says that the property is under lease. If he do not state it to be so, he does not state the case so as to enable the purchaser to know what he is to purchase, and that is a misrepresentation. But it is clear, and that is not denied in argument, that where there are outstanding leases, it is the duty of the purchaser who has notice of them to ask and ascertain what the terms are upon which the property is out on lease, so that he may know precisely the nature of the property which he purchases, that is, whether he has certain rights upon it, or whether his rights are in any manner restricted. What is the difference in principle in purchasing a lease? The conditions under which the lease is framed are what make the land more or less valuable; just as in the other case the nature of the leases makes the land more or less valuable to a purchaser. In *Hall* v. *Smith* the Master of the Rolls, referring to the objection which had been made to the covenants in the lease, said: "The objection comes to this—that if there be any covenant at all burthensome to the landlord, the purchaser may object to the title." So here this is said to be a covenant burthensome to the vendor. Admitting that it is so (I do not know that it is so, but it is said to be so), what is the vendor to do?—to make a good title to a lease which is charged with certain burthens and certain covenants. If so, there is an end of the objection. But if there is misrepresentation, so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor in such case is bound by that misrepresentation. And that explains the case of *Flight* v. *Booth*,(*a*) where the misrepresentation was as to the terms of a particular covenant, which, when the covenant itself was produced, turned out **[402]** to be of a much more stringent description. It appears to me that the party was bound in that case to take notice of the terms of the covenant in his particulars of sale; but, on the contrary, his manner of stating it implied that that was the whole restriction of the sort to which the lease was subject.

Then what are the terms of the covenant here? The first provision is that the party who takes the lease from the original lessor Shard shall not underlet any part of the premises unless Shard's attorney draws the leases. This is in order to ascertain

(*a*) And also, it should seem, the case of *Van* v. *Corpe*, 3 M. & K. 269, and *Flight* v. *Barton*, id. 282.

what was the fair proportion of the improved value which Shard was to have, the ground rent having been already fixed at £80 and one-third of the improved value; and for the purpose also of seeing that proper covenants were inserted in the leases. Then there is a clause that Law shall not assign on fine to any person without the special leave of Shard; and if he does assign with Shard's leave, Shard is to have one-third of the fine. That applies only to assignments of portions of the lands, and not of the whole. Besides, there were several portions of the property on which leases had been granted under the previous lessees. All these may be assigned ad libitum without any objection; and the others may since have been assigned, so as to render every objection of that sort nugatory. Upon the whole, it appears to me, that whatever variation there may be from the original contract is fairly the subject of compensation under the 6th condition of sale.

Exception overruled with costs.(*a*)

[403] June 29.—Part of the property in this cause, consisting of certain houses at Bermondsey, having been put up for sale by lots, Mr. Francis Nash was declared the purchaser of Lots 1, 2, and 3, and his purchase was confirmed by the Master.

A motion was now made on the part of the plaintiffs, the vendors, that Nash might be ordered to pay his purchase-money for the three lots into Court. On the other hand, a cross motion was made on the part of Nash, that he might be discharged from his purchase, and reimbursed all costs and charges, so far as related to Lot 3, together with the costs of this application, or that he might be paid for so much of the ground and premises comprised in Lot 3 as the vendors could not convey to him.

It appeared that the houses in question were old, and that a chamber in Lot 4 (which was purchased by a Mr. Rice) projected over part of the messuage, No. 3, to the extent of 3½ feet at the front and 2 feet 9 inches at the back; the depth of the projection from front to back being 17½ feet. The purchaser attended at the auction, on which occasion a ground plan of the premises was produced, from which however the nature of the projection did not appear; and according to the purchaser's affidavit he was induced to bid from seeing the extent of ground and buildings therein marked, and that he had no other knowledge of the internal state of the buildings.

The auctioneer swore that he stated generally before the auction commenced, that though the vendors had, for the convenience of the purchasers, exhibited a plan of the property, yet they would not be bound by it as to the exact measurement, tenants' names, or numbers affixed to houses; and that he stated as to this particular lot that the vendors would not sell by the plan, but by the particulars of sale.

The purchaser swore that he had been present the whole time of the sale and had heard no such statements made by the auctioneer.

[404] Mr. Simpkinson and Mr. Abraham, for the vendors, said that the property offered for sale was not described as land or ground, but as houses; and therefore the purchaser could not be deceived by what was merely a ground plan. Besides, the vendors expressly declared they did not mean to sell by the plan, but by the particulars. The purchaser ought to have excepted to the Master's report, and not to have made this motion after the Master had actually settled the conveyance. They referred to *Magennis* v. *Fallon* (2 Molloy, 592).

Mr. Bethell, for the purchaser.

THE LORD CHIEF BARON. If there were any grounds for supposing that this building overlapped the other so that the defect could be detected by the eye, I should be glad to have some further inquiry on the subject; because in other respects the property corresponds pretty well with the plan, and is consistent with the statements made by the vendors. But it is not stated even by the witness who speaks to the plan and elevation that this defect can be seen by the eye.(*b*) Then as to the statement made by the auctioneer, I cannot for a moment entertain the evasion that

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(*a*) See, as to the general rule, *Cosser* v. *Collinge*, 3 Myl. & K. 283; *Whatman* v. *Gibson*, 9 Sim. 196; and as to what amounts to misrepresentation, *Waring* v. *Hoggart*, Ry. & Moo. 39. In *Flight* v. *Barton*, referred to in the preceding page, silence was held to amount to misrepresentation.

(*b*) For cases in which a certain degree of misdescription was considered immaterial, on the ground of the defect being obvious to the senses of the purchaser, see *Dyer* v. *Hargrave*, 10 Ves. 505; *Scott* v. *Hanson*, 1 Sim. 13. 1 Russ. & M. 128.

it was not intended to sell by the plan. I can understand a general statement being made as to the vendors not being in every respect bound by the plan; but still the auctioneer cannot be heard to say that the plan is not to be abided by. Upon the whole I think the defect is sufficient to avoid the contract.

Cross motion granted.

[405] CATOR *v.* THE CROYDON CANAL COMPANY. Jan. 20, 21, March 3, 1841.—By an act of Parliament establishing a canal company, the committee of the company had power, in case any person who should agree with the company for sale of any commons or waste lands should not be able to make a good title to the satisfaction of the committee, or, in case any person entitled to commons or waste lands to be purchased by the company could not be known, to order the purchase-money to be paid into the Court of Chancery. In 1812 a contract for the purchase of certain lands on P. Common was entered into by the company with S., a party whose title to sell was then doubtful. The company, however, took possession of the lands and never paid the purchase-money into Court. In 1827 an act passed for the inclosure of P. Common, and in 1837 an award was made pursuant to that act by which the arbitrator found that S. was the true owner of the lands in question: Held, that the company were trustees of the purchase-money for S. and those claiming under him; and that as the legislature had permitted a bargain with an unascertained person, S. and those claiming under him were guilty of no laches in not filing a bill against the company for the recovery of the purchase-money before 1837, the period when the true ownership was ascertained.—Where a trustee admits that the trust-money has not been paid, but that it has remained for a length of time in his hands: Quære, whether any length of time will operate as a bar to the lawful claimant in a Court of Equity?—The legal title to purchase-money or compensation-money to be ascertained by the award of a commissioner under an inclosure act is not complete till the award is made. Therefore, if a person entitled to such money assigns away his interest before the award is made, he is not a necessary party to a bill filed by the assignee for the recovery of the money.—Where the title to a contract is made out by shewing the title to the land which is the subject of the contract, the Court will enter into the question of the title to the land at the time of the contract; and if the party insisting on the contract makes out a good title to the land at that time, the Court will direct a reference to the Master as to the subsequent title.—Upon a reference to the Master to inquire as to the title to compensation for damage done to lands, the Master ought regularly to inquire whether the damage was temporary or permanent.—Under a conveyance by the lord of the manor of P. of "all those messuages, lands, tenements, commons, wastes, woods, underwoods, and the soil of the woods and underwoods of P.," without any reservation of manorial rights, the soil of the common of P. passes.—A witness stated that he believed, from a reference to his books of account and from inspection of a cheque and other documents which were produced to him at the time of his examination, that A. on a certain day paid £500 to B.: Held, that this was not sufficient evidence of payment.

[See p. 593, post.]

By the statute 41 Geo. 3, c. 127, certain persons were incorporated by the style and title of the Croydon Canal Company, for the purpose of making and maintaining a navigable canal from Croydon into the Grand Surrey Canal near Deptford, with the usual powers to purchase and take possession of lands for the purpose of the undertaking. Certain commissioners were also appointed for settling all differences which might arise between the company and the proprietors of lands; and by the 30th section of the act it was enacted that in all cases where, in making canal aqueducts or other works, or any roads thereto, there should be occasion to cut through, take, or use any part of any commons or wastes except in the parish of Croydon, the conveyance of such parts of such commons or wastes by the lord or lords, lady or ladies of the [406] manor or manors in which the same were situate, to the company, should be a good and sufficient conveyance without the commissioners or other parties interested joining therein, and that the commissioners should

ascertain what proportion of the purchase-money should be due to the lord, &c. for his, her, or their interest in such lands, and that such proportion should be paid accordingly, and that the residue should be paid to the overseers of the parish to be applied in aid of the poor-rates.

On the 31st of July, 1802, the canal company, for the purpose of making part of the canal, set out 9 a. 0 r. 30 p. of certain lands which were then uninclosed, called Penge Common, lying within the parish of Battersea, the ownership of which was claimed by a Mr. Morgan. This piece of ground, though not paid for by the company, was soon afterwards used by them in the progress of their works. It afterwards appeared that no lord of the manor or other persons contemplated by the act were interested in Penge Common; and with a view to remedy the difficulty as to title arising from this circumstance, and similar difficulties in other cases, the 30th section of the act was repealed, and by the 48 Geo. 3, c. 18, it was enacted that when, and as often as it should be necessary or expedient for the purpose of making the canal, to take or make use of any common or waste ground, and also when and as often as any common or waste ground should have been already taken but not paid for, the committee should give such notice as therein stated (i.e. by affixing copies of the notice at the usual places, and by leaving a copy at the house of the lord of the manor) for summoning a meeting, for the purpose of settling and determining the purchase-money, annual rent, or satisfaction to be paid, given, or made for such common or waste ground; and in case any person who should agree with the company for sale of any lands should not be able to make a good title to the satisfaction of the committee or any five of them, or in case **[407]** any person to whom any purchase-money should be awarded could not be found, or if the person or persons entitled to such lands should not be known or discovered, then it should be lawful for the committee or any five of them to order the purchase-money to be paid into the Court of Chancery, to the credit of the parties interested, subject to the order of that Court.

On the 7th of April 1812, the committee of the canal company gave notice of their having taken and made use of the piece of land in Penge Common, and of their intention to assemble a meeting to settle and determine the purchase-money. The notice to this effect was posted at the usual place of notice, and a copy was left at the house of John Scott, Esq., who was then owner of Penge Place and the reputed lord of the manor, and claimed to have the soil of the common under a conveyance from Morgan.

In pursuance of this notice, six of the commissioners met and made their award, dated the 29th of April, 1812, whereby they awarded that the company should pay for the absolute purchase of the 9 a. 0 r. 30 p. so taken and received, the sum of 620l. 5s., and also the further sum of 181l. 5s., for compensation for damage done for another piece of land containing 1 a. 3 r. 24 p., with interest on both sums at the rate of £5 per cent. per annum from the 31st of July, 1802. And they awarded to Scott two sums of 33l. 12s. and 83l. 11s. 6d. for certain drains and trees, with interest as therein mentioned.

By articles of agreement, dated the 22nd of May, 1813, and made and executed between the said John Scott of the first part, Joseph Cator, since deceased, of the second part, and the plaintiff John Cator of the third part, reciting that John Cator had contracted with Scott for the purchase of Penge Place, and the soil of Penge Common and the trees growing thereon, at the price of £35,000, and that the purchase was made out of trust-money in respect of trusts under which John Cator would become **[408]** tenant for life of the hereditaments, and that it would be for the convenience of the owner or occupiers of the hereditaments that the several articles, matters, and things thereinafter mentioned should be included in such purchase, but it was apprehended that the same could not be purchased out of the trust funds, and that John Cator had agreed to purchase them out of his own proper monies: the said John Scott agreed to sell and John Cator agreed to purchase at the sum of £500, amongst other things, all and every sum and sums of money, and the interest thereof, to which John Scott was entitled under or by virtue of the award of the 29th of April, 1812.

In 1827 an act of Parliament (the 7 & 8 Geo. 4, c. xxxv.) passed for the inclosure of Penge Common. That act, after reciting that Lord Spencer, from whom Scott's lands were originally purchased, claimed to be lord of the manor of Battersea and Wandsworth, and as such entitled to the soil of Penge Common, and also that the

plaintiffs and other persons named claimed to be owners and proprietors of messuages and inclosed lands in the hamlet of Penge, and of common lands on Penge Common, and also that the copyholders of the manor of Battersea and Wandsworth and the freeholder inhabitants of Battersea claimed rights of common, gave permission to Mr. Peyton, the commissioner appointed under that act, after making provision for tithes, &c., to allot to the lord of the manor of Battersea and Wandsworth, in case he should establish his claim to the soil of Penge Common, one-sixteenth of the lands of such common as a compensation for his rights of soil, and to divide and allot out the residue of the lands to the several owners, lessees, and other persons interested therein, in proportion to their respective lands, common rights, and all other rights whatsoever.

Mr. Peyton by his award, dated the 10th of February, 1837, after allotting certain lands in lieu of tithes, &c., allotted and divided all the residue of the lands to and [409] amongst the plaintiffs and four other persons named, as the only persons interested in the said commonable lands in respect of their respective lands, common rights, and all other rights whatsoever, &c.; thereby excluding the lord of the manor of Battersea.

It appeared that in May, 1822, the canal company paid to Scott the sums of 33l. 12s. and 83l. 11s. 6d., awarded to him in respect of the trees and drains; but they never paid or tendered to him or any other person the sums of 620l. 5s. and 181l. 5s., or either of them, and they afterwards became insolvent.

In 1835 an act passed for making a railway from Croydon to the London and Greenwich Railway. This act after reciting the several acts relating to the Croydon Canal Company, and that the line of the railway was laid down over and upon the principal part of the canal, enacted to the effect that, with certain specified exceptions, the railway company should be compelled to purchase the whole scite of the canal and all the property of the canal company, and should pay the purchase-money into the Bank of England, to the credit of five persons to be named by the committee of the Croydon Canal Company; and that such purchase-money so to be paid to the said four persons, "and also every or any other monies belonging or to belong to the said Croydon Canal Company should, from time to time, be paid and applied under the orders and directions of the committee for the time being of such company, in or towards the performing, observing, paying, answering, and satisfying of all the mortgage and other debts, contracts, engagements, damages, and expenses, and all other claims, demands, and liabilities whatsoever, to which the said canal company were or might be liable." And that after payment and satisfaction of such debts, claims, demands, and liabilities, the Croydon Canal Company should be dissolved and cease to be a body corporate.

[410] On the 27th of July, 1836, the London and Croydon Railway Company paid the sum of £40,250, being the purchase-money of the scite of the canal and the lands and works appertaining thereto into the bank in the names and to the credit of Messrs. W. and J. Masterman, bankers, John Woolley, Joseph Smith, and Francis Stedman, being the five persons named for that purpose by the committee of the Croydon Canal Company.

The bill was filed by John Cator and Albemarle Cator, as tenant for life and first tenant in tail under the trusts referred to in the agreement of the 22nd of May, 1813, and by Bertie Cornelius Cator and John Foakes, trustees under those trusts, against the Company of Proprietors of the Croydon Canal, Messrs. Masterman and the other nominees, holders of the £40,250, and four persons of the name of Adams, Booth, Wilson and Fox, being the parties, other than the plaintiffs, to whom allotments had been made under the Penge Inclosure Act. The bill, after alleging the foregoing facts and stating that the sum of £500 mentioned in the agreement of May, 1813, had been duly paid by the plaintiff, John Cator, charged that the two sums of 620l. 5s. and 181l. 5s., making together 801l. 10s., still remained due and owing from the Croydon Canal Company in respect of the said pieces of land part of Penge Common so taken and damaged by the said company, together with interest thereon from the 30th day of July, 1802, at the rate of £5 per cent. per annum, and that the plaintiffs were entitled to a part of the said sum of 801l. 10s. and the interest thereon, in the proportion which their interest in the said Penge Common bore to the interest of the defendants, Adams, Booth, Wilson, and Fox. The bill further charged that the plaintiffs had been in treaty with the canal company for the payment of this money ever since the making of the award; and that though they at one time denied the

plaintiff's title, they never denied the money to be due, but, on the contrary, **[411]** their clerk, Patrick Drummond, had expressly admitted in his letters to Mr. Peyton and his solicitors, particularly in a letter to Mr. Peyton, dated the 11th of December, 1827, that the money had not been paid.

The bill prayed that the canal company, or that Messrs. Masterman and the other nominees and holders of the £40,250 might, out of that sum, pay the said sum of 801l. 10s., with interest as before stated, either to the commissioner under the Inclosure Act, or into the bank, for the benefit of the plaintiffs and the defendants interested in the allotments, and that their rights in the said sum of 801l. 10s. might be ascertained, and the amount due to them respectively might be paid. And that the defendants the company, and the defendants Masterman, &c., might be restrained from applying or paying any part of the £40,250, except under the advice of this Court.

The canal company, by their answer, admitted that no part of the sums of 620l. 5s. and 181l. 5s., or the interest thereon, had ever been paid, tendered, or secured by them, inasmuch as neither Scott nor any other person had ever made any title to the piece of ground so taken by the company, or the monies so awarded. They also insisted that the claim of the plaintiffs was barred by lapse of time, and that the suit was defective for want of parties.

The defendants Smith and Stedman insisted that they and the other nominees of the £40,250 were only treasurers thereof, and bound to obey the orders of the committee of the canal company respecting it, and had therefore no power to comply with the requests of the plaintiffs, or to pay them the sum in question in this suit. And they submitted they were not proper parties to the suit.

The cause originally came on for hearing before Alderson, B., in Hilary Term, 1840, when it was objected by the defendant's counsel, that Scott or his personal repre-**[412]**-sentative, ought to have been made parties to the suit, as being the persons legally entitled to receive the money in question; and in support of this objection, *Cathcart* v. *Lewis* (1 Ves. jun. 463), *Ray* v. *Fenwick* (3 Bro. C. C. 25), *Colburne* v. *Duncombe* (9 Sim. 151), and *Haworth* v. *Bostock* (ante, p. 1), were cited; but the Court overruled the objection, on the ground that Scott had no right to the money independently of any award to be made to him, and that no award had been made to him. What he originally had was only an equitable right to a money compensation, and that right he had assigned.

The cause now came on for hearing on the merits.

The plaintiffs, in order to prove their title under Scott, gave in evidence certain deeds of lease and release, dated the 26th and 27th of April, 1773, by which Lord Spencer conveyed to Smithson, all those messuages, lands, tenements, commons, wastes, woods, underwoods, and the soil of the woods and underwoods in Penge in the manor of Battersea; also a deed of even date with the release, and made between the same parties, by which, reciting that it was doubtful whether the waste lands were not part of the manor of Battersea, to which Lord Spencer was entitled for life only, with remainder to his son Lord Althorpe in tail male, Lord Spencer covenanted that his son would, on attaining twenty-one, join with him in suffering a recovery of those premises. The plaintiffs then proved the recovery, from which it did not appear that any manorial rights were reserved; then several mesne conveyances and assurances down to Scott; then the agreement of the 22nd of May, 1813; and ultimately a conveyance to the Cators, by deeds of lease and release, dated the 24th and 25th of May, 1813.

[413] The agency of Drummond as attorney for the canal company, as also his letter of the 11th of July, 1827, were admitted by the company.

In proof of payment of the £500 as the consideration for the agreement, the plaintiffs examined Mr. Brundrett, who was the solicitor of all parties in the transaction with Scott. The deponent stated that John Cator, about the 29th of May, 1813, gave his bond to Scott for £500, being the consideration money for the agreement: and he the deponent believed, from a reference to his books of account, and from inspection of the cheque and other documents (which he proved), that John Cator, in October, 1814, paid the said £500 to Scott, and that upon that occasion the bond was redelivered to Foakes, the agent of Cator. He also stated his belief that the bond was either lost or destroyed. The cheque in question was drawn by Foakes on Prescott, Grote & Prescott for £532, on account of J. Cator, Esq., and made

payable to Brundrett, and at the back of it was an indorsement in Foakes's handwriting as follows:—"29th May, 1813. The bond for £500 and interest this day given to Mr. Cator of Penge Place, by J. Foakes." There was a corresponding entry on the books as to the payment of the £532.

Mr. Simpkinson, for some of the defendants, contended that this was no evidence of payment to Scott of the £500. The deponent was only giving his opinion founded on conjecture. His whole evidence amounted to no more than a statement as to his belief of payment having been made.

Alderson, B. The witness may state the fact of payment, and may refresh his memory by the exhibits. The only question is whether there is a sufficient statement of the fact. At present I think there is not.

The cause then proceeded.

[414] Mr. Stuart, Mr. Cator, and Mr. Wilcock, for the plaintiffs. Supposing the statute 3 & 4 Will. 4, c. 27, to apply to the present case, the admissions of Drummond the company's agent, take it out of the statute. Drummond being their attorney, his admissions will bind them without seal: *Mayor of Thetford's case* (1 Salk. 192). And the fact of his admission being made to a third party is immaterial: *Peters* v. *Brown* (4 Esp. 46). But the Statute of Limitations does not apply to the case of cestui que trust and trustee unless the 25th section is in point. And here the purchaser is trustee of the purchase-money for the vendors: *Pollexfen* v. *Moore* (1 Atk. 272). The case of *Hughes* v. *Kearney* (1 Sch. & L. 132) is very similar to the present. *Mackreth* v. *Symmons* (15 Ves. 329), *Wall* v. *Bright* (1 J. & W. 494). The purchasers are likewise trustees by express terms of the Railway Act.

Mr. James Russell, for the defendant Adams.

Mr. Simpkinson and Mr. Chandless, for the defendants the canal company, Smith, and Stedman. The bill contains two demands: one for purchase-money of lands, the other for compensation for damage done to other lands. But the latter demand has nothing to do with the question whether the plaintiffs can make a good title to the land proposed to be purchased. The only party who can claim compensation for damage is the party who had the legal estate when the damage was done, that is to say, Morgan, or, as he is dead, his executors. As to the title, the plaintiffs make out no right to the soil of the common. The conveyance by Lord Spencer to Smithson does not convey the soil of any common or waste lands, but only wastes generally, nor do the supplemental deeds cure this defect. Then there was no regular contract with Scott, **[415]** and the award is silent as to the party entitled to compensation. If the plaintiffs are interested, so are other parties who are not before the Court. The abstracts shew that the Archbishop of York and others were interested in the common when the compensation money was awarded.

But the plaintiffs are barred by lapse of time. It is said on the other side that this case quoad the purchase-money is a case of trustee and cestui que trust, and that it is not within the stat. 3 & 4 Will. 4, c. 27, s. 25. It may be conceded that that section has nothing to do with the question; for the act only refers to express trusts. The statute, except that it provides for the case of mortgagor and mortgagee (sect. 28) (in which no doubt the relation of trustee and cestui que trust exists), is solely and exclusively confined to cases where land is conveyed verbatim between the trustee and the cestui que trust. But because implied trusts are not within the statute, it does not therefore follow that this Court will give relief to cestuis que trust who are guilty of laches. In regard to laches there is no distinction between the case of an implied trust and any other case: *Beckford* v. *Wade* (17 Ves. 97. See ante, vol. 3, p. 622). In *Lord St. John* v. *Boughton* (9 Sim. 219) the trust was express, and therefore the statute of Will. 4 was held to apply; and it was held that there was a sufficient acknowledgment within that statute to remedy the effect of lapse of time. But if the trust had not been express it would have been barred; and neither an acknowledgment under that statute, nor one under the 9 Geo. 4, c. 14, would have been available. So here the trust, if any ever existed, is barred, and the written acknowledgment of Drummond will not be sufficient to set it up. The acknowledgment under that act must be made by the party and not by the agent. This was the subject **[416]** of discussion in *Hyde* v. *Johnson* (2 New Ca. 776). And it must also be made to the other party and not to a third person. This was pointedly decided by your Lordship in *Grenfell* v. *Girdlestone* (ante, vol. 2, p. 676). Here the admission of Drummond is made to Peyton; and the recitals in the deeds between the canal

company and the railway company are merely admissions between themselves. Besides, what authority had Drummond to bind the canal company by his admissions? The clerk of a company is not competent without special authority to bind the company by contract; and if so, he cannot bind them by an acknowledgment of a contract. To have such a power he must have been appointed by their common seal for that purpose. If it were otherwise it would follow that, though the company could not bind themselves except by their common seal, they might by the appointment of a clerk, not under seal, enable that clerk to bind the company: *Wilmot* v. *Corporation of Coventry* (ante, vol. 1, p. 518), *Carter* v. *Dean and Chapter of Ely* (7 Sim. 211). At all events the acknowledgment by Drummond, whatever be its value, is no acknowledgment of the plaintiffs' right.

Then it is said that the money in the hands of the nominees is ear-marked, and that there is a legislative trust in the railway company or the nominees to pay this debt. But the clause in the Railway Act does not create debts not existing at the time, or revive debts barred at the time, but only enables the nominees to discharge existing debts. The nominees are not bound to see to the application of the monies. They are merely in the nature of bankers, and bound to follow the directions of the company. The Vice-Chancellor has decided that question.(*e*)

Lastly, if the plaintiffs are entitled to any principal **[417]** monies, their claim to interest is limited by the stat. 3 & 4 Will. 4, c. 27, s. 42.

Mr. Piggott appeared for the three other nominees, and submitted that they were bound by the decree of the Vice-Chancellor above referred to.

Mr. Stuart, in reply. There is a clear obligation existing between these parties unless barred by lapse of time; and it is immaterial whether that obligation is created by agreement or by act of Parliament. If the defendants did not pay into the bank the money which they were bound to pay, are the plaintiffs to suffer? If the plaintiffs shew a primâ facie case, they have a right to have the money paid into Court, the same as on petition. If they shew a title to any part of the monies, they have a right to a reference to the Master to say whether they have a title by themselves or in common with any other and what parties. The money should have been paid in 1802 or in 1812. Why did the plaintiffs not file a bill? Because the defendants were, as they admit by their answer, insolvent. They have been rendered solvent by act of Parliament, and now honestly insist on the stat. 9 Geo. 4, c. 14. They say that it is not intended, by the terms of the Railway Act, to revive debts already barred. But the very reason why the clause in question was inserted was that they had been insolvent 28 years. The clause expressly mentions "contracts," "engagements," "damages"—do they mean that this does not include statutory damages? No; but they say that you are to read this in conjunction with the Statute of Limitations. How can such an argument be used in a Court of Equity?

But the deed between the two companies and the act of Parliament have ear-marked the money; and possession taken under the act of Parliament is not an adverse possession, and consequently the defendants are bound to **[418]** pay. In the common case, where money is to be paid into Court under an act of Parliament instead of a contract, and the possession is parliamentary, it is a possession in a character which is so far from being adverse that it creates an obligation to pay. Such a possession stands in lieu of the contract and of adverse possession. There cannot be a right to hold under the act without fulfilling the obligation to pay.

March 3rd.—ALDERSON, B. I have taken time to consider my judgment in this case. The material facts are these:—

In December, 1800, the Croydon Canal Company were desirous, under the provisions of their act of Parliament, of taking a certain portion of Penge Common. They entered into a negotiation with Morgan, the then supposed owner of the premises, and afterwards renewed it with Mr. Scott, to whom Morgan had in the interim sold his property. In May, 1802, there was a price fixed, at which the land was to be taken, of 67*l.* 10*s.* per acre. And under these circumstances the land was set out, and on the 31st of July, 1802, taken possession of by the company, who then proceeded to execute their canal.

Difficulties then occurred as to the title, arising out of a doubt whether the manor belonged to Scott, and whether, if it did not, any good conveyance could be made to

(*e*) In a cause of *Cator* v. *Masterman*.

the company. This led to the second act of Parliament; after the passing of which the company, acting upon its powers, applied to the commissioners, who re-assessed the value of the land at 67l. 10s. per acre, and assessed also a sum for the damage done by the company to seven additional acres of Penge Common, in the course of excavating the canal, adding interest as to the land from 1802, and determining the compensation at the sum of 620l. 5s. for the land, and 181l. 5s. for the damages. This took place in 1812.

Now, under these circumstances, what was the relative situation of the parties at that time?

[419] The company were in possession of the land, which they had taken as of right under the provisions of their act of Parliament from the true owners. They had done damage, as they had a right to do under the provisions of their act of Parliament, to other land.

On the other hand, the true owners of Penge Common were, by the same act, entitled to the money the price of the land, and to the compensation due for the damage done to the other part of their land.

This was then a bargain made under the authority of Parliament, by which, if the owners were ascertained, the bargain must be considered to be made with them; and if not ascertained, must be considered as made with them when they should be ascertained; and if the company had chosen to act as they ought to have done, and had paid these several amounts into the Court of Chancery, no one would for a moment have doubted as to the rights of the parties. The Court of Chancery would then have become the trustee of the money for these parties, and the company's liability would have been at an end. But the company did not do this, but retained the money themselves. Still, I think that this does not alter the situation of the land-owners. As to them, the company, retaining the money, must be considered as trustees for the true owners as soon as they should be ascertained, exactly as the Court of Chancery would have been if the money had been deposited with that Court. They cannot in equity be allowed to place themselves in a better situation than they would have been in if they had discharged their duty under the act of Parliament. This was the situation of things in 1812.

Now let us examine what has happened since. In 1812 it was uncertain to whom Penge Common belonged, and so it continued to be till, under the provisions of the Penge Inclosure Act and the proceedings under it, it was finally decided on the 10th of February, 1837, that the whole **[420]** of the soil of Penge Common belonged to the proprietors of certain estates, between whom it was then by the award of the commissioners under the Inclosure Act finally divided.

These proprietors now claim the money remaining in the hands of the canal company according to their ascertained proportions. And there are two questions—first, are they so entitled? and, secondly, is the length of time which has elapsed a bar to their claim?

I will begin with the latter question. If I am right in thinking that the company are trustees for the true owners when ascertained under all the circumstances, there seems to me no ground for holding that the plaintiffs are barred by lapse of time. It may be very questionable whether, in a case in which it is admitted that the company have assets, and that the money has not been paid, but remains in their hands, any length of time would be a bar to the lawful claimant in a Court of Equity, where the case starts from the proposition that the one is cestui que trust, and the other trustee. But, at all events, the bar, from lapse of time, proceeds in a Court of Equity upon the laches of the party in not claiming sooner. But how is this applicable to a case in which the Legislature permit a bargain with an unascertained person, and where there is no laches after the period when he is ascertained? If, indeed, after the determination of the rights of parties under the Penge Inclosure Act, a period of twenty years had been suffered to elapse, the case would have been very different. But that is not so. Here, till 1837, there does not appear to have been an ascertainment of the right, and the parties then immediately commenced proceedings. Independently, therefore, of the conduct of the company, and their obvious incapacity to pay anything till their recent arrangements with the Croydon Railway, and the distinct provision for this very demand made between the two companies upon the handing over of the money from the one to the **[421]** other, which are all circumstances of great weight, I have arrived at a clear opinion that

there is nothing in lapse of time which ought (if the other facts entitle the plaintiffs to relief) to bar their claim to it on this occasion.

The remaining and more important question is whether the plaintiffs are the persons entitled to the whole or to some ascertainable portion of this compensation.

It appears to me well made out that the plaintiffs have a title to that estate which, at the time when this compensation was awarded, belonged to Mr. Scott. Whether all the persons who have rights to the soil of Penge Common are before the Court is not apparent on the proofs given on the part of the plaintiffs. For, of course, the title of those who have been made defendants does not appear as yet. But I think the evidence before the Court fully justifies me in sending the case to the Master for a proper inquiry as to the title. If it shall appear, upon that inquiry, as I think it probably will do, that the plaintiffs are entitled, and that the proportions in which the different proprietors of Penge Common have an interest in that common are fixed and definite; as, for instance, if it should appear from the commissioners' award that one-half, or one-third, or any given proportion of that common belongs to Mr. Scott's estate, then the case of the plaintiffs will not, as it seems to me, be affected by the absence (should that turn out to be the fact) of other persons entitled to other definite shares, but they will be entitled to claim from the defendants, the canal company, the amount of the share belonging to themselves.

Whether they are entitled to any definite share of the compensation for the damage will turn upon the fact whether they are, under the arrangement with Scott, entitled to that damage, as well as to the compensation for the land.

The Master will inquire into this arrangement, and will ascertain whether the money stated upon the belief of Mr. **[422]** Brundrett to have been paid, was actually so paid to Mr. Scott, or his agents, under the agreement. And he will make inquiries as to the plaintiffs' title to the lands of Scott, and to the other lands entitled to common, purchased by the plaintiffs from other quarters, and as to the proportion of the damages belonging to those lands; and he will also ascertain the titles of those defendants to whom the residue of the lands entitled to common belong. The Master in his inquiry and report should separate the questions of the compensation for land and for damage, and should ascertain whether the plaintiffs and the defendants make out a sufficient title to the latter under the persons entitled to the seven acres, to which it applies, at the time when such damage was done. The Master, in doing this, should also inquire whether the damages were in their nature temporary or permanent; because, if permanent, they will probably go with the land to the present owners of the estates entitled to the soil of Penge Common. When these inquiries shall have been perfected, it will be ascertained whether the persons entitled to the whole of the compensation both for lands and damage are before the Court, and whether the proportions claimable are definite or not. And it will then, upon further directions, be open to the Court, to order either the whole or some part of the money to be brought into Court, and to give such further directions as the case may require. There is no doubt as to the sufficiency and solvency of the parties, nor as to the security of the funds in the mean time.

I do not at present mean to determine the question as to intermediate interest. Indeed, I think it of importance, previously to determining that question, to direct the Master to make one further inquiry: namely, what would have been the mesne profits of the nine acres of land appropriated by the canal company to their canal. In order to determine that, he should fix a rent for those nine acres, treating them as of a similar quality to the rest of the **[423]** common. This criterion seems to me reasonable (regard being had to the 53rd sect. of 41 Geo. 3) as an equivalent for intermediate interest. I do not, however, finally determine this; but as to this, and the other remaining questions, as to costs, I propose to reserve the decision upon them till the Master shall have made his report as to the title, and other circumstances necessary to be ascertained. In the meantime, however, it seems to me that the nominees who hold this money from the canal company, but subject to the rights which attach upon it, are proper parties to be retained before the Court. In the result, they will, no doubt, be entitled to have their costs, but it will be a question upon further directions for the Court to determine by whom those costs are to be paid.

OLIVER *v.* ADDERLEY. Feb. 18th, 1841.—Exception to the Master's report in a tithe cause, on the ground that he had overvalued the tithe of milk, overruled; it not appearing that the Master had proceeded on any wrong principle.

This was a vicar's bill for tithes. The Master in taking the account allowed 1½d. per quart for the tithe of milk. The defendant took an exception to the Master's report on the ground that he ought only to have allowed 1d.

Mr. Boteler and Mr. Lowndes, for the exception, contended that 1½d. was far above the value of the milk.

Mr. Spence and Mr. W. Eagle, contrà. The Master has had all the evidence before him. If the vicar had used the milk himself he might have gained more than 1d. They who take other persons' property cannot be heard to say it is not worth so much, because they could not make it of that value. Such a matter as this ought not to have been brought here. It ought to have come before the Assistant Tithe Commissioner. [Alderson, B. I do not know that. They take into consideration the expense of collecting. **[424]** There is great difficulty in estimating the expense of a wrong-doer.]

Mr. Boteler, in reply.

ALDERSON, B. Every question of value is a subject of exception. The only point to be considered is whether the exception is prudent and discreet. It seems to me that all questions of this nature should be determined by the Master, unless there is special ground to the contrary. If it had been represented to me that the Master had proceeded on a wrong principle, I might have given directions for the Master's guidance. But he has violated no principle.

Exception overruled.

PENDLEBURY *v.* WALKER. Feb. 19th, 22nd, 1841.—If a banking company agree that upon receiving the guarantie of a particular person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition of 10s. in the pound, and setting up the trader in business again; and at the same time, the company, being themselves creditors of the trader, enter into a secret arrangement with him by which they secure to themselves repayment of the difference between their composition and the full amount of their debt, this is a fraud upon the guarantor, and upon the creditors who execute the composition deed on the faith of the ostensible agreement; and the guarantor may sustain a bill in equity to set aside the guarantie.—Where, by the construction of the terms of a guarantie, there is no right of contribution amongst the guarantors, any one of them may sustain a bill in equity to set aside the guarantie for fraud, without making his co-guarantors parties.—Where several persons are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may have contribution from his co-sureties; but if it be arranged by contract, which it may be, that each surety shall be answerable only for a given portion of one sum of money, in such case there is no right of contribution amongst the co-sureties.—The case of *Dering* v. *Lord Winchelsea* (2 Cox, 318) considered.—Semble, that where by act of Parliament a joint stock company may be sued through the medium of their public officer, he is the proper person to be sued, and not the directors, even where the directors are charged with a gross fraud; and, at all events, that one only of such directors ought not to be made a party.—Semble, that where a company is so constituted, a bill is sustainable against a single shareholder, jointly with the public officer, if it allege that he is the assignee of the debt for which the company have brought their action at law against the plaintiff.—Semble, that if a bill alleges that a person has become bankrupt, but does not allege that assignees have been chosen, a demurrer to the bill, on the ground that the assignees are not parties to the suit, is a speaking demurrer, and therefore bad.

[S. C. 10 L. J. Ex. Eq. 27; 5 Jur. 334. Principle applied, *Steel* v. *Dixon*, 1881, 17 Ch. D. 830; *In re Arcedeckne; Atkins* v. *Arcedeckne*, 1883, 24 Ch. D. 714; *Ellesmere Brewery Company* v. *Cooper*, [1896] 1 Q. B. 75. Referred to, *In re Denton's Estate*, [1903] 2 Ch. 679.]

The bill stated that in and previously to October, 1838, W. Garnett Taylor, of the Thorns, in the parish of Bolton, **[425]** in the county of Lancaster, carried on the business of a cotton-spinner, and was supposed to be seised and possessed of real and personal estate (the latter including machinery) to a very large amount; but that in fact he was at the time above mentioned indebted to divers persons, and unable to pay his debts; and that he had placed his affairs in the hands of inspectors, under whom he carried on his business; and that the defendant Jackson was one of those inspectors, and well acquainted with his concerns. That for a long time previous to, and in the said month of October, 1838, Taylor kept a banking account with the Liverpool and Manchester District banking company, which is a joint-stock banking company, carried on under the provisions of the 7 Geo. 4, c. 46, of which company Jackson was then the managing director, and one of the public registered officers; and that Jackson, in his character of inspector of Taylor's concerns, together with his co-inspectors, had also a banking account with the company. That under these circumstances, the banking company and Jackson had full notice of Taylor's liabilities, and that they knew, as the fact was, that Taylor owed the bank £7000 on his private account, and that the inspectors owed the bank £14,000 on the inspectors' account. That the bank and Jackson being apprehensive as to Taylor's solvency, a scheme was concerted between the directors of the company on the one hand, and Jackson, acting both for the company and the inspectors, on the other hand, for procuring some better security than that of Taylor for payment of his debts; and that accordingly, as it was well known to Taylor's friends that he was embarrassed, it was arranged between the directors and Jackson, and Taylor and his agents, that it should be given out and represented that the banking company were willing to advance such a sum of money as would be sufficient, not only to pay a composition of 10s. in the pound on all the then existing debts of Taylor, but also **[426]** to enable Taylor thereafter to carry on his business. That this scheme was, after several meetings and discussions, finally agreed upon by the directors (William Wright and others named in the bill), and by Jackson, and two persons who attended as the friends of Taylor. That in pursuance of such scheme such several persons gave out and represented that though Taylor was embarrassed, yet his property and business were of great value; and that if he could obtain the loan of a sum of money sufficient to relieve him from the debts he then owed, and could be restored to the possession of his business, he would very shortly be enabled to pay off such loan, and to retain the unincumbered possession and enjoyment of his property. That in order to give a colour to these representations a mock negociation was set on foot between Jackson, as the agent of the company, and some friends of Taylor; the result of which was that the company, after some apparent hesitation, agreed to accept a composition of 10s. in the pound on the amount of their debt of £7000. That in consequence of this, the other creditors of Taylor agreed to accept a like composition. That in further prosecution of this scheme, it was represented by the banking company and their agents, that in order to effect such composition the banking company were willing to advance to Taylor a sum of £25,000 for the purpose of paying such composition, and of furnishing Taylor with capital to carry on his trade, provided the amount of such loan should be secured to them by the guaranties of responsible persons, who should become bound to the repayment thereof at the end of five years. That several persons were induced by these representations to give such guaranties. That the plaintiff had long known Taylor, and was desirous to assist him; and that it was represented to the plaintiff by Taylor, with the sanction and knowledge of the banking company, and by Jackson on behalf of the said company, that Taylor had prevailed upon the company and his other **[427]** creditors to accept such composition; and that the bank were willing to advance the sum of £25,000 for the purposes before mentioned; and that the effect of such arrangement would be to leave Taylor in the full and free possession of his property, unincumbered by debts of any sort, except his liability to pay the £25,000, at the end of five years; and that the company had agreed to take the guarantie and security of twenty-one persons; that is to say, of one person for £5000, and twenty other persons for £1000 each. That the plaintiff, on the faith of these representations, signed a guarantie for £1000, in the form after mentioned. That thereupon a composition deed was prepared and executed by all the creditors of Taylor, whereby they, in consideration of 10s. in the pound on the amount of their respective debts, released Taylor absolutely. That in this deed the banking company were stated to

be creditors to the amount of £7000, and no more, and that they signed and executed the deed, and released Taylor from the whole of such debts, in consideration of a composition of £3500. That the whole sum of £25,000 was guaranteed by the plaintiff and the other guarantors, and that Taylor was ostensibly restored to the possession of his property, and carried on his business till November, 1840, when a fiat of bankruptcy was awarded and issued against him.

The bill then stated that the plaintiff had lately discovered that, although the banking company pretended to release Taylor from their said debt of £7000, in consideration of the payment of the said composition; yet, in fact, they stipulated to receive the full sum of £7000, and refused to execute either the deed of composition or to advance the £25,000 unless the difference between the composition and full amount was paid; and that, in consequence of such refusal and stipulation, and before they made the advance or executed the deed, they received some security from Frances Taylor, the mother of the said W. Garnett Taylor, for £2000, and from Frances Taylor, his **[428]** sister, an undertaking or agreement to pay £500; and from one Robert Neild, an undertaking to pay them the further sum of £1000, making together, with the composition, the full amount of £7000. That Neild had, in fact, paid the sum of £1000 to the company, by means of a bill of exchange, and a sum of cash received from Taylor himself; that Frances Taylor, the sister, had paid the sum of £500, and that Frances Taylor, the mother, had been threatened by the company with an action for the £2000. That, in fact, the company never did advance to Taylor the £25,000: for that, although they pretended so to do, they deducted £9000 in respect of the debt due from the inspectors, and, consequently, Taylor received no more than £16,000; and that inasmuch as the composition on all his debts was paid out of this last-mentiontd sum, he was left without any sufficient capital or means to carry on his said business; that this deduction of £9000 was agreed to be made, and was, in fact, made without the knowledge and consent of the plaintiff and the creditors of Taylor, who executed the composition deed; and that, by the several beforementioned transactions, such creditors were defrauded by the banking company.

The bill then contained an allegation that Jackson having been removed from his office of public registered officer, and Walker having been appointed in his room, an action had been commenced against the plaintiff, on the guarantie, in the name of Walker; but that Jackson was, at the date of the guarantie and of the deed of composition, and still was a shareholder in the company, and claimed to be interested in the said action and in the sum sought to be recovered, by virtue of an assignment thereof made to him by the said company.

The bill prayed for discovery, and that the guarantie might be delivered up to be cancelled, and for an injunction against the company and Walker to restrain the action.

[429] The form of the guarantie, so far as is material to the point in argument, was as follows:—"Whereas the Manchester and Liverpool District Banking Company have agreed at the request of me, the undersigned William Pendlebury, and divers other persons, and in consideration of the guaranties and agreements hereinafter entered into and mentioned, to advance and lend to W. G. Taylor, of &c., cotton spinner, a large sum of money considerably exceeding the amount intended to be hereby guaranteed; the whole of which said advance or sum is intended and agreed to be made the subject of a distinct account, &c.: and whereas I, the undersigned, have undertaken to guarantee the payment of the sum of £1000, part of the said advance, with interest as hereinafter mentioned, the residue thereof being guaranteed by the said several other persons at whose request such advance has been agreed to be made as aforesaid, in such proportions, and to such extent respectively, as has been stipulated between the said banking company, and such other persons respectively, and in particular the sum of £5000 (part thereof) being guaranteed by Richard Potter of Gisburn Park, in the county of York, Esquire: Now, in consideration of the said advance and loan so made to the said W. G. Taylor, by the said banking company, I do hereby undertake and agree to guarantee to the proprietors of or partners in the said banking company for the time being the payment of the full sum of £1000, part of the said advance or loan; such sum to be payable at the expiration, &c., with interest, &c., until the guarantie shall be fully discharged and satisfied. And I further declare and agree that all and every payments and payment, which shall be appropriated and applied in discharge or reduction of the said advance or loan so made by the said banking company to the said W. G. Taylor as aforesaid, shall be in the first instance applic-

able in discharge or reduction of that part or proportion of the said loan or advance (such part or proportion amounting **[430]** to the sum of £5000) which is guaranteed or intended to be guaranteed to the said banking company by the said Richard Potter as herein recited or mentioned, with interest thereon ; and that I, in common with all the said several persons other than the said Richard Potter, by whom the said loan or advance is guaranteed or intended to be guaranteed as aforesaid, shall only be entitled to the benefit of such appropriated payments or payment as aforesaid, after the said Richard Potter shall have had the benefit thereof, to the full extent of the said sum of £5000, so guaranteed by him as aforesaid with interest thereon. And that I, and all the said several guaranteeing parties, other than the said Richard Potter, shall be respectively entitled to the benefit of the said appropriated part or payments in discharge or reduction of our respective guaranties pari passu, and in the respective proportions which the several sums guaranteed by us respectively bear to the aggregate amount of all the sums so guaranteed. Witness my hand, this 19th day of October, 1838.—W. Pendlebury."

To this bill the defendant Jackson demurred, for want of equity, and because the plaintiff had not made parties the several persons named in the bill as directors, and who were stated to have been present at the meetings at which the scheme was concocted ; and also because the plaintiff had not made parties the persons other than the plaintiffs, by whom the guaranties were executed.

The defendant Walker also demurred to the bill, first, because the plaintiff had made no case for discovery or relief ; secondly, because the directors, who were necessarily parties to the bill, were not made parties ; thirdly, because it appeared by the bill that several other parties besides the plaintiff had executed guaranties, whereby the £25,000 in the bill mentioned was guaranteed and secured to the banking company, and that such persons had not been made parties ; and, fourthly, because it appeared by **[431]** the bill that the person or persons who was or were the assignee or assignees of the estate and effects of Taylor were not made parties.

Mr. Simpkinson, for both demurrers ; Mr. James Russell, for the demurrer of Jackson and Mr. Sutton Sharpe, for that of Walker. First, as to the demurrer of Jackson The charge that the debt was assigned to Jackson is not consistent with the former parts of the bill. The two charges neutralize each other. It is impossible to come to any other conclusion than that the company is the party on whose behalf the guarantie is put in suit. Then Jackson has not a regular assignment of the guarantie ; can he, being no longer the public officer of the company, be sued merely in the character of shareholder? If he is sued as a shareholder, the other shareholders ought to be made parties. You cannot sue one partner in a bank. It may be said, however, that he is made a party for the sake of discovery, by analogy to bills against corporations, in which cases their public officer or late public officer may be sued. But those cases only apply to actually existing corporations, and only where you cannot otherwise get discovery on oath. No relief is prayed against Jackson ; whereas, in order to support the bill against him as a bill for relief, it should at least have prayed that he might pay costs : *Le Texier* v. *Margravine of Anspach* (15 Ves. 159).

Then as to the other demurrer which involves the whole equity of the case. The question is whether, on the facts stated, the plaintiff is entitled to relief on his guarantie. Taylor was indebted to the company in £7000. His affairs had also been carried on by trustees, who had incurred a debt to the company to the amount of £14,000, but Taylor was not a debtor in respect of this last claim. Taylor was also indebted to other persons. He and his **[432]** friends wished to clear him and set him up again. They wished to induce his creditors to take 10s. in the pound, so as to have a surplus to go on with. At that time Taylor's business was in the hands of his trustees, and it must be assumed, as the bill states the fact, that that was known to the creditors who executed the deed of composition, and also to the parties who gave the guaranties. [Alderson, B. He was to be restored to his possession.] The inspectors had the business of Taylor, and no one could be induced to give it up, unless some portion of the £14,000 was paid. What fraud, then, was committed, either by the inspectors or by Taylor, in making arrangements with respect to their demand? They were not parties to the deed of composition with Taylor. If Taylor's creditors were paid 10s. in the pound, what fraud was there either on the general or on the guaranteeing creditors? But then it is said—you, the bank, made an agreement in fraud of the composition deed, by which, though you held out you took 10s., yet you, in an under-

hand manner, agreed to take the remaining 10s. in the pound. What then? What has the plaintiff to do with it? Admitting that the persons who gave the security for the additional 10s., and the parties who executed the deed, might file a bill to have the deed set aside, what has the guaranteeing party to do with that? It is no fraud on him. He is no party to the composition deed. If it is a fraud, it is a fraud only on the other parties. All he has to do is to guarantee part of the £25,000 which the banking company agree to advance. What becomes of the surplus over the 10s. in the pound is matter of indifference as between the plaintiff and the other persons. In the various cases in which underhand transactions of this nature have occurred, the validity of the composition deed has always been assumed, and the underhand bargain alone held void: *Eastabrook* v. *Scott* (3 Ves. 456), *Jackman* v. *Mitchell* (13 Ves. 580), *Constantein* v. **[433]** *Blache* (1 Cox, 287), *Fawcett* v. *Gee* (3 Anstr. 910), *Cockshott* v. *Bennett* (2 T. R. 763). The case of *Howden* v. *Haigh* (3 Per. & D. 661), which may be cited on the other side, was peculiar in its circumstances, and altogether distinguishable from the present case.

Next, the co-guarantors should have been parties. It is clearly settled that persons may be co-sureties, though by distinct instruments. These other persons have agreed to guarantee the repayment to the banking company of £25,000 in certain proportionate parts, each of these persons taking to himself a part. [Alderson, B. Is it correct to say that each are co-sureties for £25,000? They are guaranteeing parties each for a limited sum. Potter, for instance, guarantees £5000. That guarantie might be set aside without making the other persons parties.] If any one of them pays more than his share, he may call on the others to contribute? Suppose one pays £1000 and the others less, can it be said that he has no right to call on the others to contribute? [Alderson, B. They are not co-sureties for each other, but sureties concurrently for a third person.] The right of contribution does not depend on contract, but on general equity: *Dering* v. *Lord Winchelsea* (1 Cox, 319). The principle of that case is recognised in *Craythorne* v. *Swinburne* (14 Ves. 164), *Coope* v. *Twynam* (Turn. & Russ. 426), *Mayhew* v. *Crickett* (3 Swanst. 191), and *Stirling* v. *Forrester* (3 Bligh, 575). It is submitted that, by the terms of this agreement, parties guarantee the whole amount of the loan, though in definite proportions; but even if it be otherwise, the terms of the guarantie would make no difference in a court of equity. If any part of the sum is paid off, it is paid off pro ratâ. The bank cannot release any party because the parties are liable amongst each other. "It would be against equity," says Lord **[434]** Redesdale, "for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment." The guarantie of one is on condition of having the guarantie of the others. The whole must be taken together. If so, they are liable to contribution, and all should be parties.

Lastly, the assignees of Taylor are necessary parties, and, ore tenus, we say that the creditors who signed the composition deed are necessary parties.

Mr. Bethell and Mr. Bacon, for the bill. There are two grounds of equity in this case. First, the contract was obtained by the defendants from the plaintiff under a fraudulent misrepresentation. That ground is independent of the question of principal and surety. Secondly, considering the plaintiff as a surety, the agreement entered into between the bank and the plaintiff being different from the secret contract entered into between the bank and the principal, the surety is discharged. The bank framed a scheme to pay the entirety of their debts at the expense of the other creditors, and the friends of Taylor. At the expense of the other creditors, because they are induced at the instance of the bank to forego half their debts; and at the expense of Taylor's friends, because they thought the bank would advance him £25,000 to enable him to carry on his business. The bank makes no sacrifice, aad does not even advance the capital to carry on the business, on the faith of which his sureties advanced the money in his behalf. If a man agree to be answerable for £1000 is it immaterial to him that the situation of the party he assists is different from what he thought it to be, and on the credit of which he acted? The moiety of the £7000 which ought to have been released, and not retained by the bank, has been satisfied by the friends of Taylor, in a manner injurious to him and the plaintiff. On the face of the bill, the whole of the £3500 must be considered as coming from Taylor. **[435]** [Alderson, B. I think not. There is nothing on the bill to shew that the payment was not the voluntary act of Taylor's friends. It is alleged that Neild was satisfied by money paid to him by

Taylor; but that was not payment by Taylor to the bank.] Grant that the £3500 was paid by strangers. If I render myself liable for another man, I proceed on the faith of his ability and that of his friends. Is it too refined to consider that the plaintiff might have calculated on getting from those quarters the benefit which the bank has obtained from them? Might he not rely on the probability of Taylor's mother and sister assisting him?

It was said on the other side that notwithstanding the fraud the creditors could not set aside the composition deed, though the secret bargain might be void. But in *Leicester* v. *Rose* (4 East, 372) the ground of the decision was that the transaction was a fraud on the creditors generally. If so the creditor would be entitled to set it aside. *Ex parte Sadler* (15 Ves. 52), which was decided soon after *Leicester* v. *Rose*, as also *Howden* v. *Haigh* (3 Per. & D. 661) and *Knight* v. *Hunt* (5 Bing. 432), support the doctrine that the whole contract is avoided. [Alderson, B. In Forsyth on Composition Deeds all the cases are very nearly collected. My difficulty at present is to see how a collateral security can avoid the agreement of the other creditors who have had the whole of the assets. In *Howden* v. *Haigh* there was a subtraction of part of the assets.] If the debtor has had the means of giving additional security to one creditor, the law must infer that he had some means of affording that security to all the creditors. That is not an unreasonable supposition. The release to the debtor proceeds on the ground of equality to all the creditors. If it cannot be enforced against the creditors a court of equity will not allow any other use of it.

[436] Then as to the question of principal and surety. The plaintiff gave his guarantie on the understanding that Taylor should be altogether released, and have the benefit of £25,000. What follows? The bank, having got that guarantie on the faith of that contract, enter into a totally different contract with the principal, whereby the security of the residue of the £25,000 is lost, and the situation of the principal essentially varied. Such an interference with the situation of the principal discharges the surety: *Rees* v. *Berrington* (2 Ves. jun. 540), *Blake* v. *White* (ante, vol. 1, p. 420). [Alderson, B. If you shew on the face of the bill that the bank did not pay the £9000 to Taylor then your case is maintainable.] The bill expressly alleges that they deducted £9000 and that he had not sufficient to go on with. [Alderson, B. My difficulty is that the bill states that Taylor's assets were in the hands of inspectors and that they incurred a debt of £14,000 to the bank. That is due from the inspectors to the bank. I am not aware that it was a debt due from Taylor to the inspectors. They would have a right to retain the property till they were paid. Suppose the bank paid £9000 to the inspectors, and all Taylor's goods were redelivered to Taylor, is not that a performance of the agreement to pay the residue of the £25,000?] That would be inconsistent with the agreement, which is that the money shall remain in his hands. It was clearly the intention of the parties that the £25,000 should be advanced to him in monies numbered.

Then it has been objected that the other sureties should have been made parties to the suit. That depends on whether they have an interest in the guarantie given by the plaintiff. Now, it is an universal rule that a surety has no right to call for contribution from another surety, unless he can shew that what has been paid by himself is something for which the other surety might have been lia-**[437]**-ble. It must be a common and joint transaction of suretyship to render parties liable as co-sureties. They are co-sureties when their respective obligations may relate to the same subject-matter. That was the case in *Dering* v. *Lord Winchelsea*. There three persons were bound in respect of the same subject-matter, though by distinct instruments, and they were held to be co-sureties. Here the guarantie of each is not for the whole £25,000 but for an integral part of it. The plaintiff's £1000 is totally distinct from the £1000 of any of the other parties, or the £5000 of Potter.

As to the other objections, Jackson, at all events, does not demur to the discovery; and with respect to Taylor's assignees, the demurrer of Walker is a speaking demurrer: for it tells us that there are assignees of Taylor, a fact not mentioned in the bill. It may be true, as the bill states, that Taylor is a bankrupt, but it does not follow that assignees have been chosen: *Brownsword* v. *Edwards* (2 Ves. sen. 245), *Cawthorne* v. *Chalie* (2 S. & S. 127).

Mr. Simpkinson, in reply. It is difficult to see how the agreement between the bank and Taylor and his friends, that the friends shall pay the bank the additional 10s. in the pound, can vitiate the agreement between Taylor and the creditors

generally. It may be conceded that the underhand agreement is null and void. The parties who agreed to pay the additional 10s. in the pound would be entitled to be relieved; if they had paid the money they would be entitled to recover it back, or, if they had not paid, to have the security delivered up. That is not disputed; but how that can vitiate the other agreement it is difficult to conceive. *Howden* v. *Haigh* goes infinitely further than any other case. But in that case the agreement was that the particular creditor was to receive an addi-[438]-tional benefit out of the debtor's assets. Here there is no diminution of the assets. There is no charge in the bill that Taylor became liable to pay the £3500, nor any express charge that he was indebted to the inspectors. As to the other parts of the case, it is only necessary to observe that, by the terms of the prayer of process, Jackson is evidently made a party for relief and not discovery only, and yet no relief is prayed against him. His demurrer therefore is clearly good unless avoided by the general charge that the subject-matter of the action has been assigned to him. But a mere general charge of that sort is insufficient to avoid a demurrer: *Plumbe* v. *Plumbe* (ante, p. 345).

March 3rd.—ALDERSON, B. The bill states that William Garnett Taylor was indebted to the Liverpool and Manchester District Banking Company in the sum of £7000. It states that he had been in difficulties but that he was supposed to be a person of some property. It states that his concerns and property had been placed in the hands of inspectors, and that Jackson, who was then managing director of the bank, was one of those directors. It states that the inspectors in carrying on the business of Taylor had incurred a debt of £14,000 to the bank. The statement, therefore, was that the inspectors were indebted in £14,000, and Taylor himself, in his own private capacity, in the sum of £7000. Under these circumstances it is stated that the bank had conceived a plan that they would, in conjunction with Taylor, induce the creditors of Taylor to take a composition of 10s. in the pound, and would represent their own willingness to advance a sum of money for the purpose of enabling the composition to be paid, and to enable Taylor afterwards to carry on his business. It states that the bank pretended to accept the 10s. as well as the rest of the creditors with a view to induce them to come into the composition, and that the sum of £25,000 [439] was the sum agreed to be advanced by them for these purposes, if that sum could be procured to be guaranteed by certain persons, the friends of Taylor; and that these representations were made to Taylor's friends, and to the plaintiff, amongst others; and that they and the plaintiff, in faith thereof, and trusting to those representations thus made by the bank and Taylor guaranteed each £1000, part of the sum of £25,000, to the bank. What then were the circumstances here stated on the faith of which the plaintiff seems to have acted? They were two: first, that there is a representation made to him that Taylor is to be freed entirely from all his debts, excepting the debt of £25,000, which was to be incurred for the very purpose of so freeing him, and that he was to be freed from all those debts by an entire composition, which would be valid and effectual; and the second was that the residue of the money not employed in the composition, the residue of the £25,000, should be paid to Taylor, in order that he might be thereby enabled, after the composition had been effected and after he had been entirely freed from his debts, further to carry on his business with some additional capital. Now, if the present plaintiff, the guarantor, has been deceived by the fraud of the bank, and induced thereby to become a guarantor in these matters, he is entitled to relief in equity; for the misrepresentation of the bank is that which has caused him to give the guarantie. Now, it appears that the bank have, all the time, secretly from the other creditors, stipulated for the payment in full of all their own debt of £7000, receiving 10s. under the composition, and by means of securities which they have obtained through Taylor, from third persons, 10s. more. The question then is, what effect this has on the composition itself? Does it or does it not make the composition invalid, or capable of being invalidated? The question is, what effect it has? Now, almost all the cases upon this subject lay it down as clear law that a trans-[440]-action like this is a fraud on the rest of the creditors; and no one doubts (that is not disputed, nor was it disputed in the argument) that the bank is clearly not entitled to claim from the other persons the additional 10s., the money which they have agreed so to pay; and, further, no one doubts that if that money has been paid to the bank by the persons by whom those additional securities would be given, that those persons may recover it back again. These bargains, as the Court of Queen's Bench clearly lays down in the case of *Howden* v. *Haigh* (3 Per.

& D. 661), are founded on entire good faith; and that Court lays it down that if such good faith be not observed the whole transaction is void. And again, in *Knight* v. *Hunt* (5 Bing. 432) Lord Wynford lays it down thus: "These agreements for composition with creditors require the strictest good faith. If I see a man, acquainted with the circumstances of the debtor, agreeing to sign a paper, under which he is to be satisfied with 10s. in the pound, I conclude he has exercised a judgment on the subject. Am I not cheated if he procures another to give 10s. more? Perhaps there is no case exactly like this; but as no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions; and the principle to be extracted from all the cases on this subject is that a man who enters into an engagement of this kind is not to be deceived." Now, these observations are exactly in point with the present case. How can I say that the creditors have not been mainly induced to agree by seeing the bank, whose managing director, Jackson, was one of Taylor's inspectors, agreeing to accept 10s. in the pound from Taylor? And yet if this were all false, as I am bound to take it to be on this demurrer, this would clearly be a fraud on the rest of the creditors; and, if so, it seems to me that any one of these creditors, if he be so minded, must have the right to apply to a court of equity **[441]** to set aside that deed of composition, restoring, of course, if he be so pleased to act, the composition he has intermediately received. The act, therefore, of the bank has made the composition no longer binding on the creditors. The plaintiff's guarantie is founded on a misrepresentation of the real situation of Taylor, and the change of circumstances is produced by the act of the bank in taking the additional 10s. I think, therefore, unless these facts can be varied by some previous knowledge or subsequent assent of the other creditors, after knowledge of the bank taking more than 10s. in the pound, or can be explained or denied altogether, that the plaintiff will be entitled to relief in equity, and that the demurrer, therefore, for want of equity, must be overruled. Then as to the demurrer for want of parties, it seems to me that Jackson is properly made a party here as assignee of the debt from the bank; and he is not a proper party as a mere shareholder; and that the other defendant, Walker, under the act of Parliament properly represents all the shareholders; therefore, I do not think it was at all necessary to include all the other shareholders as parties to this bill. The only real question is whether the co-guarantors ought to have been included; but upon looking carefully at the guarantie, I have arrived at the conclusion that there is no right to contribution inter se amongst the co-guarantors. *Dering* v. *Lord Winchelsea* proceeds, I think, on the principle stated by Mr. Bethell in the argument, which is this: that where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety. And this explains, I think, the dicta stated by the other side. But here each surety is bound for an individual sum; and the suretyship is taken **[442]** only to the amount of the whole sum advanced by the bank; and there is in the instrument a mode fixed by special contract, in which the bank are to apply any payment made by the principal in discharge of the otherwise fixed liability of each surety, namely, first, in discharge of the £5000 guaranteed, and then subsequently rateably in discharge of the other guaranties; but I think this does not make each a co-surety contributory to the others. I think, therefore, that it was not necessary to make the co-guarantors parties to this record, and that both demurrers must be overruled.

Demurrers overruled.(*a*)

ADDISON *v.* WALKER. Feb. 23rd, June 10th, 1841.—Bill by cestui que trusts, and two of the trustees under a marriage settlement, against the executrix of the settlor and the remaining trustee, praying payment of the trust money, or a general administration of the settlor's assets, and seeking to impeach a prior security claimed over the settlor's property by the defendant trustee: Held, that a demurrer by the trustee for multifariousness and for general want of equity must be overruled; 1st, because the matters contained in the bill were all matters of account, and the defendant was interested in taking the account; and

(*a*) See *Cullingworth* v. *Lloyd*, 2 Beav. 385.

2ndly, because there was a general equity against him in his character of trustee. But semble, that a partial demurrer for want of equity would have been sustainable.—Mortgagee insisting by his answer that he is not bound to produce his title-deeds, but admitting that he is mortgagee of part of certain estates, is not bound, in answer to the inquiries of the bill, to say what part, as that would be stating the contents of his title deeds.

[S. C. 10 L. J. Ex. Eq. 73.]

Upon the marriage of William Thomas Addison with Elizabeth Walker, Abraham Walker, the father of Elizabeth Walker, covenanted to assure the sum of £2000 to the trustees of the settlement, upon trust to pay the interest to the intended wife for her separate use for life, and after her death to pay the interest to the intended husband for his life, and after the decease of the survivor of them, to divide the principal among the children of the marriage, in equal shares; and if no children, to pay the whole of the principal to the next of kin of the wife. The settlement contained a proviso that the principal sum of £2000 should remain and be retained by Abraham Walker, his heirs, executors, and administrators, without any right on the part of Walker, his heirs, executors, or **[443]** administrators, to pay off all or any part of the said sum, without the consent of W. T. Addison and his wife, and Walker, or the survivor of them, or the consent of the trustees for the time being, unless interest should be in arrear for the space of six calendar months.

The trustees of the settlement were Richard and Ralph Addison, W. Courtois, since deceased, and Edmund Walker.

The marriage took effect. The wife died in March, 1838, leaving her husband, W. T. Addison, and five children of the marriage surviving her.

Abraham Walker did not in his lifetime pay the £2000, but died in February, 1838, possessed of considerable real and personal property, and having by his will directed his wife, Maria Clementina Walker, to carry on his business, and having appointed her, and also Henry Hodsoll Walker, and Edmund Walker, to be his executrix and executors. Maria Clementina Walker proved the will, and entered into possession of the testator's property, and carried on his business. The other executors renounced probate.

The bill was filed by W. T. Addison, his five children, and Richard Addison, and Ralph Addison, against Maria Clementina Walker, Henry Hodsoll Walker, and Edmund Walker. After stating the foregoing facts, it alleged that applications had been made to M. C. Walker to pay the £2000 to the trustees; that she had refused to do so under various pretences, and that in particular she and the other defendants pretended that the latter was a mortgagee of all the property of which the testator died possessed, and was a judgment creditor to a greater value than all his estate: whereas the plaintiffs charged that if he was such mortgagee and judgment creditor, such mortgage and judgment were dated after the indenture of settlement, and that when he accepted the security he had notice of the settlement; that the consideration for the mortgage, if any existed, was usurious; and that, under **[444]** the circumstances, the demands of Edmund Walker in his own right were not entitled to priority over the claims of the trustees of the settlement; that he ought to set forth the date and short material contents &c. of his securities; that his taking a security for his debt having priority to the debt under the settlement was a breach of trust, and that he ought to make good to the cestui que trusts such amount as, by reason of his misconduct, the testator's estate was insufficient to pay. The bill also charged that M. C. Walker had made large profits in carrying on the testator's business; that she had, under the advice of Edmund Walker, paid simple contract debts of the testator to a large amount, and also spent large sums in improving the property, of which he claimed to be mortgagee; that she had in her hands more than sufficient to pay the £2000, and interest; and that, under the circumstances, the sums which she had paid under his advice ought to be deemed as taken by him in part discharge of the judgment debt.

The bill prayed that Maria Clementina Walker might be decreed to pay to the plaintiff, W. T. Addison, all arrears of interest on the £2000, and to pay the principal to the trustees upon the trusts of the settlement: and in case she should not admit assets, then that the usual accounts might be taken of the testator's personal estate, and, if necessary, an account of the profits made by her since the testator's death;

and that, if necessary, the real estates might be sold, and that the debts might be paid in a due course of administration. Also, that, if necessary, an inquiry might be directed as to what simple contract debts had been paid by M. C. Walker, under the advice of Edmund Walker, and also as to the consideration of his mortgage, and what was due to him by virtue of his mortgage and judgment; and further, that, if necessary, Edmund Walker might be restrained from suing out execution on the judgment, till the rights of the plaintiffs were declared and ascertained.

[445] To this bill the defendant, Edmund Walker, demurred—first, for multifariousness, on the ground that the bill was exhibited against him and the other defendants for several and distinct matters and causes &c. (in the usual form; see Van Heyth. Eq. Dr. 422; Story Eq. Pl. p. 366, note): and secondly, because the plaintiffs did not, nor did either of them on the face of their own bill, sustain a character entitling them to sue the defendant, E. Walker, in manner in the said bill set forth.

Mr. Simpkinson and Mr. Wright, for the demurrer. The case as to the mortgage and judgment has nothing to do with the account. Edmund Walker, as trustee of the marriage settlement, is a necessary party to the suit for an account; but the plaintiffs cannot take advantage of that circumstance to introduce the question as to the mortgage security. One creditor has no right to file a bill against another creditor merely to impeach the claim of that other creditor; and if so, he has no right to tack that question to a suit instituted merely for the administration of the estate of the original debtor. The object of the bill is not to redeem, but to impeach the mortgage as usurious. Not that the plaintiffs could redeem, even if they offered to do so by their bill, which they do not; because it is clear that a mere general debt by covenant cannot give them such a lien on the testator's estate as will entitle them to redeem. However, they repudiate all right of redemption, and seek to impeach the mortgage. That this party is made a defendant for that purpose, and not in the character of trustee is clear from the circumstance of their not charging that he has refused to join as co-plaintiff. In support of the main argument, the following cases were mentioned: —*Elmslie* v. *M'Aulay* (3 Bro. C. C. 624), *Utterson* v. *Mair* (2 Ves. jun. 95), *Troughton* v. *Binkes* (6 Ves. 573), *Bowsher* v. *Watkins* (1 Russ. & M. 277); and with respect to **[446]** the charge of payments made by the executrix, *Maltby* v. *Russell* (2 S. & S. 227). [Alderson, B. Your objection is that the bill contests whether the mortgage should be paid at all. But that is not an objection of multifariousness.]

Mr. Cooper and Mr. Elderton, for the bill. The object of the bill is to enforce payment of the £2000. The general administration of the testator's estate is only asked in the event of there being no assets. To enforce the trust as to the £2000, Edmund Walker is a necessary party. It is said that he should have been made a plaintiff; but there is no instance of a demurrer on the ground that one of several trustees is made a defendant instead of a plaintiff. The demurrer for want of equity, therefore, must be overruled.

As to the objection for multifariousness, a party is at liberty, by his bill, to ask for relief against another party, in respect of distinct matters; and all the Court has to consider is whether the frame of the bill is inconvenient or productive of delay or expense: Story Eq. Pl. p. 340; *Campbell* v. *Mackay* (1 Myl. & C. 616). There is no ground for saying that the frame of this bill will be productive of unnecessary expense, prolixity, or delay.

Mr. Simpkinson, in reply.

ALDERSON, B. It appears to me that the frame of this demurrer is defective. The defendant demurs, first, because the matters in the bill are several and distinct. Now, though they are several matters, they are not several and distinct; all of them may come into consideration in the course of taking the account. They may, indeed, be matters in respect of which no relief would be ultimately given; but, if so, he ought to have demurred to so much **[447]** of the bill as might be demurrable on that ground, for want of equity: not to the whole bill, because a general demurrer would be too large, but to that particular part. Then he says that there are several matters in which he is not concerned; but, I apprehend, that in all of them he has some concern. He is concerned in the account, because he is a trustee; for which reason he is very properly made a party. Upon the whole, I think the demurrer fails on both grounds.

Demurrer overruled.

June 10th.—The demurrer having been overruled, the defendant, Edmund Walker, put in an answer, to which several exceptions were taken. One was that he had not sufficiently answered an inquiry in the bill as to whether he did not claim to be a mortgagee of the whole, or some, and what part of the testator's estates. By his answer he stated that he was mortgagee, under his father's will, of part of the testator's estates, without saying what part, and that he had an equitable lien on the whole, by deposit of title deeds. He scheduled the title deeds in his possession, insisting that he was not bound to produce them.

Mr. Elderton, for the exception, contended that, having stated he was a mortgagee, under his father's will, of part of the estates, he was bound to go further, and state what part.

THE LORD CHIEF BARON. He is not bound to state the contents of his title deeds.

Exception overruled.

[448] LLOYD *v.* DOUGLAS. Feb. 24th, 25th, 1841.—Bill by A., mortgagee, against B., mortgagor, and C., a person interested in the equity of redemption, to foreclose the mortgage. Bill by B. against A. for specific performance of an agreement by A. to purchase part of the mortgaged premises. The two causes are heard, and decrees made in both on the same day. Decree in the first cause gives liberty to either of the defendants to redeem, and declares that, in case B. redeems, the money which shall be found due to him under the decree in the second cause shall go in discharge of the mortgage money: in default of redemption within a certain time the mortgagors to stand foreclosed. Decree in the second cause for specific performance, with the usual accounts. By an order made in both causes, the accounts in both are referred to one Master. Then A. and B. die. Quære, whether a bill filed by B.'s personal representative against A.'s representative and C. to revive both suits, is multifarious as against C.? But where a bill of revivor was filed under such circumstances, and supplemental matter was introduced, for the purpose of extending the remedies and accounts in both suits to a contract relating to certain lands, which had been allotted to B. under an inclosure act in respect of the mortgaged premises and over which he claimed a lien as against A.: Held, that the bill of revivor and supplement was multifarious as against C. or his representatives.—A man mortgages an estate in fee without noticing rights of common. Afterwards allotments are made to him in respect of his rights of common by virtue of an inclosure act, which enacts that the allotted lands shall be subject to the same uses as the lands in respect of which they are allotted. Semble, that the legal estate in the allotments passes to the mortgagor, and not to the mortgagee.

[S. C. 10 L. J. Ex. Eq. 34.]

In December, 1820, John Douglas filed his bill in this Court against Baldwin Lloyd and other defendants, amongst whom was Thomas Eyton, stating a mortgage in fee of lands at Llanassa, in Flintshire, under indentures dated the 5th and 6th of June, 1809, executed by Baldwin Lloyd and John Lloyd to Stolterforth, to secure £3000 and interest, and an assignment of that mortgage in September, 1817, to John Douglas. That bill also stated a mortgage by Baldwin Lloyd and John Lloyd of the same property to Kirk, by a deed of September, 1812, to secure £1000; a mortgage by John Lloyd of his share in Holywell Mine, by the same deed, as a further security to Kirk; a further charge by John Lloyd to Kirk of the last-mentioned property to secure £700, and an assignment in 1820 of these last-mentioned mortgages to Douglas. The bill then stated the death of John Lloyd, having made his will, by which his interest in the mortgaged premises devolved on the other defendants, except Eyton; and, after stating that Thomas Eyton alleged that he had some interest in the premises comprised in the indentures of June, 1809, and December, 1812, prayed a foreclosure.

In May, 1822, Baldwin Lloyd filed his bill in this Court, against John Douglas and the parties claiming under the will of John Lloyd, stating the mortgages, the receipt by **[449]** Kirk of several sums of money, by which his debt was reduced, and an agreement of the 2nd of April, 1817, between Baldwin Lloyd of the first part,

John Lloyd of the second part, and John Douglas of the third part, whereby Baldwin Lloyd and John Lloyd covenanted with Douglas that they and their heirs and all other necessary parties would, on or before the 1st of June then next, make out a good title to and convey to Douglas the fee-simple in possession of a certain property called , being part of the hereditaments comprised in the indenture of June, 1809; and Douglas covenanted that he would, on having such title and conveyance, pay to Baldwin Lloyd such sum of money and in such manner as John Matthew and John Wedge, or their umpire, should adjudge. The bill then stated that Douglas paid £50 in part payment of his purchase-money, and was let into possession and had been in possession ever since; that Matthew and Wedge had adjudged the value of the premises to be £3600, which they had afterwards increased to £3750; it then stated the assignment of the mortgages to Douglas, upon which he had been let into the possession of the other premises not comprised in the agreement; and it prayed a specific performance of the agreement, and that an account might be taken of what was due between the several parties, and of the monies which, but for his wilful default, might have been received by Douglas on account of Holywell Mine; and that the same might go in discharge of the mortgage for £1000, and that the residue of that mortgage, if any, might be paid by the sale of John Lloyd's share of the mine.

The two causes came on for hearing on the 17th of July, 1827. By the decree in the first cause it was referred to Master Spranger to take an account of what was due to the plaintiff John Douglas for principal, interest, and costs in respect of his mortgage securities. And it was decreed that upon payment by Baldwin Lloyd to Douglas of the whole of **[450]** what the Master should find due to him on the said securities, Douglas should convey the premises and deliver over the title deeds to him free from incumbrances; or, on such payment being made by the other defendants or any of them, then that Douglas should convey the premises to such of them as should pay; but if the money should not be paid by a given day, then that the mortgagors should stand absolutely barred and foreclosed. And it was declared that, so far as concerned the interest of Baldwin Lloyd, as mortgagor under the indenture of September, 1812, the rents and profits, and the purchase-monies of the messuages and premises called , and the mines, ought to be applied in payment of the principal money secured by that indenture; and that what should be found due from John Douglas to Baldwin Lloyd, under and by virtue of the decree in the cause of *Lloyd* v. *Douglas*, bearing even date therewith, should be applied in discharge of the principal, interest, and costs due in respect of the mortgage of the 6th of June, 1809.

By the decree made in the second-mentioned cause, bearing even date with the former, it was decreed that the agreement of April, 1817, should be specifically performed; and it was referred to Master Richards to take an account of what was due from Douglas to Baldwin Lloyd on account of the purchase-money, with interest from the time Douglas took possession of the purchased premises, and that Douglas should pay the amount.

Several accounts and reports were made, and other proceedings had upon those decrees; and by an order made in both causes dated in June, 1837, it was ordered that Master Spranger should retake the accounts in both causes, and that the latter cause should be referred to him for that purpose.

After the date of this order Baldwin Lloyd and John Douglas died; the former leaving Robert Lloyd his heir at law and legal personal representative; and the latter **[451]** leaving John Henry Douglas his only son and heir at law, and Ann Douglas his legal personal representative. Thomas Eyton died in May, 1837, and letters of administration to his estate were granted to his son Robert Eyton.

In the present suit Robert Lloyd was plaintiff and John Henry Douglas, Ann Douglas, and Thomas Eyton and others were defendants. The bill, after stating the proceedings in the before-mentioned two suits, which it alleged had been heard on the same day as a cause and cross cause, and after stating that by the deaths of Baldwin Lloyd and John Douglas both suits had become abated, and that Thomas Eyton had been made a party to the first suit in respect of some chattel interest therein, charged that the plaintiff was entitled to revive and prosecute the suits so abated against the present defendants. The bill also contained supplemental matter to the following effect, namely, that, subsequently to the date and execution of the mortgage of 1809, n act of Parliament passed for inclosing certain open lands in Llanassa, in the county

of Flint; that certain lands had been allotted to Baldwin Lloyd in respect of the rights of common to which he was entitled in right of the mortgaged estates; that, by the terms of the act, they were to be holden to the same uses as the estates in respect of which they had been allotted; that Baldwin Lloyd contracted to sell these lands to John Pugh for £470, of which Pugh only paid £47; that John Douglas prevailed upon Pugh to give up these lands to him, whereupon Douglas took possession and had been in possession ever since, without paying any part of the purchase-money. That the plaintiff, as the representative of Baldwin Lloyd, was entitled to the balance of such purchase-money, namely, £423, with interest from the time when Douglas took possession.

The bill prayed that the said suits so abated might stand revived, &c., and that the plaintiff might be at liberty to prosecute the same, and particularly the order of June **[452]** 1837; and that the Master might be directed, under that order, to take an account of the sum of £423, with interest accrued thereon, since the possession of Douglas; that the plaintiff might be declared entitled to a lien on the allotted lands to that amount, and the same might be paid out of the personal estate of Douglas, or, in case that was deficient, out of his real estate; and that the defendant, Ann Douglas, might either admit assets, or that the usual account of his testator's estate might be taken.

To this bill the defendant, Robert Eyton, had, in the first instance, put in a plea for want of parties; but the plea was submitted to, and the bill was amended in that respect.

The same defendant now demurred to the amended bill, first, for multifariousness; and, secondly, because Pugh was not a party.

Mr. Simpkinson and Mr. James Russell, for the demurrer. The bill, in its present shape, is clearly multifarious. Admitting that Eyton was a proper party to the foreclosure suit (which is doubtful, considering the loose allegation of his interest in that suit), what interest has he in the matter of the second suit? It does not appear from the proceedings that the two suits were heard as cause and cross cause; if they had been, there would have been only one decree. The mere allegation that they were so heard will of course not alter the case. It cannot be contended that the order for one Master to take the accounts is an order to consolidate the suits; for, notwithstanding that order, the reports must be made in each suit.

Then, is not the whole matter of Pugh independent of the matters of both causes? How is either Douglas's foreclosure, or the specific performance sought against Douglas, connected with the agreement with Pugh? The general charge that Douglas is interested in all the matters mentioned in the bill cannot cure this defect: *Plumbe* v. **[453]** *Plumbe* (ante, p. 345). At all events, if Pugh's agreement is properly introduced, Pugh should be a party. It is not alleged that he has assigned his interest, but only that he is indemnified by Douglas. [Alderson, B. This suit may materially affect that indemnity.] That makes our case stronger.

Mr. Girdlestone and Mr. Shadwell, for the bill. The demurrer for multifariousness concedes that every matter mentioned in the bill is a proper subject for relief; and the only question is whether these matters are improperly mixed up together. Now, the decree in the first suit directs a conveyance to be made to any of the defendants who shall pay the mortgage money; therefore, Thomas Eyton was recognised by that decree to be a party interested in the equity of redemption; and he or his representatives are interested in any suit which may be revived, in order to prosecute that decree: Eyton, therefore, is a necessary party in any such suit.

Then, as to Eyton's interest in the other suit. The other decree, so far from being treated as distinct from the former, is expressly engrafted upon it. The Court, by the decree in the foreclosure suit, declared that so far as concerned Baldwin Lloyd's interest, the rents and profits and purchase-monies of the messuages and premises, called , should be applied in payment of the money secured by the indenture of September, 1812. How did the Court know anything about the purchase-money, except by reference to the other decree? Then, it directs that what should be found due to Baldwin Lloyd under the decree of even date, should be applied in discharge of the money due under the deeds of the 5th and 6th June, 1809. That is to influence the balance found due on that mortgage. Therefore, although Thomas Eyton might not have been a necessary party to the suit for spe-**[454]**-cific performance; yet the moment a decree is made in the mortgage suit, by which the price or right of redeeming

is to be measured by the result of the decree in the other suit, it is idle to say that he or his representative had no interest in it. It is only upon this that the order of June, 1837, can be explained. That consolidates the two suits; and it cannot be contended that that order must be revived by two orders. The principle laid down by the Lord Chancellor in *Campbell* v. *Mackay* (1 Myl. & C. 624) applies here—that where there is a common right against a set of parties, one party cannot demur because he is interested only in a portion of the common right. *Attorney-General* v. *Cradock* (3 M. & C. 85), *Attorney-General* v. *Poole* (4 M. & C. 17). We concede that, independently of the mortgage account, Eyton has no interest in the second suit; but the two suits having been consolidated for the purpose of taking that account, he has an interest in both. He has a right to redeem in the first, and the amount of the mortgage to which his right is subject is settled by the second. It is upon payment of the balance that his right arises.

Independently of the effect of these principles, this defendant has no right to demur for multifariousness after having pleaded a defect of parties, and the bill having been amended: *Ellice* v. *Goodson* (3 Myl. & C. 653). Therefore, the whole objection as to multifariousness must rest on the matter concerning Pugh. Now, in 1809, Baldwin Lloyd made a mortgage in fee to Stolterforth. Afterwards, certain land was allotted to Lloyd as the freeholder of the property so mortgaged. By the Inclosure Act,(*e*) the **[455]** allotted lands were to be held subject to the same uses as the lands in respect of which they were allotted. The Act passed in 1811, while the legal estate of the mortgaged lands was in Stolterforth. Therefore Stolterforth's mortgage overrides everything, including Pugh's contract and Lloyd's lien; and upon the assignment of Stolterforth's mortgage to Douglas, the latter took the legal estate and stood in the place of Stolterforth. That being the case the transaction with Pugh is properly the subject of this suit. If Stolterforth's mortgage does not override the allotments, Douglas ought to have made him a party to his bill of foreclosure, which he did not.

This leads to the last objection that Pugh should have been a party to this suit. Upon this it is submitted that if he is a necessary party now, he was a necessary party ab initio. But at all events he was indemnified by Douglas.

Mr. Simpkinson, in reply, upon the question of demurring after plea and bill amended, referred to *Robertson* v. *Lord Londonderry* (5 Sim. 226), *Prosser* v. *Edwards* (ante, vol. 1, p. 481), *Ritchie* v. *Aylwin* (15 Ves. 82), and *Stephens* v. *Frost* (ante, vol. 2, p. 302). He also contended that if the deaths of the parties had occurred immediately after the decrees, the suits would have been revived separately; and that the order of June, 1837, though it directed the accounts in each suit to be taken by one Master, left the equities of the parties as before. He also denied the effect which had been ascribed to the Inclosure Act, contending that that act vested the legal estate in the allotments in Baldwin Lloyd and not in any person claiming **[456]** under Stolterforth, but at all events that the bill did not state that rights of common were included in the mortgage to Stolterforth.

Feb. 25th.—ALDERSON, B. I have considered the questions argued before me upon this demurrer and have arrived at the conclusion that it must be allowed.

It is not necessary, if even it were possible, to lay down any general rules on the subject of multifariousness; because the cases, as the Lord Chancellor has well observed in *Campbell* v. *Mackay*, do not appear reconcilable. But this is quite clear that, where a plaintiff introduces more than one distinct and unconnected subject-matter of relief into his bill, and thereby unnecessarily inflicts on a defendant or defendants a great increase of expense, vexation, and delay, this ground of demurrer is properly given to them to prevent such inconvenient results. Where, however, there is one general relief prayed against some of the defendants, which, as to some portions of it, involves

(*e*) By the stat. 51 Geo. 3, c. 149, s. 56 (which seems to be the enactment referred to), the lands to be allotted are thenceforth to be and enure to the same uses, trusts, and estates, and to be subject to the same incumbrances as the several lands and hereditaments, in lieu or in respect whereof such allotment should be made, would have been subject and liable to be charged with or affected by in case that act had not been made. By the 41 Geo. 3, c. 109 (the General Inclosure Act), the commissioners are to assign and set out the allotments to the person who, at the time of the division and inclosure, shall have the actual seisin or possession of the hereditaments in respect whereof the allotments shall be made.

third persons, there, as in the cases quoted by Mr. Girdlestone yesterday, from Mylne & Craig, the objection fails. For the relief prayed against such third persons is not, properly speaking, in such cases, unconnected with the general relief sought; and the plaintiff, so far from unnecessarily including it in the same bill, has, upon the whole, followed the most convenient course.

Let us see to which of these two classes the present case bears most resemblance.

It appears from this bill that John Douglas was the assignee of a mortgage in fee, dated the 6th of June, 1809, whereby a capital messuage, and land, and other hereditaments, in the county of Flintshire, were conveyed to secure £3000 and interest advanced to Baldwin Lloyd and John Lloyd. He was also the assignee of a second mortgage of the same premises, to secure a further sum of £1000 and interest, there being also assigned by John Lloyd as a **[457]** further security for this latter sum, certain other property therein mentioned.

This latter property was also mortgaged by John Lloyd to secure a further sum of £700 and interest, and of this mortgage also John Douglas was the assignee.

Under these circumstances, John Douglas filed his bill in December, 1820, against Baldwin Lloyd, the representative of John Lloyd, and a person named Thomas Eyton, who, it was stated, alleged he had some right or interest in the equity of redemption of the mortgaged premises, praying an account as to the two first mortgages, and a foreclosure in case of non-payment.

On this cause being heard, a decree was pronounced, referring the accounts to Master Spranger. And the Court declared that, as far as regarded the interest of Baldwin Lloyd, as mortgagor, under the second mortgage, the profits arising from premises assigned as an additional security, were to go in discharge of the sum of £1000 and interest, before any part thereof was applied in discharge of the third mortgage of £700 and interest.

It then provided that whatever should be found due on the result of a suit instituted by Baldwin Lloyd against John Douglas, should be applied in payment of the ultimate balance (if any) found due from Baldwin Lloyd to John Douglas, on the two first mortgages; and that, on payment of the then balance, the premises should be reconveyed, without prejudice as to any claim he might have on the third mortgage, as to the premises covered by it.

The suit referred to in this decree, which was heard on the same day with the one I have already mentioned, was one by Baldwin Lloyd against John Douglas and the representatives of John Lloyd, by which, after stating the three mortgages before mentioned, and the receipt of monies under a sale of part of the premises conveyed as an additional security by the second mortgage, and an **[458]** agreement with Douglas for the absolute sale of a portion of the originally mortgaged premises for a sum ascertained by arbitration, and Douglas's possession of such portion, he prayed an account of the second mortgage of £1000 and interest, and of the sums of monies received in discharge thereof, and a sale, if necessary, of the rest of the premises assigned as further security, and a specific performance of the contract of purchase; and an account of the purchase-money, interest, and profits; and of the £3000 mortgage and interest; and that Douglas might pay what should be found due, and reconvey the mortgaged premises, excepting the part included in the purchase.

This cause was referred to Master Richards to take the accounts prayed and to set off the one balance against the other.

To this suit Thomas Eyton was a party.

By an order made after the death of Eyton, this second cause was, in June, 1827, transferred from Master Richards to Master Spranger, who was thereupon ordered to retake the accounts in both causes.

The first question which arises is whether the present defendant, Eyton, who is the personal representative of Thomas Eyton, is interested in both these suits, so as to make this bill, by which the present plaintiff seeks to revive both these suits against him as well as against John Henry Douglas, multifarious.

If the case rested upon this point alone, perhaps there would be some difficulty in coming to such a conclusion. For the accounts taken in each case are substantially the same. And the right to have a reconveyance on payment of the balance, which balance depends on both suits, and in which Thomas Eyton must be considered as interested, might, perhaps, give some grounds for the very ingenious argument addressed to the Court against the demurrer. But, even as to this, I think I must

ultimately have held that the two suits were in their nature distinct, and that [459] the involving the representative of Eyton in them, both exposed him to additional inconvenience and expense; and that he would have been entitled to my judgment on this ground.

But it is unnecessary, I think, to discuss this, as I entertain a clear opinion that the introduction of the question as to the claim upon John Douglas, in respect of the allotment sold by Baldwin Lloyd to John Davies Pugh, renders the bill multifarious. It is stated in the bill that an allotment was, in the year 1814, made to Baldwin Lloyd, by certain commissioners, in respect of his rights of common, as purchaser of the mortgaged premises. This allotment was sold by auction, by Baldwin Lloyd, for £470, to Pugh, who entered into possession, after paying £47 deposit, and so continued for several years. Douglas, after this, having acquired the assignment of the first mortgage, recovered possession of the premises from Baldwin Lloyd. And then the bill states that by some agreement with Pugh, Douglas, in 1836, obtained possession of the land sold to Pugh; of which part of the purchase-money, namely, £423, still remained unpaid. And the bill claims against the representatives of John Douglas a lien on the land for the sum of £423 and interest, and the repayment thereof to the plaintiff, Baldwin Lloyd's representative, and the bringing such amount into the accounts to be taken in the two causes.

But with this claim, as it appears to me, Eyton's representatives are wholly unconnected. This question of lien depends entirely on the transactions between Baldwin Lloyd and Pugh, and that between Pugh and Douglas. It seems to me to stand precisely on the same grounds as any other transaction between Baldwin Lloyd and Douglas, on matters wholly unconnected with Eyton. To introduce him or his representatives into such a contest is wholly unnecessary and, therefore, improper. His rights are unaffected by it, and ought not to be postponed till this [460] question is determined. Nor ought he to be saddled with the additional expense and delay which the introduction of this subject into this bill necessarily must occasion to him.

For these reasons I think the demurrer must be allowed to this bill as being multifarious.

I do not think that Pugh is a necessary party. The decree cannot affect his interest. If the account be taken of all remaining due on this contract and discharged by Douglas he will be exonerated, because the account will bind Lloyd, the plaintiff. And Douglas, after discharging this account according to the statement in the bill, can have no claim on him.

The bill states that Pugh delivered up the land, securing no consideration for it.

On demurrer, I must take the statement to be correct. In no event, therefore, can he be affected. Nor is his presence necessary in taking the account. For, as to that, Douglas has undertaken to represent him, and to pay what shall be due, and to indemnify him altogether.

But for the other objection the demurrer must be allowed.

WEST *v.* COLE. Feb. 25th, March 3rd, 1841.—Testator devised his real estates to trustees, upon trust to sell and to stand possessed of the produce thereof, and also of his monies and securities for money, upon trust, in the first place, to pay his debts, funeral expenses, and legacies; and as to the residue of the monies arising from the sale of his real estates (not mentioning his personalty), after payment of the debts, sums, and legacies thereinbefore mentioned, upon trust to invest and pay the interest to A. and B. for their lives. The testator had other personal estate, which he also disposed of by his will: Held, that the mixed fund was the primary fund for payment of his debts and legacies, that the portions of it arising respectively from the real and personal estate were to be applied pro ratâ, and that the surplus of it was to be divided proportionably between the parties who were entitled, under the will, to the produce of the realty, and those who were entitled to the personalty, who in this case were the next of kin.

[S. C. 10 L. J. Ex. Eq. 40.]

Richard Matthias by his will gave to his trustees, William Cole and William Davis, whom he also appointed his executors, certain real estates described in the will, upon [461] trust within twelve months after his decease to make absolute sale of the same,

and to stand possessed of all the monies to arise from the sale, and of the monies or securities of or to which the testator was possessed or entitled at the time of his decease, and the rents, issues, and profits of the said real estates until the same should be disposed of, upon trust in the first place to pay all the testator's just debts, including a sum of £2000 due on mortgage, and the interest thereof, his funeral expenses, the costs of establishing and proving his will, and carrying the trusts thereof into execution; and afterwards to pay the several legacies by his will given to his relations, servants and labourers; and after payment thereof to invest £1000 in the public funds, or on real security, and pay the dividends, &c. to his wife for life, with remainder over. The testator then gave out of the purchase-monies of the real estates certain legacies to his relatives and servants. And as to the remainder of the purchase-monies of his said manors, tithes, and real estates thereinbefore directed to be sold, after the payment of the debts, sums, and legacies thereinbefore mentioned, the trustees were to invest the same in the public stocks, &c. and pay the interest to the testator's two sisters, Mary Matthias and Margaret Anne West, the latter to her separate use, in equal shares, during their lives, and after their deaths the principal to be divided amongst their children.

The testator also gave to his trustees the whole of his stock, crop, and implements of husbandry, &c. upon trust for sale, and to be applied as mentioned in his will.

The testator died, leaving Mary Matthias and Margaret Anne West, his only next of kin, surviving him.

The bill was filed by Margaret Anne West against the trustees, and against her husband and sister and other parties, praying to have the rights of the several parties ascertained, &c.; and, inasmuch as the testator had specifically bequeathed the residue of the produce of the real **[462]** estate, but had given no directions as to the residue of the personal estate, the question arose between the next of kin and the persons entitled under the will to the surplus of the real estate, out of what fund the testator's debts should be paid, and how the residue was to be applied.

Mr. Simpkinson and Mr. Martindale, for the plaintiff. The question is, what is the effect of the direction to pay the debts; whether it is only a charge of the debts on the real estate, or whether a trust is not imposed on the executors to apply these two portions of his property, namely, his real estates, and his monies, and securities for money, pari passu, in payment of his debts. If the latter is the intention of the testator, the Court will carry it into effect. The decisions are collected in the second volume of Williams on Executors, and they all, according to Lord Eldon's observation in *Bootle* v. *Blundell* (19 Ves. 516), proceed on the intention of the testator: *Roberts* v. *Walker* (1 Russ. & Myl. 752), *Dunk* v. *Fenner* (2 Russ. & M. 566), *Eyre* v. *Marsden* (4 Myl. & C. 240). In *Roberts* v. *Walker* the mixed fund consisted of the produce of the realty and the entirety of the personal estate; and it was held that the real and personal estate should contribute pro ratâ. Here only a portion of the personal estate is mixed with the produce of the realty.

Mr. Wilcock, for the husband of Mrs. West.

Mr. Bethell (with whom was Mr. Parry), for Mary Matthias.(*e*) The testator has charged his mixed fund with every kind of expense to which the general personal estate is ordinarily liable, intending it as a fund to answer the expense of the administration of the whole of his estate. **[463]** The ordinary rule is not here applicable. It depends on the testator's intention; and it is clear he meant to exonerate every other part of the estate, whether disposed of or undisposed of. The bequest, in this particular form, amounts to an exoneration of all the other personal estate: *Bootle* v. *Blundell* (19 Ves. 494), *Hartley* v. *Hurle* (5 Ves. 540), *Browne* v. *Groombridge* (4 Madd. 495), *Choat* v. *Yeats* (1 Jac. & W. 102). In both the last cases the general personal estate was held exonerated, on the ground of the testator having charged specific portions of his personal estate. It is said that next of kin claim in the absence of intention, and therefore cannot avail themselves of the benefit of the rule. But that is a fallacy. The decisions authorize you to give the same benefit to next of kin as to a legatee of the residue: *Donne* v. *Lewis* (2 Bro. C. C. 257), *Milnes* v. *Slater* (8 Ves. 295). *Waring* v. *Ward* (5 Ves. 670) is not conflicting, being decided upon another principle. *Roberts* v. *Walker* recognises this principle: that, when the testator has united real and personal

(*e*) The remainder of the arguments and the judgment are ex relatione Mr. Edward Cooke.

estate, charging the produce with all the liabilities to which the general personal estate would be first liable, then the funds shall bear the burthen equally, and the residue devolves upon the heir-at-law and the next of kin respectively, after each portion has borne its proper proportion of the burthen. If a testator give legacies out of the produce of a real estate, they must come out of such produce exclusively: *Spurway* v. *Glynn* (9 Ves. 483), *Hancox* v. *Abbey* (11 Ves. 179).

Mr. Swanston, for the trustees.

Mr. Girdlestone and Mr. Stinton, for the parties interested in the real estate. *Bootle* v. *Blundell* defines the rule of **[464]** construction, that you must find not only an intention to charge the real estate, but also to exonerate the personal estate. The testator, after creating a mixed fund for the payment of debts, disposes of the residue arising from the real estate only, but makes no disposition of the residue arising from the personal estate. The presumption from that is that he knew there could not possibly be any surplus of the personal estate. The real estate was only therefore given in aid. It is clear he thought he was disposing of his whole estate. The devisees of the real estate are entitled to have the whole of the produce of the real estate that remains after the personal estate has been applied in payment of the debts, &c. *Donne* v. *Lewis* was a question between the heir and devisee, and has no analogy to the present case, for the rules of law, as to real and personal estate, are quite distinct. In *Milnes* v. *Slater* there were clear words of exoneration of the personal estate. The whole of the proposition in *Roberts* v. *Walker* is that where a general purpose fails that does not raise a presumption of intention in favour of the heir. That is different from the question whether that which would ordinarily form a fund for payment of debts is exonerated? The general personal estate is not exonerated unless it be satisfactorily made out from the whole context of the will that such was the intention of the testator: *Walker* v. *Hardwick* (1 Myl. & K. 396). [Alderson, B. Have you any case upon the subject of a mixed fund of real and personal estate? Because there is a broad distinction between that and a general charge.] If the testator here had disposed of the surplus of the personal estate, then the question in *Roberts* v. *Walker* would have arisen. The testator only disposing of the surplus of the produce of the real estate is strong evidence of his intention that there should be no surplus of the personal fund.

[465] ALDERSON, B. It seems to me that it is better to adhere to the general rule than to adopt conjecture as to the particular intention of the testator. We should more generally carry into effect intentions of testators by subjecting these questions to a general rule. It appears that the first general rule is that, where a testator creates a mixed fund of a portion of his personal and real estate and appropriates that fund to the payment of debts, it is primarily liable, because the testator so intends it; and that the residue of the personal estate is chargeable only after the primary fund fails. Else, why does a man create a fund at all? To take it out of that rule there must be clear evidence to the contrary. The case of *Roberts* v. *Walker* establishes this, that where a mixed fund is created out of a portion of real and personal estate, the payments must be made out of that mixed fund and go in reduction of the mixed fund; so that what remains shall remain a fixed fund rateably consisting of the monies and securities, and the produce of the land. Now here, that portion of it which belonged to the land has been specifically bequeathed; but, by some accident, the testator has said nothing as to the surplus of the personal estate. It seems to me that the law has settled the matter. The persons entitled to the personalty must have the residue of that part of the fund, and the persons to whom the residue of the produce of the land has been bequeathed must take that, after each part has borne a proportionate part of the burthens imposed on it by the will.

Let the Master apportion the principal of the debts, funeral and testamentary expenses and legacies, and the costs of this suit, between the real and personal estate by the will devised and bequeathed for the payment thereof, according to the respective values of the said real and personal estates. And let the Master certify what portion of the per-**[466]**-sonal estate remains upon such apportionment; and let the Accountant-general sell so much of the sum of £—— (stock produced by the other personalty) as will realize the amount so certified, and pay one moiety thereof to the defendant, J. G. West, the husband of the plaintiff, and the other moiety to the defendant, Mary Matthias.

EX PARTE JONES. IN THE MATTER OF ST. PHILIP'S BRIDGE COMPANY. 1841.—Where a person interested in a long term of years in certain property, agreed by mistake to sell the fee-simple of the property to the company: Held, upon the construction of the Railway Act, that the reversioner was barred, and that the transaction was equivalent to selling the fee.—Semble, that the provisions of the 9th section of stat. 3 & 4 Will. 4, c. 27, are applicable to the case, where rent is reserved and no rent paid, but not to a case where no rent is reserved.

This was a petition for payment of purchase-money out of Court to the petitioner under the following circumstances:—The petitioner having only a leasehold interest in four-fifths of a certain property, which was held for a long term of years, contracted to sell the fee to the company under an apprehension that she had the fee. She had been upwards of twenty years in possession, and had paid no rent; none being reserved in the lease. The company paid the purchase-money into Court, under the 24th section of their act (the stat. 1 & 2 Vict. c. lxvi.), by which they were empowered to do so, in case the vendor could not make a title to their satisfaction.

By a previous section of the act (sect. 20) it is enacted that, upon payment or legal tender of such sum of money as shall have been contracted or agreed for between the parties, for the purchase of any lands as therein mentioned, within one calendar month after the same shall have been agreed for, "or upon payment of the said sum of money within the said one calendar month into the Bank of England, as hereinafter directed and required, it shall be lawful for the said company, and their attornies, and their agents, workmen, and servants, to enter upon such lands; and then and thereupon such lands, together **[467]** with the yearly profits thereof, and all the estate, use, trust, and interest of any person therein, purchased by such payment as aforesaid, shall thenceforth be vested in and become the sole property of the said company for the purposes of this act; and such payment shall not only bar all right, claim, interest, and demand of the person to whom the same shall or ought to have been made, but also shall extend to and be deemed and construed to bar the dower of the wife of every such person, and all the estates tail and other estates in reversion and remainder of his issue, and of every other person whomsoever therein so purchased as aforesaid."

Mr. Bagshawe, for the petition.

Mr. Simpkinson and Mr. Blower, for the company, said there was some difficulty in the case, because the possession of the petitioner could not be considered an adverse possession, and therefore the reversioner, notwithstanding the lapse of time, might come at the end of the term and avoid the conveyance.

In the course of the argument reference being made to the stat. 3 & 4 Will. 4, c. 27, s. 9, and it being contended that, upon the construction of that enactment, there was no adverse possession in a lessee, except by adverse payment of rent, the Lord Chief Baron said that, in his opinion, if a landlord granted a lease subject to rent, and the party paid no rent, that would be adverse possession, as well as if the lessee paid rent to another person. But he added that in a case where no rent was reserved the statute would not apply.

THE LORD CHIEF BARON then called upon counsel to read the 20th and 24th sections of the Railway Act, which being done his Lordship made the order as prayed.

[468] EX PARTE HIRST. IN THE MATTER OF THE BIRMINGHAM AND DERBY JUNCTION RAILWAY ACT. Feb. 17th, 1841.—"Costs in consequence of the purchase:" Held, not to carry costs of the interim investment in the funds.

The question was whether the words "costs in consequence of the purchase" would carry the costs of the interim investment in the funds.

ALDERSON, B., held they would not.

Mr. Craig, for the petition.

Mr. Bacon, for the company.

MILLS *v.* PEARSON. 1841.—Personal service of notice of an injunction granted under special circumstances.

Mr. Simpkinson moved for leave to give personal service of a notice of a motion for an injunction; the defendants not having appeared, and the plaintiffs

being of opinion that the Court would not grant the injunction in their absence, and the defendants having no clerk in Court.

Ordered.

MEMORANDUM.

In February, 1841, Sir Joseph Littledale, Knt., one of the Justices of the Court of Queen's Bench, resigned his office, and was shortly afterwards sworn in a member of Her Majesty's most Honourable Privy Council.

Sir Joseph Littledale was succeeded in his office of a Justice of the Court of Queen's Bench by William Wightman, of Lincoln's Inn, Esq., Barrister at Law, who was thereupon called to the degree of the coif, and gave rings with the motto "Æquam servare mentem," and shortly afterwards received the honour of knighthood.

[469] PRICE *v.* CHIPPENDALE. April 1, 1841.—Where a bill was brought to have a guarantie delivered up on the ground of fraud, and A. and his wife were made parties to the bill, upon an allegation that the wife was concerned in a conspiracy to defeat the guarantie, and no act was alleged against the husband, but it was stated that he was imbecile: Held, that a demurrer to the bill by the husband was sustainable.

The bill stated that in August, 1839, Joseph Hartley applied to the plaintiff to be guarantor, together with W. Lowe, for the repayment to the defendant, Mrs. Chippendale, of a sum of £200, which she had agreed to advance to Mr. Wigney, a brewer, by way of security for the good and industrious behaviour of Hartley, in conducting the business of beer-seller alone at the Royal Oak Hotel. That the defendant Mrs. Chippendale did, in fact, agree to advance the money, and that the plaintiff, under the assurance that Hartley was to conduct the business alone, was ultimately induced to sign a joint and several guarantie, together with Lowe, to secure to Mrs. Chippendale two-thirds of the amount. That the plaintiff had since discovered that Mrs. Chippendale did not advance the £200, in pursuance and for the purposes of the agreement, but in order that she might become a partner in the business; and that she had actually, together with the defendant Mrs. Pennington, become a partner in the business with Hartley. That the business was carried on, not by Hartley alone, but by Hartley, Mrs. Chippendale, and Mrs. Pennington in co-partnership, and was conducted in a disorderly and disreputable manner, &c. That the whole transaction was the result of a plot fraudulently concocted by all the defendants, except Lowe.

The bill, after alleging that the defendant George Pennington, the husband of Mrs. Pennington, was imbecile, prayed that the guarantie might be declared null and void, and that Mrs. Chippendale might be restrained from proceeding in her action against the plaintiff. No relief was prayed against the Penningtons, but the prayer of process was that they might abide the decree and order of the Court.

To this bill the defendant George Pennington demur-**[470]**-red; first, because no relief was prayed against him and Mrs. Pennington, or either of them; and secondly, for want of equity.

Mr. James, for the demurrer. A bill which prays no specific relief against a defendant is a bill of discovery only, and if it prays process to abide such further order, &c. it is demurrable: *Angell* v. *Westcombe* (6 Sim. 30), *Ambury* v. *Jones* (1 Younge, 199). As against George Pennington no case whatever is made, and as against his wife the case is only one of discovery. She might be a witness at law; but if the bill is sustainable at all against these defendants, it can only be sustained as a bill of discovery. [The Lord Chief Baron. It has been decided that in no case can you make a party to a bill of discovery who is not a party at law. That has been solemnly decided in the House of Lords,(*c*) overrul-**[471]**-ing all the

(*c*) See *Queen of Portugal* v. *Glyn*, West's Cases in the House of Lords, p. 258, reversing the decision in *Glyn* v. *Soares*, ante, vol. 1, p. 644. One ground for this reversal appears to have been that the bill against the Queen of Portugal was a bill for discovery only, and not for relief; and it was much questioned both in that case and in *Irving* v. *Thompson*, 9 Sim. 29, whether even in insurance cases it has been the practice in the Exchequer, until very recently, to allow mere bills of discovery against

cases which have been decided on insurance matters in this Court for many years.] Then as to the second ground of demurrer, nothing is alleged against the husband except that he is imbecile. Why then, being in truth neither a witness nor a party, should he join in the answer of his wife? They should have obtained an order to answer separately. [The Lord Chief Baron. She could not separately be a party pro interesse suo, nor a party on the ground of being criminally concerned.] There is no case against either the husband or wife. As to them, the deviation from the conditions of the guarantie can make no difference. If there had been an allegation that they, with Mrs. Chippendale, had possession of the guarantie, there might have been some colour for the bill; but there is none as it stands.

Mr. Steere, for the bill, contended that all the defendants were interested in the guarantie, and that without the Penningtons the bill would have been defective for want of parties.

THE LORD CHIEF BARON. Nothing is alleged against the husband. How then can a Court of Equity render a husband liable for debts of which he had no notice? According to the statements of the bill the wife does not act as the authorized agent of the husband. She enters into a partnership, her husband is imbecile, and nothing is stated against him to make him accountable. The husband must be privy to the acts of his wife either in fact or by implication. If these parties had not been made defendants, and Mrs. Chippendale had demurred for want of parties, the answer would have been, Mrs. Pennington's husband is not interested, and therefore his wife is not. Besides, no circumstances amounting to a case of conspiracy are stated.

Demurrer allowed.

[472] FARRAR *v.* THE EARL OF WINTERTON. March 24th, 1841.—Testatrix devised a freehold property, in which she had an equitable estate in fee, to A. for life, with remainder to B. for life, with remainder to the family of B. (who were infants), in strict settlement. She then contracted to sell part of the estate, and died before conveyance. After her decease the legal estate was got in, and the owners of it, together with the tenants for life, were willing to complete the purchase: Held, nevertheless, that in order to give the purchaser an immediate estate in fee, both legal and equitable, a decree for specific performance of the contract under the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 17, was necessary; and that as this was a question of title, and the vendor had contracted to deduce a good title at her own expense, and there was no laches on either side, the costs of the suit must be paid out of the vendor's estate.

Anne Chapman by her will dated the 17th of December, 1834, devised her freehold estate in the parish of St. George in the East, in the county of Middlesex, to trustees for a term of years, for the purposes therein mentioned, and subject thereto to the use of her three half sisters as tenants in common for their lives, with cross remainders for life, with remainder to the use of Adolphus Cottin in fee. Adolphus Cottin dying in the lifetime of the testatrix, she by a codicil dated the 24th of June, 1838, devised the remainder after the decease of her three sisters to the use of Lord Winterton for his life, with remainder to such one or more of his children for such

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parties interested in a policy, not being parties to the record at law. Without entering into the question how long the modern practice in the Exchequer may have obtained (and that it has obtained is evident from *Janson* v. *Solarte*, ante, vol. 2, p. 127), it may be remarked that Lord Eldon, in *Jervis* v. *White*, 7 Ves. 414, said that bills of relief in insurance cases were treated in the Exchequer as bills of discovery. If so, is there (except with respect to the costs, which, in the case of a bill of discovery, the plaintiff in equity must pay) any material distinction between them? And what is the degree of allegation which will be sufficient to turn a bill of discovery into a bill for relief? Will it be consistent with modern pleading to allow general allegations of fraud as suggested in *Plummer* v. *May*, 1 Ves. sen. 426, or prayers that parties may pay the costs, as mentioned in *Le Texier* v. *Margravine of Anspach*, 15 Ves. p. 164, to have that effect? It has been the practice of this Court of late years to discourage, as far as possible, general allegations in pleading (see ante, *Tarleton* v. *Hornby*, ante, vol. 1, 172, *Plumbe* v. *Plumbe*, ante, p. 345), and that practice seems consistent both with good sense and substantial justice.

estates, &c. as he should by deed or will appoint, and in default of such appointment to the use of his first and other sons successively in tail, with remainders over.

On the 8th of January, 1839, the testatrix entered into a contract for the sale of part of this property to the trustees of a Methodist chapel, whose chapel and premises had been purchased by the Commercial Railway Company, and the purchase-money for which had been paid into this Court under the Railway Act.

By the terms of the contract the purchase-money was to be paid on or before the 26th of June, 1839; and the vendor agreed that she would, within a fortnight from the date of the contract, at her own expense, make and deliver an abstract of the title of the premises to the purchasers or their solicitors, and would also at her own expense deduce a good title to the land in question; and further, that she and all other necessary parties would on or before the 26th of June, 1839, at the costs and charges of the purchasers, execute a proper conveyance.

In consequence of the purchase being made under the authority of the Railway Act several references were made **[473]** to the Master, which occasioned, as usual, considerable delay; and on the 7th of May, 1840, which was after the Master had approved of the title, but before he had settled and approved the conveyance, the testatrix died.

Viscount Turnour, the eldest son of Lord Winterton, being an infant, the purchasers were advised that the contract could not be carried into execution until after a specific performance should have been decreed by a Court of Equity, under the statute 11 Geo. 4 & 1 W. 4, c. 60, s. 17,(*a*) inasmuch as the effect of the will and codicil was to carry the land to the devisees, and to affect it by the limitations of the will and codicil, subject only to the performance of the contract.

It appeared that at the time of the testatrix's death the legal estate in fee in the premises was outstanding in Miss Wegg; and in order to aid the vendor's title, she, by indentures of lease and release, dated the 30th and 31st July, 1840, conveyed her estate in the premises to the trustees under the will, subject to the limitations of the will.

A bill, however, for specific performance of the contract, **[474]** was filed by the purchasers; and the questions, at the hearing of the cause, were, whether the suit was necessary, and if so, whether the vendor or the purchasers were to pay the costs?

Mr. Hodgson and Mr. Calvert, for the plaintiff, said that the purchasers were entitled to an immediate conveyance by deed, both of the legal and equitable interest. That this could not be had without a decree for specific performance, which in this case was as much a matter of title as any other matter; and, therefore, that according to the contract, the vendor must pay the costs of the suit.

Mr. Girdlestone and Mr. Law, contrà, questioned whether the suit was necessary, the contract being a revocation of the will in equity, and the legal estate being in the trustees, under the conveyance of July, 1840. But that supposing it was so, the delay was occasioned by the purchasers not being in a situation to take an immediate conveyance, and therefore they should pay the costs.

ALDERSON, B. The decree must be as prayed by the plaintiffs. This is a matter of title and not of conveyance. By the terms of the agreement the expenses of making out the title fall on the party who sells, and those of the conveyance on the party

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(*a*) By which it is enacted that when any land shall have been contracted to be sold, and the vendor or any of the vendors shall have departed this life, having devised the same in settlement, so as to be vested in any person for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person, from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court of Chancery, it shall be lawful for the Court by whom such decree shall be made, by the same or any other decree, or any decretal order, or upon petition in the cause, to direct any such tenant for life or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple, or other the whole estate contracted to be sold, to the purchaser, or in such manner as the said Court shall think proper; and every such conveyance shall be as effectual as if the person who shall make the same were seised of the fee-simple, or other the whole estate contracted to be sold.

who buys. The party who originally made the contract died, and there is nothing to satisfy me that there has been laches on one side or the other. The delay arose from an accident, for which neither party is responsible. Then the question is, what is now necessary to give a good title? The act of Parliament comes in and enables persons to convey, in these particular circumstances, but independently of the act these persons have no right to pass an estate in fee. Provision is necessary to clothe them with the right to make a conveyance which is to be operative on all parties as a conveyance in fee. **[475]** Therefore, without the act of Parliament, their title is incomplete. Then the expenses are to follow the contract; and the parties who are to make out the title are liable to the expenses, and therefore the expenses of this suit must fall on the vendors.

Decree accordingly.

NORRIS *v.* DAY. April 24th, 1841.—Bill to restrain an action brought by an architect against his employers for his commission; the bill suggesting fraud on the part of the architect in taking gratuities from the tradesmen, &c., and praying a general account. Injunction dissolved, the matter being as fit for the decision of a jury as for that of a Court of Equity, though, probably, most fit to be the subject of arbitration.—The mere existence of cross demands is not a sufficient ground for an injunction to restrain an action on an account stated.

[S. C. 10 L. J. Ex. Eq. 43.]

In 1835 the plaintiff, Richard Norris, who held the office of Provincial of the Society of Jesuits in England, and who was succeeded in that office by the other plaintiff, Bird, instructed the defendant, on their behalf, to prepare plans and specifications for, and to superintend, as their architect, the erection of a chapel at Bury St. Edmunds, and also a chapel and dwelling-house in Broad Street, Hereford; and in pursuance of such directions the defendant prepared the necessary plans and specifications.

A tender was afterwards made by Heather and Pritchard, of Hereford, builders, to erect the chapel at Hereford for 5684l. 15s. 4d., which tender was accepted by the Rev. Joseph Postlewhite of Hereford, a member, and one of the superiors of the society, and acting in that behalf for the society.

By an agreement in writing dated the 1st of July, 1837, and made between Postlewhite of the one part, and Heather and Pritchard of the other part, reciting that Heather and Pritchard had contracted to build the chapel at Hereford, subject to such conditions and superintendence as thereinafter mentioned, and that the defendant Day had prepared a certain specification for the chapel contained in the schedule and certain drawings, forty-six in number, which had been signed by Pritchard and Heather and the defendant, and were intended to be deposited with the **[476]** defendant; it was witnessed that, in consideration of the said sum of 5684l. 15s. 4d., Heather and Pritchard thereby covenanted &c., that they would build and completely finish the chapel &c. by the 1st November, 1838, with materials of the best quality, according to the specification and drawings, and to the satisfaction of the defendant; and that they would in all things follow the instructions and directions of the clerk of the works for the time being of the said defendant, &c. And it was agreed that the contract should include all that was requisite for completing the buildings, so that no extra charge whatever should be made beyond the amount thereby contracted for. Then followed several special clauses; amongst others, clauses giving power to the defendant to dismiss workmen, and also in default of a sufficient number of workmen being employed, to employ an additional number, and to certify the amount of their wages, such certificate to be binding on Heather and Pritchard, and the amount to be the subject of deduction from any monies coming to them from Postlewhite. Then followed a covenant that in case Heather and Pritchard should at any time not execute the works according to the terms of the agreement, or should not proceed therein, or execute the same to the satisfaction of the defendant, or in case there should be any unnecessary delay on their part in the execution or completion of the works, it should be lawful for the defendant to give such notice to them as therein mentioned to continue the works; and in case they should disregard such notice, then it should be lawful for the defendant to employ any other workman or workmen,

either by contract or measure, and value or otherwise, to proceed with the works, and to complete the same in the same manner as Heather and Pritchard were thereby required or ought to have executed the same, and to pay or cause to be paid the amount of the charge for the said works and for all necessary materials, which **[477]** amounts should, at the option of Postlewhite, be paid to him by Heather and Pritchard, or deducted out of any monies or balance which should be payable to them by virtue of the agreement; such amount to be ascertained and fixed by the certificate in writing of the defendant, and to be finally binding and conclusive. And it was further agreed that the defendant should have full and absolute authority, at any time during the progress of the works, to make any variations, alterations, additions, or omissions to or in the same, as he should from time to time think proper, and give written instructions to Heather and Pritchard for that purpose, who should obey the same; and that any such variations, alterations, additions or omissions should not vacate the contract, but the amount and extent thereof should be valued by the defendant, and should be added to or deducted from the amount of the contract, and payment should be made accordingly. The agreement then, after several other special clauses, contained a covenant by Postlewhite, upon receiving from the defendant certificates of work done to his satisfaction, to make to Heather and Pritchard such payments as therein mentioned; and upon receiving from him a certificate of the whole of the works having been finished to his satisfaction, to pay the residue of the 5684l. 15s. 4d., or such greater or less sum, payable as aforesaid. And it was lastly agreed that the decision in writing of the defendant, with respect to the amount, state, and condition of the work actually executed, and also in respect to any and every question that might arise touching the contract or the specifications or drawings, or the execution of the works, or the payment for the same, should be final and conclusive on both of the parties to the said agreement, and might be made a rule of Court at the instance of either of them.

Heather and Pritchard, in pursuance of this agreement, commenced the works, but failed to do them to the satis-**[478]**-faction of the defendant; and he refused to certify that any work had been done by them to his satisfaction, whereupon their operations were suspended; and in November, 1837, the defendant, under the powers given to him by the contract, took the management of the works into his own hands.

In October, 1838, application was made to the defendant by the plaintiffs, through the medium of their solicitor, for a certificate of the execution of the works, pursuant to the terms of the contract. In December following the defendant sent a certificate signed by him, which, after referring to the agreement of the 1st of July, 1837, was in these terms: "I do hereby certify that I have, in consequence of the said Messrs. Heather and Pritchard having made default in regularly and duly proceeding with the works thereby contracted to be done, employed workmen to proceed with the said works, in the same manner as the said Messrs. Heather and Pritchard ought to have done; and that I have paid or caused to be paid the amount of the charges for the said works and necessary materials, and that such amount is the sum of £6000 and upwards. And I do likewise hereby certify that the said Joseph Postlewhite is entitled to be paid by Heather and Pritchard the above-named amount of £6000 and upwards, or otherwise to deduct the same out of any monies or balance which shall or may be payable to them by virtue of the agreement."

The plaintiffs being greatly dissatisfied with this certificate, by reason of the amount of the sum certified, gave notice in June, 1839, to the defendant that they should discontinue his services; and to the clerk of the works that the works should be suspended. On the 10th of July, 1839, the defendant wrote a letter to Mr. Postlewhite, in which, after stating that he had no wish to be concerned in the buildings at Hereford in any manner inconsistent with the powers given to him by the agreement, he used these **[479]** expressions: "You must be aware that there are now some outstanding accounts, to a considerable extent, still remaining unpaid, due to parties employed by me by virtue of such authority, the amounts of which are to be ascertained by me as soon as they are settled and adjusted, as well as my own account for the superintendence of the works," &c.

In consequence of the alleged exorbitant charges of the tradesmen, whose bills formed the aggregate amount of the £6000 certified by the defendant, and also in consequence of the alleged collusion between them and the defendant, the plaintiffs refused to pay the defendant the amount of his account for commission and personal

charges, which was delivered to them in February, 1840, and amounted to 1528l. 1s. 4d.; and, accordingly, the defendant, in March, 1840, commenced an action against the plaintiffs to recover that amount. In the following month he delivered his particulars of demand, whereupon the plaintiffs, defendants at law, obtained an order for better particulars of demand which were delivered accordingly.

In June, 1840, the plaintiffs filed the present bill, which, after charging the defendant to be their agent (more especially from his admissions contained in his certificate and his letter of the 10th of July, 1839) and alleging that he had from time to time received large sums of money from the plaintiff, R. Norris, on account of the works, prayed that, by reason of the fraudulent negligence and unskilful conduct of the defendant, he might be declared to have forfeited all right to commission, or any other claim against the plaintiffs in respect of the works at Hereford, or that he might be declared entitled to commission only on the real value of the works done; and that an account might be taken of all the dealings and transactions of the defendant with respect to the works at Hereford, and of all sums which he was entitled to charge for commission, and for an injunction to restrain the action.

The principal charges of the bill, which was very long, **[480]** were to the effect that it was always agreed and understood, and had frequently been admitted by the defendant, that the expense of erecting the chapel was to be limited to the sum of 5684l. 15s. 4d. That, notwithstanding this agreement, and notwithstanding express notice, he had, wilfully and fraudulently, for the purpose of getting a higher amount of commission, employed London tradesmen at exorbitant prices; that he had also, in some cases, taken the difference between the sum which the tradesmen ought to have charged and the sum which he certified to be due to them: and, in other instances, particularly in a matter with Messrs. Wyatt, Parker & Co., he had received presents for allowing the tradesmen to make high charges; that he had also, in many cases, allowed certificates, without inquiring into the truth of the charges or properly examining and measuring the work; and, moreover, that in furnishing the second particulars of sale, he had inserted false items, for the purpose of making the amount of the second particulars agree with that of the first. There were also complaints of overcharges, &c.

The defendant by his answer denied that he had ever received any money from the plaintiffs, or that he had ever employed any workmen, or paid their wages; alleging that all the workmen were employed and paid by Postlewhite. He stated that though he had engaged some workmen from London, it was only with the previous sanction of Postlewhite, and that he had never contracted with the tradesmen, but simply engaged them for Postlewhite. That he never had any interest in the works as a builder, but had on the contrary frequently insisted on being kept free from any such engagements. He denied the allegations of the bill, as to the works being contracted for at a limited sum, and he positively denied all the allegations of fraud. He admitted, however, that he had, by his second particulars, added a sum of £50 for drawings to an item which, in the first particulars, was £900, but which had on **[481]** subsequent calculation, been reduced; but he insisted on the £50 being a usual charge. He also admitted that he had received a £50 cheque from Messrs. Wyatt & Co. as a present, but that that was some time after they had supplied materials for the works, and solely in consequence, as the defendant believed, of his having recommended them to business on several occasions.

The common injunction having been obtained to stay proceedings at law,

Mr. Girdlestone and Mr. Teed now shewed cause against dissolving it. The bill and injunction are sustainable against the defendant as the agent of the plaintiffs. He certainly attempts to shew that he was passive as regards the contracts, that he employed no workmen, and that his duty was merely to superintend and to certify the amounts of the tradesmen's bills. But his representation in this respect is totally at variance with the certificate which he gave the plaintiffs, and with his letter of the 10th of July, 1839, in both of which he speaks as having himself employed the workmen. It appears, therefore, by his own admission, that he was the plaintiffs' agent, and that he certified an expenditure greater than he was authorized to do. On general principles, the relation in which he stands to his employers is sufficient to justify them in bringing him into equity; and if so, the intricate nature of the accounts, and the strong suspicion of collusion for the purpose of making high commission and overcharges, and the improper manner in which the defendant confessedly received gratuities from tradesmen, demand an inquiry here, and a suspension of the action. [The Lord Chief

Baron. The question is whether, if a man brings an action on an account stated, you have a right then to come into equity for an account and an injunction to stop the action. If you came here first it might be different. He could not then, perhaps, draw the case out of equitable jurisdiction.] **[482]** In *The East India Company* v. *Henchman* (1 Ves. jun. 287) the bill was filed against Henchman for an account of all sums received and disbursed by the defendant on account of certain contracts in which the plaintiffs were concerned. The bill charged collusion by means of the agent receiving gratuities. The demurrer was allowed, not on the ground of want of jurisdiction, but because there was no sufficient connexion between the contracts and the alleged fraud. *Massey* v. *Davies* (2 Ves. jun. 317) was also the case of a bill against an agent. The agreement there was that the agent was to have no profit beyond his salary, yet he took advantage of a secret partnership in which he was engaged to sell goods to his employer at a profit price, and it was held that he must account in a court of equity for the profit. The present case must be decided on the same principle. It would be monstrous to say that, in a complicated case of this nature, you are confined simply to a bill of discovery, where you must pay the costs. That this Court has jurisdiction to interfere is clear: *Corporation of Carlisle* v. *Wilson* (13 Ves. 276), *Mackenzie* v. *Johnson* (4 Madd. p. 373), *Ranger* v. *Great Western Railway Company* (Nichol, Hare, & Carrow, R. W. Ca. 1).

Mr. Simpkinson and Mr. Romilly, contrà, were stopped by the Court.

THE LORD CHIEF BARON. I agree that if this bill had been filed in the first instance, and the Court had obtained jurisdiction over the fund and the account, I should have prevented the defendant from bringing his action afterwards. But it happens in this case that a court of equity and a court of law having concurrent jurisdiction (for that is admitted), the court of law is set in motion in the first instance; ought, then, this Court to interfere to stop the **[483]** proceedings at law? I think not. I do not dispute the authority of the cases cited in argument, but there are particular circumstances in this case which appear to me to make it more fit for the consideration of a court of law than a court of equity. I do not say that it may not be investigated in equity; but if no action had been brought and I had to investigate this case here, I should feel myself obliged, in the course of the investigation, to direct an action—and I will tell you upon what point. As long as the contract between the contractors and the plaintiffs was depending and the work was done under that contract, the certificates of Day would be binding on the contractors and could not be avoided except by shewing collusion between the other party and Day. But when the contract was abandoned Day assumed a new character. His certificates were no longer binding on anybody. They only authorized the plaintiffs to pay the tradesmen; they would not bind anything, nor would the tradesmen be bound by them. Still less would Day, because he was entitled to receive £5 per cent. under the contract, be entitled to £5 per cent. on his subsequent expenditure. I do not say he would not be entitled to something for work and labour done, but that would be a fit question for a jury. I think, therefore, that if his claims depend, as they do here, partly on a contract for a commission certain, and partly on a question of mere quantum meruit, it is a fit question for a jury. As it is probable, therefore, that if I heard this case matters would arise which would be improper for me to decide, why should I allow an injunction to restrain this action?

But then there is a question of account, and a question of fraud. As to the question of fraud, suppose Day made use improperly of his situation as agent to obtain a benefit from the tradesmen which he ought to give to the plaintiffs, a court of equity would treat him as a trustee for his employers; and in certain cases a court of law **[484]** would do so too. A court of law would treat him as having and receiving money to the use of his employer. Lord Mansfield said that an action for money had and received was equivalent to a suit in equity; and certainly this observation is true as applied to some cases, as that of set-off at law, where there are cross claims, and one party alleges that the other has received the difference, which he has no right to. There are many cases where a fraud of this sort gives ground for an action for money had and received. There are many cases also where a court of law would not assume jurisdiction and a court of equity would. But these are still reasons why I should not now stop the action. It was thrown out by Mr. Girdlestone that there was much inconvenience in trying a long account before a jury. I should say, sitting in this place, that it would be better to refer it to arbitrators. But if the matter is to be tried at all, and not by arbitrators

but by a court of equity or a court of law, it would be a better case for a jury than for the Master, who hears a long story on affidavits, which perplexes him first and the Court afterwards.

For these reasons I think it better that the case should be tried by a jury than the Master; and if an arbitration be necessary, a court of law can direct it as well as I can sitting here. If the case is improperly tried, the plaintiffs can still have the benefit of their bill.

Injunction dissolved.

See the observations of Lord Cottenham, C., in *Rawson* v. *Samuel*, 1 Craig & Phillips, 178. See also *White* v. *O'Brien*, 1 S. & S. 551; *Tomkins* v. *Willshear*, 4 Taunt. 431.

[485] CHAPPELL *v.* PURDAY. May 24th, 29th, June 10th, 1841.—In 1830 A., a foreigner, resident in Paris, made a legal assignment of his copyright in an opera to L., resident in England, and L. in the same year sold his interest to C. without executing any written memorandum. C. died in 1834, and in 1836 C.'s executrix obtained a legal assignment. In the meantime copies of the full score had been imported into England, and sold in London by several tradesmen. In 1841 P. published and sold the overture of the opera in London: Held, that C.'s executrix could not maintain an injunction against P. for piracy.—Quære, whether, after a foreigner has published his work in a foreign country, he can at common law assign his copyright, limited to Great Britain, to a British subject so as to give the assignee the benefit of the statutes relating to copyright? A court of equity where justice requires it, will grant an injunction to restrain a piracy on the application of a person having only an equitable title.

[S. C. 10 L. J. Ex. Eq. 50; see further, 1845, 14 M. & W. 303.]

Motion that an injunction which had been obtained by the plaintiff against the defendant, to restrain him from publishing, selling, and disposing of the Overture and Airs of the Opera of Fra Diavolo, arranged for the piano-forte, with accompaniments for the flute, violin, and violoncello, might be dissolved. The injunction had been obtained on certificate of bill filed and affidavit, ex parte, and without notice.

It appeared that in 1829, and before any publication of the book, Troupenas of Paris contracted with Auber, the author of the opera, who also resided at Paris, for the purchase of the copyright of it so far as concerned the sale in France, Italy, and Germany. On the 12th of January, 1830, Auber and Troupenas, in consideration of £50 paid to them by Latour of Bond-street, assigned to Latour the copyright, so far as related to the sale of it in Great Britain and Ireland. This last-mentioned assignment was by means of a memorandum, by which, in consideration of £50, Auber and Troupenas, for themselves, their executors, and administrators, promised and agreed to and with Latour, his executors, &c., at their and his costs, to execute a proper assignment to Latour, his executors, &c., or as they should direct. Auber and Troupenas also, at the same time, signed a receipt for the money, which was expressed to be for the absolute sale of all the copyright, &c., in the opera. Latour afterwards in 1830, in consideration of £50 paid to him by Chappell, the testator of the plaintiff, sold to Chappell his interest in the work. There was no assignment or memorandum in writing between Chappell and Latour. Chappell afterwards published several parts of the work. On the 15th of December, 1834, Chappell died, **[486]** having appointed his wife, the plaintiff, his executrix, who on the 2nd of June, 1836, obtained a proper assignment from Auber, Troupenas, and Latour, and she afterwards continued to publish the work. The publications by Chappell and his wife were stated on the title-page to be "Copyright."

In December, 1834, the defendant published certain parts of the opera, under the circumstances mentioned in his affidavit; and in January, 1841, he published the overture, expressly stating it to be Auber's Overture arranged for the piano-forte, with accompaniments, &c.

The principal facts in dispute were whether the publication of the work in France preceded the publication in England, and if not, whether Chappell had not, by his conduct, waived his right. It was sworn positively by the plaintiff, that the work was

published by Chappell in England on the 9th of February, 1830, and after the sale by Latour. On the other hand, the defendant by his answer stated that he believed the sale by Latour to Chappell was not till after February, 1830. He also stated that he had been informed and believed that the opera of Fra Diavolo was composed and written in France by a native of France; and that on the 29th of January, 1830, if not before it was publicly acted at Paris, as being composed by a composer of the name of Auber; and further, that the following entry shewing the time of publication appeared in the books of the Minister of the Interior: "Fra Diavolo, Opera en trois actes, par Auber: 11 Fév. 1830: Trois épreuves." He further stated that he did not believe that the opera was published by Chappell in England on the 9th of February, 1830; for that the entry of that date at Stationers' Hall was, "Then entered for their copy, published by Goulding & Co., Fra Diavolo;" and that there was a subsequent entry of March 15th, "Then entered for their copy, published by Latour, Fra Diavolo." And he further stated his belief that Chap-**[487]**-pell's publications were not sold till long afterwards, his music not being engraved till April. And he further stated his belief that Chappell's Overture was copied from that published at Paris by Troupenas, as it was precisely the same, page for page and note for note, and there was the same omission in both of one whole bar.

In reference to the alleged waiver by Chappell of his copyright, if he ever had any, and also to shew that he had some doubt as to his real title, the defendant stated that in March, 1830, a rondo from the opera of Fra Diavolo appeared in a periodical publication called the Harmonican, and also that the trade had freely imported from Paris copies of the full score of the opera, and had sold them without any objection on the part of Chappell. And further, that in 1834 the defendant having employed Reinbauld to arrange and adapt several parts of the opera from the original score, for the purpose of publication, informed Chappell of it, when Chappell objected to it; but said that if the defendant would abstain from publishing, he, Chappell would have the same arranged for the defendant, and would supply him with copies at £35 per cent. under the trade price. That in consequence of this offer the defendant abstained from publishing in Chappell's lifetime, but that he had never in his communications with Chappell admitted Chappell's copyright, but on the contrary denied it. He had been supplied with several copies in pursuance of this arrangement, but that the plaintiff had refused to continue the supply, and the defendant had therefore published his own arrangement.

Mr. Simpkinson and Mr. O. Anderdon, for the motion. First, there was no valid assignment to Latour in 1812, and no assignment in writing by Latour to Chappell, and on that ground alone the injunction must fail; for, unless the legal title is clear, the Court will leave the party to his legal remedy. But supposing these assignments valid **[488]** in point of form, there was no copyright which could legally be the subject of assignment. The answer in effect states that the publication took place in Paris before the publication here. We do not say that a foreigner can in no case have a copyright here; but no decision goes to the extent that a foreigner residing abroad and publishing abroad is entitled to a copyright here. The decision in *D'Almaine* v. *Boosey* (ante, vol. 1, p. 288) does not go so far. In all these cases the acts of Parliament have been treated as if for the protection of British subjects. If Chappell had obtained from Paris an assignment of the copyright, and had published the work here before anything had been done at Paris, he would, upon the authority of *D'Almaine* v. *Boosey*, have been entitled to maintain an injunction; but this case goes farther. [The Lord Chief Baron. If a party publishes here for the first time a book published abroad, has he not a copyright?] We submit that, except under the recent statute,(*b*) he has not. The earlier statutes have reference only to the protection of British subjects, and perhaps to foreigners publishing for the first time in England. Here is a publication in France by a deposit of copies with the Minister of the Interior, and an actual sale of the work at Paris, before any assignment to Chappell. The case, therefore, is within the principles of *Clementi* v. *Walker* (2 Barn. & Cr. 861), and *Guichard* v. *Mori* (9 Law Journ. 227). Independently, however, of these principles of law, it is clear that the plaintiff's testator, by allowing the publication in the Harmonicon and the importation from abroad, waived his right to an injunction.

(*b*) The statutes cited were 8 Anne, c. 19; 12 Geo. 2, c. 36; 54 Geo. 3, c. 156, and 1 & 2 Vict. c. 59.

Mr. Girdlestone and Mr. Chandles, contrà. The answer does not, in fact, represent that the publication in Paris took place first; for, even supposing that the deposit of **[489]** the "trois épreuves" amounted to a publication which is doubtful, the whole statement as to this part of the case rests only on the defendant's information and belief. But supposing that, in fact, there was that publication in France, there is nothing in law to displace the injunction. It has been argued, on the other side, that the Court will not entertain the bill unless the right is tried at law, though it may retain the bill till the right is tried, and direct an account to be kept in the meantime. But the Court will not do this unless it sees it can do justice to the plaintiff in the account which it cannot do here, because the defendant is underselling the plaintiff. We, however, deny the proposition that, in order to maintain an injunction, the legal title must be clear. The Court will interfere where the title rests in possession, and merely on a parol contract; much more, therefore, will it do so where the contract is in writing. In *The Universities of Oxford and Cambridge* v. *Richardson* (6 Ves. 707) Lord Eldon, referring to a dictum of Lord Mansfield, said he could not go the length of saying with his Lordship that "the universal rule is that, if the title is not clear at law, the Court will not grant or sustain an injunction until it is made clear at law;" for there were many instances in which the Court had granted or continued an injunction under such circumstances. From *Tonson* v. *Walker* (3 Swanst. 672) it appears that it was the custom, so long ago as 1752, to grant and continue an injunction in copyright on a doubtful title. *Mawman* v. *Tegg* (2 Russ. 385), *Colburn* v. *Duncombe* (9 Sim. 151). In the latter case the Vice-Chancellor allowed the demurrer, but gave leave to amend, without prejudice to the injunction.

These authorities shew the jurisdiction of the Court to interfere both upon an equitable title and possession under colour of title. The cases against this are *Clementi* v. **[490]** *Walker* and *Guichard* v. *Mori*. But the former, when understood, is not an authority on the question of title. The latter is only a short note, and the circumstances seem peculiar, as it appears that an affidavit was filed in support of the answer. [Mr. Simpkinson. That may be so. It was so in *The Catholic case* (ante, p. 358).] The principles laid down by your Lordship in *D'Almaine* v. *Boosey* are completely in point, and must govern the present case. With respect to waiver and acquiescence, there has been equal acquiescence on the other side. The plaintiff has been in possession without interruption by the defendant from 1830 to 1841. In 1841 the defendant pirates.

Mr. Simpkinson, in reply. If the defendant's title is founded on information and belief, the plaintiff's is founded on mere inference and construction of law; for she says that the agreement and receipt of January 1812 constituted a valid and legal assignment. But the case of *Colburn* v. *Duncombe* is an authority against this proposition. It certainly decides that after a demurrer a bill is not out of Court, but may be considered as a subsisting bill, and the injunction may be continued. But it also decides that an agreement and memorandum such as that on which the plaintiff relies, do not give a title to an injunction Assuming there was afterwards a valid assignment, how can they contend they have a right to prohibit the importation of any of these works published in France? It is clear that various parts of it were published in France before the publication here. But in order to have the protection of the statutes the work must be composed and published here. [The Lord Chief Baron. The statutes are consistent with a foreigner bringing it with him and publishing or selling it here.] That may be so; but not if the foreigner have first published it abroad. But whatever be **[491]** the right in this case, there has been a waiver of it. A Court of Equity will not interfere by injunction, where importation and publication has been allowed by the party seeking the injunction; *Rundell* v. *Murray* (Jac. 316), *Platt* v. *Button* (19 Ves. 447), *Saunders* v. *Smith* (3 Myl. & C. 711). It must be a clear case to induce the Court to grant an injunction in the first instance: *Osborne* v. *Donaldson* (2 Eden, 327). In that case the time allowed by the statute of Anne having expired, the plaintiff applied for an injunction on the ground of his common law right. Lord Northington refused the injunction on the ground of doubtful title, and that gave rise to the celebrated case of *Millar* v. *Taylor* (4 Burr. 2303), in which the legal title was established. Now, Lord Eldon certainly dissented from the observations of Lord Mansfield in *Millar* v. *Taylor*, when taken in their unqualified sense, but as a general proposition it may be laid down that in the case of a doubtful title the Court will direct an action and retain the bill: *King* v. *Reid*

(8 Ves. 223, n.), *Mawman* v. *Tegg*, *Wilkins* v. *Aiken* (17 Ves. 422). The case of *Collard* v. *Allison* (4 Myl. & C. 487) shews the reluctance of the Court to grant relief beyond the legal title. How can it be said the title here is so free from doubt as to induce your Lordship to continue the injunction? Besides, if a foreigner has the right insisted on in this case, of what use are the provisions of the statute of Victoria?

Mr. Girdlestone. Lord Eldon's dissent from the opinion of Lord Mansfield, and the reasons of his dissent, are clearly and distinctly given. In most of the cases cited on the other side, the doubtful title arose from a question whether permission had not been given to publish. *Wilkins* v. *Aiken* and *Collard* v. *Allerton* are consistent with the plaintiff's case.

[492] June 10th.—THE LORD CHIEF BARON. It appears from the bill, answer, and affidavits in the case that Fra Diavolo was composed by Auber in December, 1829; that on the 12th of January, 1830, the copyright, so far as related to Great Britain and Ireland, was conveyed by Auber to Troupenas, of Paris, for £50. It does not appear that there was any conveyance of this interest, but, on the same day, Auber and Troupenas joined in a sale of this copyright to Latour, of Bond-street. Upon this occasion a memorandum was drawn up stating the sale to be in consideration of £50, with an engagement to make any further conveyance which might be required. That, therefore, is a complete conveyance of the copyright to Latour, or it amounts to an equitable title in Latour, with a right to have a more formal conveyance afterwards. In October, 1830, Latour sells to Chappell his right, which he had purchased of Troupenas. No memorandum was made in consequence, and therefore, according to the cases which I think are rightly decided, Chappell obtained no legal title in the copyright. Then in December, 1834, the defendant received from Chappell several copies of the parts of the music in question, at £35 per cent. under the trade price. The plaintiff, after her husband's death in 1836, obtained a regular assignment from Troupenas and Latour. Therefore, in 1836, she got all the right these parties could give her in Great Britain and Ireland.

But it appears from the answer that before the plaintiff obtained the legal title the work had been communicated to the public, by reason of persons in the trade having imported the music in France and published it in England. I was desirous of obtaining that information, and I had some doubts, at one time, whether that was stated on information and belief only, or whether it was stated positively, and I therefore desired to see the answer. Upon looking at it, it appears to me that the answer is in express terms, and that an indictment for perjury would lie against the defendant if he stated what was false. [His Lordship **[493]** here read the passage in the answer.] Therefore the facts are these: that Latour acquired (as I am disposed to think) a legal title to the copyright in 1830, that the plaintiff's testator acquired no right, except by payment of the money, and that in 1836 the plaintiff acquired the legal title; but that in the meantime the work had been published in Paris and sold in London. The question, therefore, is whether, admitting she thus acquired a legal title, and admitting that this Court would in an ordinary case lend its assistance to her, yet whether this Court would do so, after a previous publication of the work in the manner I have mentioned.

Now, in *Clementi* v. *Walker* the defendant, without knowledge of the plaintiff's title, imported into this country the music of a French air composed by Kalkbrenner. The defendant thought he had done so before the plaintiff had acquired any right himself. In the present case it is true the defendant does not state that he acquired the right of publishing this work in England before the plaintiff, but he says that various other booksellers did, and I think it clear from his statement that the work was given to the public in England before the plaintiff acquired her right, and therefore that she cannot maintain her injunction. In saying this I do not mean to uphold Lord Mansfield's dicta in *Millar* v. *Taylor* to their fullest extent. They must be received with some qualification. He was contending in favour of the legal right of the party, and he added unnecessarily, in order to maintain his proposition, that unless a Court of Equity saw a legal right existed in the author, it would not interfere. Now, if by this it was meant to be said that a Court of Equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a Court of Equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice, otherwise great fraud would ensue.

[494] Many points have been introduced into the argument which were not absolutely necessary in the view which I take of this case, but as I have been much pressed for my opinion upon them I cannot let them fall to the ground without observation. A question was made whether the statute of Anne raises any protection for foreigners, and that case of *D'Almaine* v. *Boosey* was cited to shew that I had formed that opinion. Therefore I shall address a few words to that question. The statute of Anne was passed for the protection of British subjects. It does not in terms extend its protection to the publications of foreigners. But take the whole question together and see whether the same principles do not apply to both cases. I may be allowed, perhaps, to state in the presence of gentlemen who, no doubt, attend to matters of literature, that when I came to the profession I took a great interest in the case of *Millar* v. *Taylor*, and other cases of that sort. In that case Lord Mansfield and two of the judges differed from Mr. Justice Yates, and I own I think that to the material parts of Mr. Justice Yates's argument Lord Mansfield made a successful reply, though unquestionably the arguments of Mr. Justice Yates were very ingenious. Lord Mansfield said, "That the reasons for supporting the author's right before publication were equally applicable after publication;" and I think that was a successful reply. That case was disposed of at common law. But the case of *Donaldson* v. *Beckett* (4 Burr. 2408), in which the same question was raised, went to the House of Lords. In that case eight of the judges were of opinion, first, that the author had a right at common law to the exclusive publication of his work in the first instance. Lord Mansfield, the ninth judge, gave no opinion. The other judges were of a contrary opinion. Then the second question was whether, admitting the author had originally a right at common law, he retained the right after publication. Mr. Justice Yates thought he had **[495]** given it to the public, but eight of the judges were of opinion that he did retain it. That being the case, the law was then settled as regarded the common law right. But then the question was whether the right of protection given by the common law was not limited by the statute of Anne, and upon that the majority of the judges were of opinion that the statute had put an end to the right which had existed at common law, because it gave the protection for fourteen years and no longer. Now the statute was made for the protection of British subjects; but the same reasons apply to protect a foreigner. We must presume that the foreign law would do the same for him, and, in fact, it does. A foreigner, therefore, having a copyright in his own country, might give the same right to a British subject. Therefore, it appears to me that a foreigner who is the author of a work unpublished in France, may communicate his right to a British subject, at least for the period prescribed by the statute of Anne, that is to say, fourteen years.

That being the case, I should see no difficulty in allowing the injunction to be retained, upon the ground that Mrs. Chappell obtained this right from a foreign subject. But I consider the fact alleged by the defendant's answer to be sufficient to preclude me from allowing the injunction. I don't say it precludes Mrs. Chappell from pursuing her right at law, or at a future time, in equity. But it is a question of considerable doubt and I cannot decide it on motion. This case is not exactly the same as *Clementi* v. *Walker*. The question is whether a party who, before the copyright had been actually parted with to him (because at that time there was no conveyance), had permitted the books to be imported here, and sold without interference, is afterwards to be at liberty to come forward and say that no party shall do the like again? It is an important question, and I think it is sufficiently doubtful to prevent my interference by injunction until it is decided.

Injunction dissolved.

[496] EX PARTE ANGELL. IN THE MATTER OF THE TRINITY HOUSE LIGHT-HOUSE ACT. May 7th, 1841.—Under the act of Parliament giving power to the Trinity House to purchase light-houses, this Court is authorized, by express words, to order the corporation to pay the costs of the interim investments in the funds and other consequential costs, on purchases from infants and other incapacitated persons; but no such words are used with reference to purchases under doubtful titles. Where, therefore, an incapacitated person, together with the trustees of

the settlement under which he took his interest (which trustees had a power of sale) contracted to sell a light-house to the corporation, and the corporation, being doubtful as to the title of the vendors, paid the purchase-money into Court, under a clause contained in the act for that purpose, the Court, taking into consideration that the objection as to title was not trivial, and that the purchase was made by the Trinity House for public objects, declined to give the vendors the costs of the interim investment in the funds, and the other usual consequential costs.

The petitioner was tenant for life under a settlement of three undivided fourth parts of the light-houses at the Spurn Point, in the river Humber, subject to certain terms for raising portions, with remainder to his grandson, an infant in tail. Power of sale and exchange was given to the trustees of the settlement with the consent of the petitioner.

Under the provisions of the stat. 6 & 7 Will. 4, c. 79, the petitioner, together with the trustees of the settlement, and George Lowther Thompson, who was owner of the other undivided fourth part, entered into an agreement in writing with the master, wardens, and assistants of the Trinity House for the sale to them of the light-house, at the price of 309,531l. 4s. 7d., being 23½ years' purchase, after certain deductions. Of this sum the Trinity House paid one-fourth, namely, 77,382l. 16s. 1¾d. to Mr. Thompson, but being doubtful about the title of the petitioner to his three-fourths, they availed themselves of a clause in their act to refer the question of value, as to his share, to a jury. The jury awarded the sum of 232,148l. 8s. 5¼d., being three-fourths of the above-mentioned sum of 309,531l. 4s. 7d., as the value of three-fourths of the light-house. That sum was then paid into Court under the 26th section, to the credit of the joint account of the Trinity House and the parties interested in the three-fourths.

By the 27th section of the act the party in possession is to be taken to have the complete title until the contrary be shewn to the satisfaction of the Court of Exchequer, and the dividends of the sum in Court are to be paid accordingly.

The prayer of the petition was that the several sums of **[497]** money which had been raised by mortgage, for the purpose of satisfying the portions, might be paid out of the 232,148l. 8s. 5¼d., and that the residue might be laid out in the funds and carried to the same account as before, and that the dividends might be paid to the petitioner till a proper purchaser could be found, or till further order. And that the costs, charges, and expenses attending the purchase of the said three-fourths of the said light-houses, tolls, and duties which had been or might be incurred in consequence thereof, and also of this application and incidental thereto, might be paid by the Trinity House.

The question was whether in favour of the petitioner and the infant tenant in tail, the Court would make an order for costs to the extent prayed for; the money having been paid into Court, not under the 23rd section, which directs payment into Court of the purchase-money for lands purchased of any "body politic or corporate, or any feme covert, infant, lunatic, or other person under a general disability or incapacity to sell," but under the 26th section, which makes the same provision in cases of purchases of lands held under a doubtful title.

By the 26th section it is enacted, that in case any person to whom any sum of money shall be awarded shall refuse to accept the same, or shall not be able to make a title to the satisfaction of the master, wardens, and assistants of the Trinity House, &c., then the master, &c., may order the said sum assessed and awarded for purchase-money, to be paid into the bank in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account, to the credit of the master, &c., and the parties interested, subject to the order of the said Court, which said Court, on the application of the said master, &c., or any party making claim to such sum of money or any part thereof, by motion or petition, may, in a summary way of proceeding or otherwise, as to the same Court shall seem meet, order the **[498]** same to be invested in the public funds, and may order distribution thereof or payment of the dividends thereof, according to the respective estate or interest of the parties making claim thereto, and may make such other order in the premises as to the said Court shall seem just.

By the 28th section it is enacted that where, by reason of any disability or incapacity of the person entitled to any such light-house, the purchase-money shall be

required to be paid into the Bank of England, and be subject to the orders and directions of the Court of Exchequer, under the provisions therein contained, it shall be lawful for the said Court to order all the reasonable costs, charges, and expenses attending such purchase, or which may be incurred in consequence thereof, and also of the investments of the purchase-money on real or government securities, and likewise the reinvestment of such purchase-money, or the government or real securities purchased therewith, in the purchase of houses, &c., thereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase-money and of the government or real securities purchased therewith out of Court, to be paid by the said master, wardens, and assistants, &c.

Mr. Simpkinson and Mr Walker, for the petition.

Mr. Girdlestone, for the infant tenant in tail.

Mr. Knight Bruce, Mr. Boteler, and Mr. Loftus Wigram, for the Trinity House.

Mr. Spence, for John Lowther Thompson.

Mr. Witham, for a mortgagee.

[499] In support of the petition, and on behalf of the infant, it was argued that the 26th section applied to costs as well as any other matter, and therefore that the Court had full jurisdiction to order the same costs under that section as were expressly mentioned in the 28th section. That the Legislature never could have intended to draw any distinction between costs on purchases from persons under disabilities and costs on purchases under a doubtful title. Besides, it must be presumed that some distinction was intended between the words "disability," and "incapacity," and this was fairly a case of incapacity. That if the costs asked for were refused, the consequence might be that the Trinity House, or any other less scrupulous corporation standing in the same situation, might make any trivial objection to title for the purpose of having the money paid into Court, under the 26th section. That admitting the present purchase was made for the public good, and not for mere private benefit, that circumstance ought not to affect the interest of those persons whose property was taken in a summary manner for the purposes of the act. In the course of the argument, *Ex parte Northwick* (ante, vol. 1, p. 166) and *Ex parte Trafford* (vol. 2, p. 522) were cited.

On the part of the Trinity House it was contended, that costs under the 28th section were only awarded in those cases where the purchase-money was required to be paid into Court, namely, in the cases enumerated in the 23rd section. That this was not a case where the payment into Court was required, in the sense intended by the 23rd section, but where such payment was thought expedient in consequence of the obscurity of the title. That supposing the Court had jurisdiction to award the costs prayed for, yet this was a case of purely a public nature, and not to be dealt with in the same spirit as a purchase under a railway act. Besides, the jury had awarded to the peti-**[500]**-tioner the same sum as had been expressly contracted for. Why, then, should the Trinity House pay more in consequence of the party not having a clear title?

The circumstances of the title were not entered into, and it seemed to be admitted, that, though the title might be perfectly safe, the objection taken by the Trinity House was not frivolous or vexatious.

THE LORD CHIEF BARON. The able and conclusive argument of Mr. Knight Bruce has satisfied me that all the power I have in this case rests upon the 26th section. I think that he has clearly shewn, upon the construction of the act, the distinction between the case of a party incapacitated to sell or make a contract, or to treat, and the case of a person who has no satisfactory title. I think, also, that in justice and equity there is a distinction between the two cases.

Suppose the case of a tenant for life, who has no power at all of selling, or that of trustees, who have no power of selling: the act of Parliament in such a case is imperative, and obliges them either to enter into a contract, or, if they decline that, to go before a jury to agree upon the amount. They are put to great expense, first, in the investing the money in the funds, in order to obtain the dividends, and then in the conveyance (in case they find what the Court thinks a fit purchase) to lands to be limited to the same uses. It is very hard that they should be called upon to pay those expenses; and therefore, in such case, it seems to me perfectly reasonable that

the Legislature should give the Court the power, and that the Court should exercise the power to award the costs both of investment and reinvestment in real estate. But the case of persons who have possession, claiming a title, which title is not satisfactory, is different. If they claim a title, by the nature of which they are at liberty to sell, and are competent to make a bargain, and if they do make their own [501] bargain, it seems to me that, provided they are placed in the same situation as they would have been in if they had no occasion to apply to this Court at all, there is no injustice done to them. And certainly it appears to me that, under the twenty-sixth section the Court has a general power to make any order it thinks equitable or just, to meet all the circumstances of any particular case. Indeed, I believe that in two instances, in the cases of railroad, this Court has exercised a similar power under a similar clause in the Act of Parliament, by compelling the company to pay the costs. Suppose, for example, that a company, for its own private interest, embarks in a railroad, gets the power to run through a man's land, and chooses, for the very purpose of avoiding the expense of a conveyance, or avoiding any other inconvenience, to say, though the title is very good, that they are not satisfied with it, and will go before a jury or pay the money into the Court of Exchequer—if the case were made out to the Court, it would be a case in which the Court might be very well justified in applying the general power to make an order to pay such costs as the parties had been put to by the unreasonable and ungrounded pretence, in order to obtain a particular object. But that is not the present case, and therefore on that ground alone I should be disposed to exercise the discretion in this case more favourably towards the party purchasing. But again, there is another distinction which it is proper to advert to, between the case of a private company, who, for its own profit, obtains a power to take a man's land, and to give him a forced compensation, and a corporation which has no private interest whatever, but the members of which are merely trustees for the public, to carry into effect very important objects of universal benefit. Now, that is the case with the corporation of the Trinity House. Supposing, therefore, it were a case of mere discretion, I should be much more disposed to make a private company, pursuing its own [502] emolument at the expense of other people, pay costs, than I should the corporation of the Trinity House, who, though paying out of the public money, are themselves no gainers, and have no private or personal object. But what are the facts of this case? It is admitted that the Trinity House, or those who advised them, acted very reasonably, in requiring the protection which the verdict of a jury might give them, and which the payment of the money into Court would give to the title. I do not say that if I were to give a private opinion upon it, I should have much apprehension of the title of the numerous Angells which may be set up against the persons who are in possession of the light-house, but I cannot bring my private knowledge into this case to determine that; and upon the whole, I think the discretion of those who advised the Trinity House well exercised. This then being conceded, what is the situation of the petitioners? Supposing the corporation had actually paid them the money, what must have been done with it? They could not have asked the corporation to be at the expense of laying it out in the funds, or reinvesting it in land. Can it be said, then, that, because the Trinity House have paid the money into Court, in order to ensure the title, that they shall by that means give the petitioners an advantage which otherwise they could not have possessed? The real object of these clauses is to place the parties as nearly as possible in the same situation, without detriment to their property, as if these acts had not existed; but, in this case, if I complied with the prayer of the petitioners to the full extent, I should be giving them a positive advantage out of the act of Parliament. I cannot go that length. Besides, I cannot altogether pass over the argument of Mr. Wigram that you cannot presume, if these parties have made a private bargain, or, if they have obtained from the jury, upon a full consideration of their claim, any given sum, that they would neglect to introduce into the consideration the [503] necessity they were under of incurring the expenses of reinvesting; more especially as this was not a case of a man merely selling his own estate, but here were trustees to whom it would be perfectly right for the jury to allow something for the expenses of reinvestment, and who, on their own part, would act quite rightly and legally, if they made it a term in the agreement that they should be compensated. Under these circumstances, I think I should not act with sound discretion if I awarded the costs of investing the money in the three per cents. But,

under the circumstances, I shall direct the Trinity House to pay the costs of this petition.

Order accordingly.

Mr. Witham, for a mortgagee, then asked for his costs, observing that he had been served with notice of the petition, but—

THE LORD CHIEF BARON refused the application, observing that he need not have appeared.(*a*)

EX PARTE GARDNER. IN THE MATTER OF THE EASTERN COUNTIES RAILWAY ACT. May 24th, 1841.—Agreement for sale of real property, with a stipulation that, if the residue of the purchase-money is not paid by a certain day, the agreement shall be void, and the vendors shall have power to resell. The money is not paid on the day, but the purchaser retains possession, giving a warrant of attorney to confess judgment in ejectment. The stipulation as to time in the agreement is waived.

[S. C. 10 L. J. Ex. Eq. 46.]

One West being seised in fee of certain freehold and copyhold estates, and being possessed of certain leaseholds, mortgaged them to Curries & Co., who, under a power in the mortgage deed, contracted to sell the premises to Martin. At the time of the contract, Martin paid Curries & Co. £400, and it was agreed that he should pay the **[504]** remainder of the purchase-money on the 25th April, 1837, or that the contract should be void and Curries & Co. should have the power of reselling, upon repayment of the £400. Martin did not pay the remainder of the purchase-money at the time appointed, but Curries & Co. allowed him to retain possession. In December following, however, they obtained from him a warrant of attorney to confess judgment in ejectment. In June, 1837, Martin, without the knowledge of Curries & Co., entered into a negotiation with the railway company to sell to them the premises, at an advantageous price. This negotiation was concluded in June, 1838, when notice of it was for the first time given to Curries & Co., Martin then offering to pay them the remainder of the purchase-money, which they refused to accept. Both West and Martin afterwards became bankrupts, and the company paid the purchase-money due under their contract with Martin into Court, under a clause in their act of Parliament.

Martin's assignees now presented their petition, praying that the contracts made between Curries & Co. and Martin, and between Martin and the company, might be specifically performed, and that it might be referred to the Master, to inquire what was due to Curries & Co. for principal and interest on their mortgage security, and that the surplus might be paid to the petitioners.

Mr. Simpkinson and Mr. Keene, for the petition.

Mr. James Russell, for Curries & Co. The benefit of the contract with the railway company belonged to Curries & Co. Time, in this case, was of the essence of the contract; for the contract was to be void, and a re-sale was to take place, if the money was not paid in April. And this term in the agreement was not waived by anything that took place afterwards; for the compelling Martin to give a warrant of attorney in ejectment, clearly shews that **[505]** Curries & Co. intended to keep Martin in their power. The warrant of attorney strengthened the right which they before had to treat the contract as void under the terms of it. They did not recognize Martin's title, except upon condition. Martin ought not to profit, either by his own laches in not paying according to his contract, or by the supressio veri by which he led away the vendors from exercising their rights. If Curries & Co. had contracted with the comany, and then Martin had filed a bill for specific performance, the case would have been different.

Mr. Sharpe and Mr. K. Parker, for other parties.

THE LORD CHIEF BARON. The jurisdiction in this case is founded on the words of the Railway Act and the fact of the money being paid into Court. Several of the recent statutes have presented a useful form of remedy in these cases, by which the rights of the parties interested may be decided, without the expense of a long adverse

(*a*) This point has been ruled differently by the Court at different times: but this is the latest decision.

litigation, in a suit in equity. I must treat this case therefore as if a bill had been filed. Suppose then that, in June, 1838, Martin had filed his bill against Curries & Co., stating that he had made a contract with them for the purchase of the premises; that he had paid £400 down; that, though it was true he had not paid the remainder of the purchase-money on the 25th April, yet the parties were willing to let the contract stand; and that, in December, 1837, he gave them a warrant of attorney, but which they agreed to keep in their hands, and only to compel payment in case of emergency; upon such a representation, I should say that the time mentioned in the contract was certainly dispensed with, and the clause of forfeiture waived. Could they, upon a statement in June, 1838, that he was willing to pay the remainder of the purchase-money and that he was enabled to do so in consequence of a beneficial contract which he had entered [506] into—could they, in answer to his prayer for specific performance, have made use of the clause in the agreement, by which, on non-payment on the 25th April, the contract was rendered void? They could not at law insist on that clause under such circumstances; at law a reasonable time for the performance of the agreement would be implied; and I apprehend that after such a transaction, a court of equity could not say, either that time was of the essence of the contract; or, if it had been that it had not been waived. I think that in a court of equity, in such circumstances, specific performance would be decreed.

The value of the sale might be a motive in one party or the other, either to enforce or to rescind the contract, but it cannot alter the rights of the parties, and I think they stand in the same situation as if a bill had been filed in the manner I have mentioned, and the remainder of the purchase-money had been tendered. But I am also much inclined to think that even if Curries & Co. had sold the premises, they would have been trustees for Martin, for all beyond their costs and charges. If so, the case is stronger. Upon the whole, it seems to me that I must declare that Martin's assignees are entitled to the surplus of the money in Court, after payment of what is due to the vendors for principal, interest, and costs.

Order accordingly.

EX PARTE SHAW. 1841.—A small sum of money in Court under a Railway Act to be laid out in lands to be settled "to the like uses," ordered to be applied in new erections.

[S. C. 10 L. J. Ex. Eq. 92.]

In this case £450, which was in Court until it should be laid out in lands to be settled to the "like uses," pursuant to a Railway Act, was on behalf of certain infant petitioners, ordered to be paid out of Court to the trustee, for the purpose of new erections; the Master having reported that sum necessary.

Mr. Mylne, for the petition.

[507] EX PARTE PRING. IN THE MATTER OF THE LONDON BRIDGE ACTS. June 11th, 1841.—Upon the construction of a will, the Court held that a testator did not intend a conversion out and out, and that the purpose for conversion having partially failed, the heir-at-law was entitled.

Joseph Pring, by his will, after directing payment of his debts and funeral expenses, gave and bequeathed to certain persons whom he named as trustees, their heirs, executors, administrators, and assigns, all his freehold and leasehold estates, whatsoever and wheresoever, and also all the rest and residue of his personal estate, to hold to them the said trustees, their heirs, executors, administrators, and assigns, upon the trusts following: that is to say, as to his freehold houses, stables, gardens, and premises, situate in Coleman Street and Nunn's Court, in trust to receive the rents and profits, and to pay to or permit the same to be received by his wife, Jane Pring, during her life; and, after her decease, in trust to sell and dispose of the said freehold property in Coleman Street and Nunn's Court, and to pay and transfer one full moiety or half part of the monies to be received from such sale, to the executors, administrators, and assigns of the said Jane Pring, and to pay and transfer the other moiety or half part of the said monies unto and amongst John Pring the younger and Thomas Pring, and all other the sons and daughters who should be living of his, the testator's

cousin, John Pring the elder, and James Pring and Elizabeth Pring, son and daughter of the testator's uncle, James Pring; and, in case the said testator's wife, Jane Pring, should desire to dispose of the said property in her lifetime, then that the same should be forthwith sold, and the monies produced by such sale should be invested in the consols in the names of the said trustees during the life of the said Jane Pring, and the interest and dividends paid to her during her life; and, after her decease, the said trust funds should be applied upon the same trusts as the monies produced by the sale of the same estates were **[508]** in the said will directed to be applied, if sold after her decease.

The testator died, leaving John Pring the younger and Thomas Pring, and one other child of his cousin John Pring the elder, and also James Pring, son of his uncle James Pring, surviving him; but Elizabeth Pring died in the testator's lifetime. Upon the death of the tenant for life, the question was whether what would have been Elizabeth Pring's share of the fund if she had lived, went to the testator's heiress-at-law, or to his executors for the benefit of his next of kin.

Mr. Boteler and Mr. Chandless, for the petitioner, contended that there was nothing on the face of the will to shew that the testator intended that the real estate should be converted into personalty for all purposes; and that, consequently, as the specific purpose for which he had directed the estate to be sold had failed so far as regarded Elizabeth Pring, the heiress-at-law, was to that extent entitled. *Digby* v. *Legard* (2 Dick, 500), *Ackroyd* v. *Smithson* (1 Bro. C. C. 503), *Williams* v. *Coade* (10 Ves. 500).

James Russell, for the next of kin, contended that the testator intended a conversion of the property out and out. He cited *Mallabar* v. *Mallabar* (Cas. temp. T. 79), and *Durour* v. *Motteux* (1 Ves. sen. 320).

Mr. Whitmarsh, for the executrix, observed that the testator could have intended no benefit for the heiress-at-law, as an option was given to sell in the lifetime of the tenant for life.

THE LORD CHIEF BARON. The two cases last cited are either overruled by or distinguishable from the other cases on this subject. The intention of the testator was to have the property sold and divided amongst specific persons, **[509]** and to be applied to no other purpose. The testator has made no provision inconsistent with the right of the heir-at-law: and, therefore, part of the specific purpose having failed, the heir is not excluded. Suppose, in the lifetime of the widow, all the persons for whose benefit the fund was intended had died; then, all the purposes failing, and there being no declaration that it should be taken as part of his personal estate, but simply a provision for sale, the law is settled that the heir is entitled. Applying that to the partial failure in this case, I think the petitioner entitled.

Order accordingly.

PRICE *v.* NORTH. 1841.—Held upon the construction of a will that a primary direction for payment of all the testator's debts did not render his real property equitable assets.

[Reversed, 1841, 1 Ph. 85.]

The original bill was filed by Roderick Price and David Jenkins, on behalf of themselves and all other the creditors of the testator Roderick Gwynne, deceased, against the administrator with the will annexed, and the parties interested under the will, praying that the trusts of the will might be established, and for the usual accounts.

The will of Roderick Gwynne commenced as follows:—"First, I will that all my just debts, funeral expenses, and the costs and charges of proving this my will be fully paid and satisfied." The testator then gave and devised the reversion or remainder expectant, and to take effect on the decease of his father, T. H. Gwynne, of and in the several messuages, lands, and hereditaments then in the possession of his father, in the county of Brecon, and all other his real estates, unto the Rev. Joseph Bonner and his heirs, to the use of his the testator's daughter, Anna Maria Eleanor Gwynne, for life, with remainder to trustees, to preserve the contingent remainders, with remainder to the first and other sons of the testator's daughter in tail male, &c., with divers remainders over; with a power of leasing to the daughter, and all other persons **[510]** for the time being, who should be entitled to the rents and profits.

The testator then gave to his servant, David Armstrong, fifty pounds, and all his ready money, money in the funds, and securities for money, goods and chattels, and all other his personal estate and effects whatsoever and wheresoever (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed), he gave and bequeathed unto his said daughter, A. M. E. Gwynne, to be assigned, transferred, and paid to her at her age of twenty-one years or day of marriage: Provided, that if she died under twenty-one years, and without having been married, than he gave the whole of his said personal estate to his brother and sister to be divided equally between them.

The question on further directions was whether a fund in Court, which had been raised by sale of part of the real estates of the testator, should be apportioned amongst his specialty creditors, or divided equally amongst all the creditors; which question depended upon whether the real estate was legal or equitable assets.

Mr. Swanston and Mr. Sutton Sharpe, for the plaintiffs.

Mr. Simpkinson and Mr. Neate, for the defendants.

The following cases were mentioned: *Douce* v. *Lady Torrington* (2 M. & K. 600), *Palmer* v. *Graves* (1 Keen, 545).

THE LORD CHIEF BARON held that the assets were legal, being of opinion that the charge at the beginning of the will was cut down by the words in the subsequent part of it, relating to the personal estate.

[511] SNOWBALL *v.* DIXON. June 28th, 1841.—Where a writ is made returnable "immediately," the meaning is that it should be returned immediately after execution of the writ, allowing a reasonable time for such execution. Therefore, where a writ of attachment issued on the 22nd of June, and the suit became abated on the 24th, and was not revived till the following November, the return of the writ in January was held sufficient.—Where a writ of attachment having issued, the suit abates before execution, the order to revive the suit revives the attachment.—After an arrest of a questionable nature in a house, the prisoner surreptitiously got out of the house and was arrested in the high road: Held that the second arrest was legal.

[S. C. 10 L. J. Ex. Eq. 56.]

Motion to discharge an attachment which had issued against the defendant, Jane Dixon the elder, for not putting in an examination to interrogatories before the Master. The motion was made on the ground of irregularity in the time and the manner of the attachment.

1st, As to the time. The Master's certificate of default was dated the 7th May, 1840. The attachment issued the 22nd June, and was returnable immediately. On the 24th June the plaintiff, T. Snowball, died, whereby the suit became abated. The bill of revivor was filed the 16th July, upon which the defendant appointed a new solicitor and clerk in court. The order to revive was dated the 14th November, and was served on the defendant's clerk in Court on the 19th of the same month. The attachment was not executed till the following January.

2ndly, As to the manner. It appeared that two sheriff's officers, of the names of Crosier and Chapman, went to the house where this defendant and two other defendants, Jane Dixon the younger and Marianne Snowball Dixon, resided; that they entered the house by the window, and immediately arrested the last-named defendants; that after a long search they found Jane Dixon the elder, under a heap of foul linen; that, upon her entreaty to be allowed a little fresh air, they permitted her to go into a room at the back of the house: that, finding she did not return, Chapman went in search of her, and found that she had escaped from an upper window to a high mound of earth near the house, and was in the act of clambering over the top of it; that he then went round and took her in the highway.

Mr. Cooper and Mr Elderton, for the motion. First. The attachment was irregularly executed in point of time. It issued too late with reference to the date of **[512]** the Master's certificate, and it was returned too late. Where an attachment out of Chancery in the hands of the sheriff is returnable immediately, it cannot be executed after the last return of the following term: Smith's Ch. Pr. vol. i. p. 84, 1st ed. Here the sheriff's officers were not even named till the 15th January. There ought

to be no interval of any length between the issuing and the return of the attachment, because, in the interval, the defendant may put in an examination: Smith Ch. Pr. vol. 2, p. 122. Dan. Ch. Pr. vol. 2, p. 285. [Alderson, B. If the writ is returnable immediately, does it mean any thing more than immediately on its execution? It was substituted for a day certain.] After the attachment had issued, the suit became abated, and it was therefore necessary to take out an attachment in the original and revived suit, which has not been done.

Secondly, The mode of arrest was illegal. [Alderson, B. Waiving the contradictory statement as to the arrest in the house, is there not a good one in the road? If the original attachment was invalid the detainer would be bad, and she would be discharged out of custody. But if she were afterwards taken in the road it would be otherwise.] Supposing she was arrested in the road, yet, as it followed the original irregular arrest it was illegal: Foster Cr. Ca. 320, *Ballam* v. *Price* (9 Bing. 566). [Alderson, B. If it was a consequence of the original arrest it might be illegal.]

Upon this part of the case the affidavits were in a slight degree contradictory, but the arrest in the road was not disputed; and no affidavit was filed by Jane Dixon the elder.

June 29th.—ALDERSON, B. I am of opinion that this motion must be refused, with costs. First, it was said that the attachment was not issued in due time after the Master's certi-**[513]**-ficate was made; but it appears that the order for the attachment was obtained in due time, and therefore I think that objection fails. Then, it was questioned whether the suit was properly revived; but it appears to me that the defendant has, by her proceedings, adopted the suit. Another objection was made that the attachment which had been issued in the original suit, was at an end after the suit had been revived; but I am of opinion that the order to revive revives the attachment, and all proceedings under it. The last objection upon this head was, that the attachment had run out, the writ being returnable immediately, and the attachment not having been executed till long after the issuing of the writ. By the former practice of the Court the writ was made returnable on a certain day, and execution of it after that day was invalid. According to the present practice the writ is returnable "immediately," which means, as I apprehend it, immediately after the execution of the writ. Now I cannot find any rule of Court which limits the time within which the writ must be executed, and therefore I think a reasonable time for the return of the writ must be allowed. In the present case I cannot see that the time which has been taken for that purpose is unreasonable under all the circumstances. During the abatement of the suit the writ could not be executed, and after the revivor a reasonable time was required.

Then the other principal question was whether the writ was properly executed, in consequence of the manner in which the officers entered the house. Upon this there is a great contest in the affidavits, and if it were necessary to decide the case on that point I should have great difficulty; though, upon the whole, even as to this part of the case I should be disposed to lean against the prisoner. It was her duty to make out in the affirmative that the arrest was illegal, by shewing that the house was shut, and whether the window was shut or fastened would have been imma-**[514]**-terial for the purpose of making out her case; but this she has not done. But whether the house was open or shut, it appears to me clear that the second arrest was valid. Taking all the facts together, I have come to the conclusion that the prisoner was taken in the high road after having surreptitiously escaped from the house. It is left uncertain, on the affidavits of the other ladies, in what manner the prisoner escaped, but the prisoner herself has made no affidavit on the subject, and she must know.

Motion refused.

CALVERT *v.* ROOTH. June 11th, 1841.—Proceedings in a suit by a pauper stayed till the costs of a previous suit in the Court of Chancery were paid.

Motion by the defendant that all proceedings in the suit might be stayed till the plaintiff should pay the costs of the proceedings in the second suit instituted by him in the Court of Chancery, or that he should be dispaupered.

It appeared from the defendant's affidavit, that on the 22nd of November, 1834, the plaintiff filed his bill in the Court of Chancery in formâ pauperis against the defendant, for an account of the rents and profits of certain mortgaged premises in

the bill mentioned, received by the defendant, or by any person or persons for his use, or which, but for his wilful default, he might have received; and that the plaintiff might be at liberty to redeem. That the deponent appeared and put in his answer on the 20th of March, 1835. That in July, 1835, the deponent moved the Court to dismiss the bill, when the plaintiff undertook to speed. The plaintiff then filed his replication, but examined no witnesses. That the cause was then set down, and came on for hearing in June, 1837. That no person appeared for the plaintiff, and the bill was dismissed. That the plaintiff, on the 20th of August, 1839, filed another bill in Chancery, stating and praying to the same purport, that **[515]** an answer was put in, a motion made to dismiss the bill for want of prosecution, and ultimately that the bill was dismissed with costs. That the deponent had incurred costs to the amount of 58l. 15s. 11d., which had not been paid. That in February last, a bill was filed in this Court by the plaintiff in formâ pauperis, for the same matter. That the plaintiff had written letters (which were produced), shewing that he intended to harass the deponent in every possible way, and that his object was, as the deponent believed, to force him to give up his mortgaged security without being paid.

Mr. Sutton Sharpe, for the motion, cited *Baldwyn* v. *Malo* (3 Anstr. 835), *Spires* v. *Sewell* (5 Sim. 193), and *Brook* v. *Alcock* (1 Smith, Ch. Pr. 555).

Mr. Stephenson, contrà.

THE LORD CHIEF BARON ordered the proceedings to be stayed.

FRASER *v.* PALMER. July 3rd, 1841.—The trustee of the separate property of a married woman acted as her attorney in three several suits, instituted in relation to the trust property. In the first of these suits he was not a party; in the others he was: Held, that in the first suit he was entitled to his costs, as between solicitor and client; but in the two others only to costs out of pocket.

[Applied, *Bainbrigge* v. *Blair*, 1845, 8 Beav. 594. Discussed, *Manson* v. *Baillie*, 1855, 2 Macq. H. L. 80.]

The object of the petition was to obtain the payment of certain professional charges, made by Alderman Harmer as solicitor to the defendant, Mrs. Palmer, in two suits in Chancery, and an action which had been instituted in relation to Mrs. Palmer's separate annuity, of which Alderman Harmer was trustee. The charges had been disallowed by the Master, on the ground that Harmer being both trustee and solicitor to Mrs. Palmer, was not entitled to any costs as against his cestui que trust, except costs out of pocket. It was stated that Mrs. Palmer had been **[516]** informed as to the rule of law on the subject, and had expressly agreed, though verbally only, that Harmer should be allowed out of her separate estate all his charges and expenses, both as a solicitor and otherwise, incurred in the execution of the trust; except that he was not to charge any thing for receiving the annuity.

The first suit, that of *Fraser* v. *Palmer*, was brought by Fraser, as a creditor of Mrs. Palmer, against Mr. and Mrs. Palmer, to enforce payment of his debt out of her separate estate.(*a*) To that bill Harmer was not a party.

In the second suit, that of *Palmer* v. *Fraser*, a bill in the nature of a bill of interpleader was filed by Palmer against Harmer and Mrs. Palmer, praying for the directions of the Court concerning the annuity.(*b*) To this bill Harmer and Mrs. Palmer severally demurred, and their demurrers were allowed.

Lastly, the action of *Harmer* v. *Palmer* was brought by Harmer as trustee, to recover the annuity, and this action was successful.

Mr. G. L. Russell, for the petition. There is no rule to prevent Harmer in these suits from recovering costs, taxed in the usual way. The rule in *New* v. *Jones* (Jarm. Conv. vol. 9, p. 338), and *Moore* v. *Frowd* (3 Myl. & C. 45), does not apply—at all events it cannot apply to the first cause, in which Harmer was not a party, and which was not in execution of the trust, but adverse to it. Mrs. Palmer's agreement, however, extends to all the costs, and since the decision in *Murray* v. *Barlee* (4 Sim. 82; 3 Myl. & K. 209) it is impossible to say that she may not make a bargain for herself,

(*a*) See ante, vol. 3, p. 279. (*b*) Ante, vol. 3, p. 491.

in relation to her separate estate. Harmer sent his amount of fees, &c., to Mrs. Palmer, at her own request. *Smith* v. *Langford* (2 Beav. 362).

[517] Mr. Simpkinson, contrà. If Mrs. Palmer is bound by the agreement in the manner represented, the order for taxation is wrong. [Alderson, B. If there is any exception to the rule as to costs between cestui que trusts and trustees, it ought to appear clearly and distinctly: more particularly where the parties are attorney and client.] *Moore* v. *Frowde* is explicit on that subject. But here it is contended that the business done, at least in one suit, was not done in relation to the trust property. But it was the duty of this party to protect the trust property. Mrs. Palmer could only be made liable to the demand of Fraser through her trustee. She was only sui juris as to a particular estate. There could be no personal decree against her in respect of that property: *Francis* v. *Wigzell* (1 Madd. 258). If, then, it was the trustee's duty to protect her interest, can he, in discharge of such a duty, entitle himself as against the married woman, or her separate estate, to charge the estate with the expenses? If Harmer had been a party to the suit, there would have been no question. But because the bill was filed against her wrongly, he not being a party, it is contended that he may charge in his character of solicitor.

ALDERSON, B. I think the Master was wrong as to the first suit, and right as to the others. In the first suit Harmer was not acting in the character of trustee, though he was Mrs. Palmer's solicitor. As to the other matters, he is clearly not to be allowed more than his costs out of pocket. The principle is that the estate is to be protected by the unbiassed judgment of the trustee. Can a solicitor, who is a trustee, be allowed to make a profit of the contest in which the estate is involved? If so, he would have two interests in opposition to each other. A trustee in such a situation has a duty to perform and a private interest. In some cases, if the costs now asked for were put into **[518]** the scale, private interest would kick the beam. It has been said that the attorney in this case is respectable; it may be so, but it is in order that attornies may be respectable that they sustain the loss. I think, therefore, that in the first suit he ought to be allowed his costs as between attorney and client, and that in the two other suits he ought to be neither a sufferer nor a gainer. The case must proceed on the principle laid down by the Lord Chancellor in Mylne and Craig.

EX PARTE NEWTON. IN THE MATTER OF THE MANCHESTER AND BIRMINGHAM RAILWAY ACT. June 3rd, 1841.—Where money is in Court under a railway act, previous to being laid out in lands to be settled "to the like uses," the Court will lend its aid to an advantageous purchase beyond the amount of the money in Court; and will direct the extra costs to be paid out of the money in Court.

This was the petition of a tenant for life of certain lands devised in trust under the will of Gabriel Newton. Certain messuages had been purchased by the railway company at £2200, and the money had been paid into Court under the disability clause. The trustees afterwards entered into a contract for the purchase of other messuages at a higher price than £2200, and it was arranged that the excess of costs occasioned by the larger purchase should be secured by a perpetual rent-charge on the newly purchased property. The Master having reported against this contract, and exceptions to his report having been taken and allowed, it was referred back to him to review his report and tax the costs. The Master then disallowed, as against the company, all costs occasioned by the peculiarity of the contract, including the costs of the exceptions; and Alderson, B., having confirmed this decision, the object of the present application was to have those costs paid out of the money in Court.

Mr. Simpkinson and Mr. Mylner, for the petition.

Order as prayed.

[519] RICKETTS *v.* LOFTUS. July 1st, 2nd, Nov. 16th, 1841.—A father, upon his second marriage, settled lands to the use of the children of his first marriage (naming them) for such estates, and in such shares and proportions, manner and form, as he should from time to time by deed or will appoint, and in default of appointment, to the use of the said children (except the eldest) as tenants in common in tail. All the children, except two, namely, the eldest son and daughter, died in the lifetime of the settlor. By his will, reciting the power, the

settlor appointed a rent-charge out of the estates to the daughter, and the estates, subject to the rent-charge, to the son in fee: Held, that the appointment so made to the surviving children was a valid execution of the power.—In a marriage settlement, by which real estates were settled to the use of the children of the settlor by a former marriage, power was reserved to the settlor, "during his life," by deed to demise, limit, or appoint any of the settled lands to trustees for terms of years, upon trust, by sale or otherwise, to raise any sum or sums for the better advancement in the world and preferment in marriage of such children, to be raised and paid at such times and subject to such conditions and limitations (such limitations to be for the benefit of the children) as the settlor should by such deed appoint. By deed reciting the power, the settlor limited the estates to trustees for a term of 1000 years "to commence after his decease," and "without impeachment of waste," upon trust to sell the premises comprised in the term, and out of the proceeds of the sale to pay and apply certain specified sums to the several children by name: Held, that this was a valid execution of the power, and that two of the children having died intestate, and without issue, in the settlor's lifetime, the sums appointed to them devolved to the settlor, and were subject to the dispositions of his will.—Where by the terms of a power the instrument by which it is executed is to be sealed and delivered in the presence of and attested by two or more credible witnesses, it is sufficient primâ facie evidence of attestation if on the instrument there appears an indorsement to the effect that it has been sealed and delivered in the presence of two persons, although such two persons are not named as witnesses, either in the body of the instrument or the attestation.

[S. C. 10 L. J. Ex. Eq. 49. Referred to, *In re Ware; Cumberlege* v. *Cumberlege-Ware*, 1890, 45 Ch. D. 269.]

By indentures of lease and release, dated respectively the 26th and 27th April, 1790, and made in contemplation of the marriage of General William Loftus with Lady Elizabeth Townshend, the manor or lordship of Killbride, in the county of Wicklow, and various other real estates in the counties of Wicklow and Westmeath, were conveyed to the use of William Loftus for his life, and after his decease to the use of trustees for certain terms of 100 years and 200 years, upon trust for raising an annual sum for the jointure of Lady Elizabeth and portions for her children; and from and immediately after the expiration or sooner determination of the said terms, and subject thereto, to the use of Henry Loftus, W. Francis Bentinck Loftus, Mary Ann Loftus, Harriet Loftus, and Frances Mary Loftus, the sons and daughters of the said William Loftus by Margaret his late wife, for such estate and estates, and in such parts, shares and proportions, manner and form, as the said W. Loftus should from time to time, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more **[520]** credible witnesses, with or without power of revocation, or by his last will and testament, in writing, to be by him signed, sealed, published, and declared in the presence of and attested by three or more credible witnesses, direct, limit, give, devise, or appoint of or concerning the said manor, lordships, castle, town, messuages, cottages, lands, hereditaments, and premises, or any part or parts thereof; and for want of or in default of such direction, limitation, gift, devise, or appointment, and subject to such direction, limitation, gift, devise, or appointment as should at any time or times be so made or given when the same should not be a complete and absolute direction, limitation, gift, devise or appointment, or complete and absolute directions, &c., then to the use of the said W. F. Bentinck Loftus, Mary Ann Loftus, Harriet Loftus, and Frances Mary Loftus, equally to be divided between them as tenants in common, and the respective heirs of their bodies, with remainders over in favour of the children of the second marriage.

The settlement contained the following proviso:—"Provided always, and it is hereby agreed and declared, that it shall and may be lawful for the said William Loftus from time to time, and at all times during his life, by any deed or deeds in writing, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses (but subject to the rent-charge of £200 hereby granted to the said Lady Elizabeth, and to the said terms of 100 years and 200 years, and the trusts thereof hereinbefore declared), to grant, demise, limit, or appoint all or any of the said manor, hereditaments, and premises to any person or persons, his executors,

administrators, or assigns, for any term or terms of years, upon trust by sale or mortgage of the said lands and hereditaments so to be granted, limited, or appointed for all or any part of such term or terms, or out of the rents or profits thereof, or otherwise, as to the said trustees shall seem meet, to levy **[521]** and raise any sum or sums for the better advancement in the world and preferment in marriage of the said Henry Loftus, William Francis Bentinck Loftus, Mary Ann Loftus, Harriet Loftus, and Frances Mary Loftus, the sons and daughters of the said William Loftus by the said Margaret his late wife, or any or either of them, to be raised and paid at such times and with, under, and subject to such provisoes, conditions, and limitations over (such limitations over being for the benefit of such children) as in and by such deed or deeds, to be sealed, and delivered, and attested as aforesaid, shall be directed, declared, and expressed of or concerning the same."

The marriage took effect soon after the execution of the settlement.

In 1792 Frances Mary died unmarried.

In 1804 Harriet Loftus married the plaintiff, Mr. Ricketts. Upon the occasion of that marriage an indenture of appointment, dated 20th of July, 1804, was made and executed between and by General Loftus of the one part, and certain trustees of the other part, whereby, after reciting the settlement and the provisions therein contained for providing for the children of the former marriage, the marriage of General Loftus with Lady Elizabeth, the death of Frances Mary, and that General Loftus was desirous to make provision for the surviving children (naming them) by executing an appointment under the power for that purpose contained in the said proviso, and to make provision for them, each £4000, it was witnessed that in pursuance of the said intention, and in consideration of natural affection, &c., and in order to make a provision for them under the power aforesaid, he, in pursuance and by virtue and in execution of the power and authority in him vested in and by the said recited indenture of release and settlement, and of all other powers and authorities then in him vested, or in anywise enabling him thereunto, granted, demised, and appointed to the trustees, **[522]** their executors and administrators, all and singular the manor, hereditaments, and premises mentioned and comprised in and granted and released by the said indenture of release of the 27th April, 1790, with their appurtenances, to hold the same &c. for and during the term of 1000 years, to commence after the decease of the said William Loftus, without impeachment of waste, upon trust within six months after the commencement of the said term to make sale or mortgage of the premises comprised in the said term, and by the proceeds of such sale or mortgage to raise the sum of £12,000, with interest at £5 per cent., and thereout to pay the following sums to the appointor's children by way of advancement, namely—£1000 to Henry, £3000 to W. F. Bentinck, £4000 to Mary Ann, and £4000 to Harriet; and upon further trust, upon the decease of the survivor of them, William Loftus and Lady Elizabeth to raise £3000 for Henry and £1000 for William Francis Bentinck.

In 1811 Mary Ann Loftus died unmarried; and in 1823 Henry Loftus died without issue.

By the will of General Loftus, dated the 24th June, 1830, reciting the deeds of 1790 and 1804, and that by the deaths of his children Henry and Mary Ann in his lifetime the sums of £1000 and £3000 belonging to the former and the sum of £4000 belonging to the latter under the deed of 1804 had accrued to him the testator, he the testator thereby appointed and bequeathed the sum of £1800 part of the aforesaid sums to his son W. Francis Bentinck Loftus, and £200 other part thereof to his daughter Mrs. Ricketts, and directed that the residue should fall into the estate. The testator then, in pursuance, as therein stated, of the power and authority vested in him in and by the settlement of 1790, and in exercise of that power, gave, devised, and appointed all and singular the manor and lordship of Killbride in the county of Wicklow, and all and singular other the estates, towns, &c. in the county of Wicklow and also in **[523]** the county of Westmeath, comprised in or subject to the said marriage settlement, and the said power of appointment therein contained, free from the terms therein limited of 200 years for raising portions for the children of the second marriage which were thereinafter provided for, but subject and without prejudice to the trust of the term of 1000 years limited by the deed of July 1804, except so far as those trusts were thereinafter satisfied and discharged, "to the use of the said William Francis Bentinck Loftus and Harriet the wife of T. B. Ricketts, Esq., my only children now living by my first wife Margaret, for the respective estates, and

in the parts, shares, and proportions, manner and form following, that is to say, to the use, intent, and purpose that my said daughter Harriet Bentinck Ricketts and her assigns shall and may during her life have and receive and take out of the said lands, hereditaments, and premises one clear rent-charge or annual sum of £100 free from all deductions, to be paid and payable to her by quarterly payments, namely, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each year for her sole and separate use and benefit, free from the control, debts or engagements of her present or any future husband, and without power of anticipating the same or any part thereof, with power to enter and distrain upon the said premises for the same; and subject thereto to the use of my said son Francis Bentinck Loftus, his heirs and assigns for ever."

In 1831 General Loftus died.

The present bill was filed by Mr. and Mrs. Ricketts against Francis Bentinck Loftus for the purpose of obtaining a declaration from the Court that, subject to the trusts of the terms of years created by the indentures of settlement of April 1790, the plaintiffs were entitled in right of Mrs. Ricketts to one moiety of all the settled estates; the powers of appointment created by the settlement **[524]** not having, as the bill suggested, under the circumstances, been duly executed.

The cause now came on for hearing.

In the course of the cause the plaintiffs' counsel took a formal objection to the deed of 1804, on the ground that the execution of it was not properly attested. In the body of the deed it was expressed that William Loftus "by this present deed in writing by him sealed and delivered in the presence of and attested by the two credible witnesses whose names are indorsed on the back of these presents as witnesses of the execution hereof, did, in pursuance and in exercise of the power, &c., grant, limit and appoint, &c." The attestation was in the following form:—"Signed, sealed, and delivered by the within-named William Loftus (being first duly stamped) in the presence of Ottiwell Robinson, of Craven-street, Strand, gent., Robert Spencer, of Old Burlington-street, gent." The substance of the objection was that as there was no evidence of the attestation beyond the claim itself, and as those persons might have been present without having animum attestandi, there ought to have been some statement that they attested, or that the execution took place in their presence as witnesses.

ALDERSON, B. (after referring to *Doe d. Spilsbury* v. *Burdett* (9 Ad. & Ell. 936)). I think there was a sufficient attestation. The words of the power are that there shall be two witnesses, and that the requisites of the power shall be complied with in their presence. The power requires sealing and delivery. I think these persons have stated that they saw the testator seal and deliver. In a late case in the Exchequer (*Curteis* v. *Kenrick*, 3 M. & W. 461) it was held that any equivalent expression was **[525]** sufficient to shew "publication." A multo fortiori the expressions here used are sufficient to shew that the deed was attested. Why did they sign at all except as witnesses?

The cause then proceeded, and the arguments on this occasion were confined to the question—whether the second power, contained in the settlement of 1790, was well executed by the deed of 1804.

Mr. Girdlestone and Mr. Koe, for the plaintiffs. The object of the second power is the advancement in the world of sons, or the preferment in marriage of daughters. The power is "during his life by deed" to appoint. The power must be executed by deed. In all fair and reasonable construction it is a power in derogation of the settlor's present life interest, to be executed antecedently to the time when the estate itself will become vested in the objects of the power. The estate is vested in the objects, subject to the estates and shares to be limited by the parent. So the power to advance must be a power to be exercised during the life of the parent. Advancement and preferment import a present object. If the advancement is postponed, the consequence may be, as here, that upon the child's death in his parent's lifetime, the parent takes the benefit of the advancement. The words "during his life" are surplusage, unless the advancement or preferment is to take place in the parent's lifetime. If this execution of the power is valid, he might have appointed the whole property for the advancement of one child in derogation of the first power.

There are other objections to the instrument of 1804. The power is to advance or prefer; but the instrument executing the power treats the power as a provision.

Again, the term limited by the instrument is to commence in futuro, and to be without impeachment of waste; but **[526]** there is nothing in the power authorizing a limitation without impeachment of waste. Upon the whole, if this instrument cannot take effect under the second power, it cannot under the first. *Bristow* v. *Warde* (2 Ves. jun. 336), *Routledge* v. *Dorrill* (id. 357).

Mr. Simpkinson and Mr. Bacon, for the defendants. On the construction of the settlement, there can be no doubt that the General had an arbitrary and capricious power to direct the money to be raised and paid at any time or times he should think fit. That is the general construction of the settlement; but even taking the power by itself, can it be contended that the party taking the estate subject to the power, has a right to say that the money shall not be raised after the settlor's death? Besides, in this case, the settlement is purely voluntary as regards the children of the first marriage. How can it be said that words, importing a general power to raise at any time he thinks fit, shall be confined to the settlor's life? It is contrary to the express words of the deed. There is no trust in General Loftus to raise the portions. He was to have free and unlimited power for that purpose. [They were then stopped by the Court.]

Alderson, B., expressed his opinion to be clear that the operation of the second power was not confined to the lifetime of General Loftus, and that it was well executed by the deed of 1804.

July 7th.—The question whether the first power, created by the deed of settlement of 1790, was well executed by the will of General Loftus, was this day argued before Alderson, B., and Rolfe, B.

[527] Mr. Girdlestone and Mr. Koe appeared for the plaintiffs.

Mr. Simpkinson, and Mr. Bacon, for the defendants.

Mr. Girdlestone. First, upon the true construction of the power, on the death of three out of the five objects, the power was so far gone that it could not be executed in the way of appointing the whole estate to the surviving objects: and if it could not be so executed, then, as that was all which the appointor professed to do, the appointment fails in toto, and the limitation in default of appointment takes effect. The power was not one of selection or exclusion, it only prescribed what estates, and in what manner and form the individuals named were to take. It was not a power to vary the objects. Under a limitation of this description the estates are vested, subject to be divested only in the event of a proper execution of the power: *Smith* v. *Camelford* (2 Ves. jun. 698). How can an appointment to two satisfy the terms of a power to appoint to five in such shares, &c.? If it does, either you must, in the expression "in default of such appointment," construe the word "such" to mean "any," or you must introduce the words "survivor, or survivors." But in the case of a deed such a liberty cannot be taken. That "such" is a relative word, and cannot be modified, appears from *Denne d. Briddon* v. *Page* (11 East, 603, n.; 3 T. R. 87), *Doe d. Dacre* v. *Dacre* (1 B. & P. 250), *Burleigh* v. *Pearson* (1 Ves. sen. 281), *Bielefield* v. *Record* (2 Sim. 354), *Howgrave* v. *Cartier* (3 Ves. & B. 79). If, upon the face of the instrument, you find clear and distinct evidence of an intention that all the children of the first marriage should have the benefit of the power, and an absence of intention to give that benefit to some only, you cannot execute the power in behalf of survivors only: if it were **[528]** otherwise, the issue of the deceased chlldren, if they had had issue, would have been defeated. *Maddison* v. *Andrew* (1 Ves. sen. 57) shews that where there is a power to appoint among certain objects, and one dies in the lifetime of the appointor, the party cannot appoint to a deceased object. *Boyle* v. *The Bishop of Peterborough* (1 Ves. jun. 299; 4 Bro. C. C. 243), which will be cited on the other side, was not a case of a limitation to certain individuals, as here, but to a class; and there was not a limitation over in default of such appointment. That there is a distinction between the case of individuals named, and a class, appears from *Reade* v. *Reade* (5 Ves. 744). In that case there could be no lapse of the power if it could have been executed in favour of surviving objects. [Rolfe, B. But in that case, as I collect it, the one-fourth did not go amongst the four.] In *Butcher* v. *Butcher* (1 Ves. & B. 86) it was argued by Richards that an appointment to one of several objects who was dead rendered the whole appointment void. *Vane* v. *Lord Dungannon* (2 Sch. & L. 118, 124, 125). In the present case it will be observed that, while the second power may be exercised in favour of the five children, "or any or either of them," the first power is in terms more limited.

Supposing, however, that the Court should be of opinion that the first power is well executed in other respects, it remains to be considered whether a gift of a rent-charge is a due execution of it. Under the settlement the children are to be entitled "for such estate and estates, and in such parts, shares, and proportions," &c. as General Loftus shall appoint. He has in form appointed to the surviving son and daughter "for the respective estates &c. following;" but what is appointed to the daughter is not an estate, but a mere rent-charge. If such an appointment be good under such circumstances, so would the appointment of a mere right of way. *Roberts* **[529]** v. *Dixall* (2 Eq. Ca. Abr. 668, pl. 19; Sug. Pow. App. No. 22) and the other cases collected on this point in Sugden on Powers (Sug. Pow., vol. 1, p. 509) are distinguishable from the present. For in those cases either the appointor had power to direct the estate to be sold, and to appoint the proceeds of the sale, or the terms of the power were such as to warrant an exclusive appointment, in which case the party excluded might have a rent-charge.

If the Court should be of opinion that the will is not a good appointment, then the sum of £8000 sinks into the estate and goes to those who take in default of appointment.

Mr. Simpkinson, contrà, was desired by the Court to confine his arguments to the first point. The question is in whom the estate vested in default of appointment. If it vested in the five children, there is an end of the argument drawn from the word "such." If it vested in the four, as is contended on the other side, the consequence would be that if any of the four died in the lifetime of the General, the estate would in every event go to the survivors of the four to the exclusion of Henry and his children. Henry could not in such case take by appointment, because an appointment to him and the surviving children would not be a due execution of the power to appoint to the five. Though Henry might have survived the General, and have had issue, and though he was an original object of the power, he would take nothing. On the other hand, if Henry died in the General's lifetime, the General would be stripped of all the authority which he had reserved to himself to enforce the obedience of his children. He would not be able to appoint to one child a larger share than to the others, but the four children would take equally. [Alderson, B. And if Henry were the sole survivor, it **[530]** would go over to the eldest child of the second marriage.] Is it not clear from the authorities cited, as well as others, that this power of appointment was coupled with an implied condition that it should be exercisable in favour of the survivors? All the cases support this view, except perhaps that of *Reade* v. *Reade*, which it is difficult to understand. *M'Ghie* v. *M'Ghie* (2 Madd. 368) decides that in a case similar to the present, an appointment to the survivors is a good and valid appointment of the whole fund. [Rolfe, B. That was not an exclusive power.] No. Then *Boyle* v. *Bishop of Peterborough* is a leading authority on this subject, and is recognized in *Houston* v. *Houston* (4 Sim. 111). The only difference between this case and *Boyle* v. *Bishop of Peterborough* is that there the power to appoint was amongst "all and every the child and children," without naming them: here the children are named, but they are described as "sons and daughters" of the appointor. If their names had been omitted, *Boyle* v. *Bishop of Peterborough* would have been decisive of the present question.

Mr. Girdlestone, in reply, said that all he contended for was that General Loftus could not execute the power so as to appoint the whole estate to the survivors. He would not say that the General might not appoint a part to Henry. The power might exist for the purpose of affording a provision for him.

Nov. 16th.—ALDERSON, B. When this cause was heard before me at the sitting of the Court of Exchequer in Equity, in July last, I delivered my opinion on two of the points then made in argument: first, that the attestation of the deed, executed in 1804, by General Loftus, was sufficient in point of form; and secondly, that the deed itself was a valid execution of the power secondly mentioned in his settlement. It is not **[531]** necessary, therefore, again to state the reasons on which that opinion was founded.

Some other points, however, remained for further consideration, and as one of them, at least, involved a question of some importance, I was anxious to avail myself of the experience and knowledge of my learned brother Rolfe, that I might be assisted in arriving at a correct conclusion thereon. The parties mutually agreed that my decision might be given, notwithstanding the then expected abolition of the Court's

authority; and, therefore, now, although my powers as a Judge in Equity have terminated by the passing of the late Act of Parliament, and these cases have been transferred to the Court of Chancery, where they may receive the determination of more competent skill and greater learning, I shall proceed to deliver my judgment on the two remaining points, having the less scruple in doing so, because, on this occasion, at least, I shall have the concurrent authority of my learned brother for the conclusions at which I have arrived, although for the reasons of this judgment I am myself properly responsible.

The questions, then, are two: first, whether the will of General Loftus contains such an appointment of his estates as is a valid execution of the first power given by his settlement. By that instrument, after settling his estates, on the occasion of his marriage with Lady Elizabeth Townshend, upon himself for life, and, after his demise, providing for Lady Elizabeth's jointure, and certain other matters which are of no importance on the present question, he conveys the property now in dispute to certain trustees therein named, to the use of Henry Loftus, William Francis Bentinck Loftus, Mary Ann Loftus, Harriet Loftus, and Frances Mary Loftus, the sons and daughters of the said William Loftus, by Margaret his late wife, deceased (who were in fact all the children of that marriage), for such estate and estates, and in such parts, shares, and proportions, manner and form, as he should from time to time by **[532]** any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, published, and declared, in the presence of and attested by three or more credible witnesses, direct, limit, give, devise, or appoint of or concerning the same manors, &c., or any part or parts thereof. And the settlement then provided that, for want or in default of such direction, limitation, gift, devise, or appointment, and subject to any such direction, &c. as should at any time be so made or given, when the same should not be a complete direction or directions, &c. of the whole of the said premises, or of the whole of the premises comprised in such directions, &c., or of the whole and absolute estate or interest therein respectively; and as and when any estate or interest so to be directed, &c. therein, or any part thereof, should respectively end and determine, to the use of William Francis Bentinck Loftus, and his three sisters (the four last-named of the five children, excluding the eldest son), equally share and share alike, as tenants in common, &c., with a limitation over in case of their death without issue to the children of the second marriage successively.

It is not necessary more particularly to state the limitations of this settlement, in order to the proper determinations of the points raised in argument.

General Loftus, having thus settled his estates, married. Subsequently, and during his life, three of the five children of the first marriage died, that is to say, Frances Mary, in 1792, Mary Ann, in 1811, and Henry Loftus, in 1823, all without issue. The surviving daughter, Harriet, married Mr. Ricketts, the present plaintiff, and the surviving son is the principal defendant in this suit.

In 1831 General Loftus himself died, having by his will duly executed and attested, and bearing date 24th June, 1830, after reciting this power vested in him, and the prin-**[533]**-cipal provisions of the deed executed by him in 1804, to which it is now necessary more particularly to refer, appointed (subject to a rent-charge of 100l. a-year, given to Mrs. Ricketts for her life) the whole of the manors, &c. to his only surviving son, William Francis Bentinck Loftus, the present defendant in fee.

The question is whether such an appointment is valid. It is contended on the part of the plaintiff, that it is not, being an appointment of the whole of General Loftus's settled property; and it was argued that, after the deaths of three out of the five children mentioned in the settlement, no such appointment could be valid. But after consideration we are clearly of a different opinion. This case cannot properly be distinguished from that of *Boyle* v. *The Bishop of Peterborough*, where it was expressly laid down that the death of one of a class over whom the power extends, even where there is no power of exclusion, does not prevent an appointment amongst the survivors of the whole property to the full extent of the power. That case has been recognized as good law by a variety of decisions of the most eminent judges: by Lord Eldon in *Butcher* v. *Butcher* (1 Ves. & B. 89), by Lord Redesdale in *Vane* v. *Lord Dungannon* (2 Sch. & Lef. 118); by Sir John Leach in *M'Ghie* v. *M'Ghie* (2 Madd. 368), and by

the present Vice-Chancellor of England in *Houston* v. *Houston* (4 Sim. 111). It must therefore be considered as of undoubted authority and great weight.

The learned counsel for the plaintiff attempted to distinguish it from the present case, but, we think, unsuccessfully. Here, as there, estates are given to the children of the first marriage as a class, in favour of whom the power was to be capable of execution by General Loftus. The mere circumstance of their being named in this settlement, when the children named constitute the whole **[534]** family, is not a sound ground for any distinction. The whole object of this provision was clearly to provide for all the children of the first marriage as a body in preference to the other class consisting of those children who might be born of the marriage then about to be contracted; and we agree entirely with the observation of Sir John Leach in *M'Ghie* v. *M'Ghie* (2 Madd. 378), that it is of great importance to the stability of property not to allow minute distinctions to prevail upon some supposed grounds of inconvenience resulting from an adherence to the authority of a case like that of *Boyle* v. *Bishop of Peterborough*, where the case before the Court cannot, as we think this cannot, be substantially distinguished in principle from so leading an authority. For, on this authority, learned conveyancers have probably acted for many years in preparing deeds of appointment, and all these would be put in hazard if the Court were so to treat the case. We, therefore, adhere to the authority of that case, and consider it conclusive as to the first question.

The only remaining question is whether the assignment to Mrs. Ricketts of the annuity or rent-charge of £100 a year for her life invalidates the appointment, and we think it does not. It is admitted that no appointment would be valid which did not assign to her a portion, and a substantial not an illusory portion, of the estates in question. It was suggested that a rent-charge was no part of the estate, and it was compared to the case of General Loftus giving to her a right of way across a part of the property; which would probably be bad, because it would be an illusory appointment. But this rent-charge is very different. This is a beneficial pecuniary interest of considerable amount, and is to come out of the estate. It is not necessary to give a part of the land itself. The power allows General Loftus to divide the estates in such shares **[535]** and proportions and in such manner and form as he may think fit; words as large as possible, applicable, probably, alone to beneficial interests of a pecuniary nature, but, with that restriction, including any manner or form of distribution of the property in question which he might think it expedient to adopt. We are therefore of opinion that General Loftus was at liberty, if he so thought fit, to appoint to Mrs. Ricketts a rent-charge out of the estate in question as her share of that property. And there is no pretence for considering this at all as an illusory appointment.

This point therefore also fails; and the result of the whole is that, in the opinion of the Court, both the appointment made by the deed of 1804 and that contained in the will of General Loftus were valid executions of the two powers contained in his marriage settlement, and this makes it unnecessary to consider another point made by Mr. Girdlestone in argument as to the distribution of the sum of £8000, part of the sum raised under the deed of 1804, for this point only arose in case the appointment by General Loftus's will had been, in the opinion of the Court, invalid.

On the whole, the respective rights of William Francis Bentinck Loftus and his sister, Mrs. Ricketts, are these: Mrs. Ricketts is entitled to her £200 under the deed of 1804, to the sum of £200, and the rent-charge of £100, under her father's will; and the defendant William Francis Bentinck Loftus to the residue of the property.

The result of this will be that the plaintiff has entirely failed, and that his bill must be dismissed with costs.

Decree accordingly.

[536] MEMORANDA.

In the course of Trinity Vacation, 1841, the following official changes and professional promotions took place:—

In June her Majesty directed letters patent to be passed, granting the dignity of a Baron of the United Kingdom to Sir John Campbell, Attorney-General, and the heirs male of his body, by the name, style, and title of Baron Campbell, of St. Andrews, in the county of Fife. Shortly afterwards his Lordship was appointed Lord High Chancellor of Ireland.

Sir Thomas Wilde, her Majesty's Solicitor-General, was appointed Attorney-General, in the place of Lord Campbell.

Later, in the same vacation, Lord Cottenham resigned the office of Lord High Chancellor of England, and was succeeded by Lord Lyndhurst.

Lord Campbell resigned the office of Lord High Chancellor of Ireland, and was succeeded by Sir Edward Burtenshaw Sugden.

Sir Thomas Wilde resigned the office of Attorney-General, and was succeeded by Sir Frederick Pollock.

Sir William Webb Follett was appointed Solicitor-General.

In the same vacation William Whateley, of the Inner Temple, Esq., Richard Godson, of Lincoln's Inn, Esq., Sutton Sharpe, of the Middle Temple, Esq., Charles James Knowles, of the Middle Temple, Esq., Matthew Talbot Baines, of the Inner Temple, Esq., and the Honourable James Stuart Wortley, of the Inner Temple, were appointed her Majesty's Counsel; and Charles Austin, of the Middle Temple, Esq., received a patent of precedence, to rank next after M. T. Baines, Esq.

John Vincent Thompson, of Lincoln's Inn, Esq., was called to the degree of Serjeant at Law, and gave rings with the motto, Nec ultrà nec citrà.

[537] Afterwards, in the same vacation, Alexander James Edmund Cockburn of the Middle Temple, Esq., was appointed one of her Majesty's Counsel.

Shortly previous to Michaelmas Term, 1841, and under and by virtue of the statute 5 Vict. c. 5 (by which the jurisdiction of the Court of Exchequer, as a Court of Equity, was abolished, and transferred to the Court of Chancery), James Lewis Knight Bruce, Esq., of Lincoln's Inn, and James Wigram, Esq., of Lincoln's Inn, were appointed Vice-Chancellors, and shortly afterwards received the honour of knighthood.

About the same time, and under and by virtue of the same statute, Richard Richards, Esq., the Accountant-General, and one of the Masters of the Exchequer, was appointed a Master in Chancery.

[538] In the Court of the Stannaries of Cornwall.

Before Prince Albert, Lord Warden, Lord Lyndhurst, C., Lord Brougham, Lord Langdale, M. R., Wigram, V. C., and Parke, B.

Vice *v.* Thomas. May 21st, 30th, 1842.—The equitable jurisdiction of the Vice-Warden of the Stannaries of Cornwall depends upon the principles of equity, as administered in the High Court of Chancery. Therefore, in a case where ejectment lies for a mine, a petition to the Vice-Warden for delivery of possession to the plaintiff, without alleging any impediment to the recovery of the premises in a court of law, is bad on demurrer. Nor will a petition lie simply for an account of mesne profits of a mine, in a case where it is not shewn that any difficulty exists in taking the account, or that such account may not be taken as conveniently at law as in equity.—Semble, that the interest of an owner of tin bounds in Cornwall is not a mere easement or incorporeal hereditament, but may be the subject of an action of ejectment, even where he is not in actual possession at the time of the wrongful entry of the defendant.

This was an appeal (*a*) against an order of the Vice-Warden of the Stannaries of Cornwall, made in the equity side of that Court, upon the petition of W. M. Thomas.

The petition stated that, on or about the 12th August, 1825, J. S. Enys, of Enys, in the county of Cornwall, Esq., being lawfully possessed of the several tin bounds thereinafter mentioned, did by indenture of that date, for the consideration therein expressed, grant and set to the petitioner, his executors and assigns, full and free liberty, license, power, and authority to dig, work, and search for tin and tin ore, within, under, and throughout his tin bounds in Polberrow mine, that is to say, &c., and the tin and tin stuff there found to raise and bring to grass, and there to spall, dress, stamp, make merchantable, and (subject to certain reservations and covenants, and to the right of persons lawfully claiming royal mines) to convert and dispose of

(*a*) A more full report of this case, with an appendix, has been published by Edw. Smirke, Esq.

the same to his and their own use, with liberty to dig drafts, shafts, pits, cuts, or other conveniences necessary or convenient for the better working of the premises: To hold and enjoy the said several liberties, &c., to the [539] petitioner, his executors, administrators, and assigns, from, &c., for and during the term of twenty-one years thence next ensuing, subject to certain reservations and payments therein contained. That in pursuance and exercise of the liberties, &c., so granted to him, the petitioner began in or about the month of, &c., to dig, work, and search for tin and tin ore, within and under the said tin bounds, and, for the purpose of more effectually working within the same, erected whims and other machinery and buildings thereon, and expended a large sum of money, to wit, the sum of £10,000, or thereabouts, in erecting such whims and machinery and buildings, and in digging, working, and searching for tin and tin ore, within and under the same tin bounds, until about the month of May, 1827, when he discontinued working, but with the full intention of resuming mining operations within the bounds, when it should be convenient so to do; and that, with that intention, he left whims and other machinery standing upon the same tin bounds. That the petitioner raised large quantities of tin and tin ore within the tin bounds between the month of, &c., and the month of May, 1827, and disposed of the same to his own use and benefit, and that he duly paid the toll and farm respectively payable in respect thereof. That the said J. S. Enys had not re-entered upon the same tin bounds, or revoked, or countermanded, or annulled the said indenture or any of the liberties thereby granted or set to the petitioner, and that the said bounds, at the date and execution of the said indenture, were and still are good and lawful tin bounds, and had been duly and regularly preserved and kept on foot, as required by, and agreeably to, the laws and customs of the stannaries of Cornwall. That whilst the petitioner was so entitled, and whilst a part of such machinery was standing within and upon the same tin bounds, the defendants, William Vice, of, &c., within the said stannaries, merchant, and John Bennetts, of, &c., within the said stannaries, mine agent, [540] combining and confederating with divers other persons unknown to the petitioner, in or about the month of January, 1834, forcibly and fraudulently entered upon the same tin bounds, and broke down and removed the said machinery, and expelled and dispossessed the petitioner of and from the same tin bounds, and from thenceforth had kept possession of the same, and dug, worked, and raised tin and tin ores within the same, and carried away, converted, and disposed of, to their own benefit, large quantities of tin and tin ore, to the manifest wrong and injury of the petitioner and against the laws and customs of the said stannaries. That the plaintiff had frequently required the defendants and their confederates to deliver up possession to him of the same tin bounds and workings within and under the same, and the tin and tin ore raised therefrom, and in their possession, and to account for and pay to the petitioner the proceeds and produce of the tin and tin ore so disposed of by them, as in justice and equity ought to have been done; but that they had hitherto refused to deliver up possession of the same tin bounds, or any of them, or any part thereof, or of the workings within or under the same, or the tin and tin ore so raised therefrom, and had also refused to account for and pay the proceeds and produce of the said tin and tin ore, to the great wrong, &c., contrary to equity and good conscience, and against the laws and customs of the said stannaries.

The petition prayed a summons convening the defendants before the Vice-Warden, to answer the premises, and that they might be ordered and decreed to declare the names, &c., of their confederates within the said stannaries, in order that they might be made parties defendants to the suit; and that the defendants might be ordered and decreed to deliver up possession to the petitioner of the said tin bounds and workings, and of the said tin and tin ore, and account for and pay to him the proceeds and produce of the tin, &c., and for general relief.

[541] To this petition the defendants demurred generally, for want of equity, and also specially. Amongst the special causes assigned for demurrer were the following, viz., that the petition was an indirect attempt (under the pretence of an application to the Court for an account and equitable relief) to try the title to the mines. That the petitioner shewed no want of title in the defendants, or any title in himself, or any title in Enys. That Enys, supposing him to have been possessed of the bounds, could not pass the same to the petitioner, or demise or transfer the same, or make the said grant, but that he could only be entitled by the laws and customs of the stannaries to work the same, rendering the accustomed toll to the

lord of the soil, and could not transfer his right of working to another. That the petition was, on the face of it, a plea of land, and a claim of an interest in the soil; and that it prayed that the defendants might be ordered to deliver up possession thereof. That it was, in fact, an application to the Court to restore possession to the complainant, and was therefore substantially a proceeding in the nature of an action of ejectment; and that the first part of the prayer was substantially for a writ of habere facias possessionem, and the latter part, in effect, an application for the mesne profits; and that, for any cause or complaint set forth, the remedy was in a court of law, and this Court had no jurisdiction.

The demurrer was argued at Truro on the 24th January, 1838. On a subsequent day—

DAMPIER, V. W., delivered judgment. The petition of W. M. Thomas against William Vice and John Bennetts was argued here at the last sittings. The petition stated that, in August, 1825, Mr. Enys, being lawfully possessed of tin bounds, did, by indenture, set to the plaintiff for twenty-one years. That plaintiff, in pursuance of such indenture, in 1823, commenced work, and continued to **[542]** work till 1827, when he discontinued, with an intention of resuming the works within the said bounds; and, therefore, left machinery thereon: and that while the plaintiff worked, he raised ore, and duly paid the toll to Mr. Enys, who has not at any time re-entered, or revoked the set; but that the indenture and set are still valid, and subsisting for the residue of the term of twenty-one years; and the bounds, which, at the time of making the indenture, were valid tin bounds, have been duly and regularly renewed according to the custom of the stannaries. That the plaintiff being entitled, as aforesaid, to work the bounds, and having left his machinery thereon, and whilst the same was there standing, the defendants, in 1834, forcibly and fraudulently entered, and expelled and dispossessed the plaintiff from the same bounds, and have worked and raised ore. For which the plaintiff prays an account, and a re-delivery of the bounds. To this petition the defendants demurred, and stated the causes of demurrer at considerable length, as in a special demurrer at common law. The causes may be collected into several distinct classes and severally examined without very much repetition.

The first cause of demurrer was that the plaintiff had no equity: because, as was argued by the advocate for the defendant, the Stannary Convocation Act of 12 Car. 1, s. 18, may have given the defendant a title accruing to him by eighteen months' peaceable possession, which is consistent with the allegations in the petition. That section is, in effect, the same as the Stannary Convocation Act of 22 Jac. 1, s. 21. I am of opinion that it does not apply to this case, for it enacts that where the right is in dispute, the person who has been in possession for a year and a day shall not be dispossessed, "before judgment on the right." In this case the right is not in dispute, for the right and title, which is set out in the petition, is admitted by the demurrer, and the sole question is, if it be properly **[543]** set out; and the defendant contends that such right and title of the plaintiff is consistent with a right which he may have acquired. It was next contended that the plaintiff had no equity, because he had his remedy at law by an action of trespass or trover; and that, at the utmost, the plaintiff could only ask for a discovery in this case, and not for a discovery and relief. Many cases were cited by the advocate for the plaintiff as authorities for a double remedy being open to him both at law and in equity. A knowledge of the history and progress of the courts of common law and equity at Westminster will shew how each has at times, for the benefit of all, advanced on the other. I am of opinion that the objection founded on the plaintiff's ability to sue the defendants at common law is not valid. The objection that the plaintiff should have sought a discovery only and not relief, is of more difficult solution. For though, in many cases of mines, the Court of Equity has entertained a suit for relief, there seems to have been some special reason of confusion of local limits, which had there caused alleged wrong, or some fraud which gave the Court a jurisdiction, as well in affording relief as discovery. A case of mining under bounds is, however, in itself, in some degree, peculiar; and as I find that, in this Court, suits for relief as well as for discovery have been maintained where a wrongful working in bounds has been alleged, I am neither willing, nor do I think I ought to narrow the jurisdiction. In this case, the question concerns bounds —a very peculiar right; and, for that reason, not unlikely to have been brought within the cognizance of this Court of Equity. The defendant is alleged to have raised, in the absence of, and unknown to the plaintiff, large quantities of ore from

within the plaintiff's bounds. If the plaintiff be entitled to a discovery only, he must pay for that discovery, though the defendants may have committed a wrong for which he must afterwards sue them at common law. When I find that, in such case, this **[544]** Court alone has given the relief as well as the discovery, I am not willing to refuse a jurisdiction which has heretofore been exercised, and which appears to be founded not only on the peculiar nature of the subject-matter, but in convenience to the suitor. For, considering the nature of bounds, and the questions likely to be raised in contests regarding bounds, it seems to be a subject within the province of this Court; and the Convocation Act, 22 Geo. 2, (s. 8, p. 89 and s. 2, p. 91), appears to shew that bounds are within the cognizance of the Court of Equity in the stannaries.

Another objection urged by the defendants' advocate was that, in the petition, a mere trespass in land was alleged, whereupon a writ of possession was prayed; that such wrong and remedy was within the scope of an action of ejectment, and that such action of ejectment, therefore, and not this suit, ought to have been brought by the plaintiff. The answer to this objection seems, in a great measure, to have been given in the answer to the last. Though, perhaps, the plaintiff might have proceeded by way of an action of ejectment (on which, however, I give no opinion), it appears by precedents that he may proceed in this Court by petition. I repeat, therefore, that, if I were inclined, I do not consider that I ought to deny this jurisdiction, which, I find, has been heretofore exercised. The prayer that possession be granted to the plaintiff as part of the relief does not vitiate the petition. For it is a common case that one person shall have a legal possession of, and title to, land to which another has an equitable right, which is enforced by a Court of Equity decreeing a conveyance according to the right.

The advocate for the defendant then argued that this petition involved a plea of land. At the last sittings I adverted to this objection. I think the exception of pleas of land from the jurisdiction of the Court applies to the common law Court of this district; which cannot, therefore, assume, and never has assumed, to decide questions **[545]** concerning the right to the freehold. Such questions are reserved for the superior Courts of common law. No Court of Equity has ever been allowed to decide such questions. But a Court of Equity may inquire if the legal owner of a freehold be under any equitable obligation or trust for the use of another, and may enforce the performance of such trust. It is clear that bounds are not a freehold interest; independently, therefore, of any objection arising from the defendants' non-compliance with the provisions of 6 & 7 Will. 4, c. 106, s. 13,(*a*) the objection that this is a plea of land is inapplicable to the case.

It was then objected, for the defendant, that this was an indirect attempt to try the title to the mines mentioned in the petition, and that this Court should not so try a title even to a chattel interest. This objection does not seem to me to be relevant; for, though I grant that, if any title to this chattel interest appeared to be in question, that question would be better settled by an action or an issue at common law, after which this Court could decide the question of relief, yet at present no question of title appears to be in dispute. For the plaintiff alleges that his title, being properly pleaded, is admitted by the effect of the demurrer; while the defendant alleges, not that he has the title, but that the plaintiff has set out an imperfect title; that the plaintiff's petition is demurrable; and that he has thereupon demurred. The question, therefore, to be decided is whether the plaintiff's title, as it appears in the petition, is primâ facie well pleaded; and, having disposed of the above-mentioned objections, which were more general, I come now to the consideration of that question which, wholly and specially, arises out of the form and allegations of the petition.

The first objection which arises out of the form and allegations of the petition is that no title to these bounds is **[546]** shewn to be in Enys, from whom the plaintiff claims. The propriety and particular allegation of the title depends on the peculiar circumstances of each case. In the case of bounds, possession alone can be the origin of a title to them, and the retaining and renewing the symbols of possession form the sole continuance of that title. Now, in the petition, Mr. Enys is said to have been in possession, in 1825, of these bounds, which were then valid bounds, and that they have been, since that, regularly renewed. The plaintiff cannot state a higher title

(*a*) This section provides that an objection to the jurisdiction shall be taken by demurrer or plea within fourteen days after appearance.

than a rightful possession so retained and renewed, and the Court cannot, in the absence of all evidence, infer that he has a tortious or a limited interest in those bounds. The allegation of possession, therefore, fortified as it is by precedents, which I have inspected, appears sufficient. This title, then, being sufficient, the defendant goes on to object that it is imperfectly set out, for that no proclamations nor any requisites of the stannary laws are stated—no renewals shewn—no averment that the bounds were worked before the year 1823. From an inspection of the records of the Court, it appears that proclamations are not pleaded any more than, in pleading, it is necessary to state a livery of seisin, or the registry of an annuity, or the enrolment of a deed of bargain and sale. Besides, the modes of proclamation have been repeatedly varied by the Convocation Acts, 22 Jac. 1, s. 17; 11 Car. 1, s. 15; 2 Jac. 2, s. 1; and 22 Geo. 2, s. 4. It would be difficult for the plaintiff to know which was the mode. His bounds may have existed previously to any proclamation being necessary. A want, therefore, of allegation of proclamations will not affect the right of the plaintiff, which is founded on a possession of bounds. There is an allegation of renewal; the objection, therefore, arising from an absence of such allegation fails.

Then it is objected that, though Mr. Enys might have a good title to these bounds, he could not transfer a title to **[547]** the plaintiff; for bounds were such an interest or rather easement, as to be incapable of being transferred.

I noticed this objection at the time of hearing. There is nothing in the nature of bounds which forbids a demise, or set of them, being made. In practice, bounds are set or demised; and the word "farmers," in the Convocation Act, 22 Jac. 1, s. 21, and 11 Car. 1, s. 16; the word "set," in 11 Car. 1, s. 31; the expression, in 22 Geo. 2, s. 3, "as if he had a set thereof," remove any doubt from my mind, if any ever existed, that bounds may be set, and that, therefore, the plaintiff has the interest in these bounds, and may petition for any injury done thereto.

But suppose that Mr. Enys could and had set these bounds to the plaintiff, still an objection is made, that no title is shewn to be in the plaintiff, for (as far as I understood the objection) it does not appear that Mr. Enys' interest was such as allowed him to make this demise or set to the plaintiff. The answer to this objection is that the Court will presume, till the contrary appear, that Mr. Enys' possession was entire and unrestricted, especially when the plaintiff alleges that the demise is still in existence and valid.

An objection is then made that, from the plaintiff's own shewing, he had ceased working in 1827, and that the bounds were unworked till 1834, when the defendants entered; so that, for many years, there was no working nor any payments as the fruit of working. The advocate for the defendant urged that this amounted to an absolute forfeiture and a nullifying of the bounds. That it was absurd that a mere ceremony of turning a turf once a year should be held to preserve the unworked bounds; that the bounds, therefore, were again thrown open, and the land was, in fact, unbounded. I shall not enter on a question of forfeiture, which does not necessarily arise. If this omission to work caused a forfeiture, it should have been shewn by the defendants. There may be a custom regarding for-**[548]**-feiture, such as the defendants allege. But I know nothing of it as far as regards this case, in which the only question is, if the plaintiff's petition be correctly drawn.

The last objection is this, that the whole statement of the plaintiff is consistent with his having lost the power of working by an omission to work the bounds; and that the defendants' title may have arisen by their having taken advantage of such omission, and entered on the bounds. This objection is unlike the last, for it is now conceded that the bounds do still exist, and that they have been regularly renewed, and that the indenture or set is still valid; but that the defendants have substituted themselves for the plaintiff, under the Convocation Act of 22 Geo. 2, s. 3, by which provision it appears that a stranger, willing to enter and work neglected bounds, may (after performing certain conditions) work the bounds as if he had a set thereof, and so the stranger has all the powers which the negligent owner had. All this, the defendants argue, may have been done within the period during which the bounds were neglected. The validity of this objection will be decided by ascertaining whether the plaintiff ought, in the first place, in addition to his allegation that he was possessed, to have denied the defendants' claim under any right of substitution given by 22 Geo. 2, s. 3; or, whether the defendants ought not to have made out their right and claim in their answer. The plaintiff says he was in possession of, and entitled to, bounds which

he had ceased to work, or even to occupy, except by certain machinery left thereon. There is nothing inconsistent in this; for he may be possessed of, and entitled to, though it may be that he does not occupy, the bounds. The defendants may have entered on the bounds so possessed by him. It does not necessarily appear that they claim by any title, especially when the plaintiff alleges not only his possession and title, but that defendants forcibly and fraudulently entered. Had the plaintiff taken on himself to deny any supposed title of the defendants, he would have **[549]** acted contrary to the rules of pleading, and needlessly anticipated objections which might never have been made. He would, to use an expression of a learned Judge, have "leapt before he came to the stile." If, therefore, the defendants have any title, they should rely on it in answer. The petition requires an answer, and the demurrer fails. In a case in equity, a decision against the demurrer, which is unconnected with the merits of the case, does not (as at law) conclude the defendants. The defendants, therefore, in this case must answer.

Demurrer overruled, with costs. Ordered that the defendants do forthwith file their answer to the petition.

From this judgment the defendants appealed; and the case was now argued before Prince Albert, L. W., and the Judges above named.

Sir W. Follett, S. G., and Mr. Sutton Sharpe, for the appellants, contended, first, that there was no equitable jurisdiction in the Vice-Warden; and, secondly, that, if such jurisdiction existed, it could not be exercised in the present case. In support of the second branch of the argument (to which, alone, it is necessary here to refer),(*a*)[1] they contended that the present petition was in substance an action of ejectment and of trespass for the mesne profits, and, therefore, not the subject of equitable jurisdiction; that the petitioner might have brought his action of ejectment, though not eo nomine for bounds, yet for a mine: *Doe d. Lord Falmouth* v. *Alderson* (1 M. & W. 210; Smirke, 39); and that, as regarded the jurisdiction of the Courts of Equity in this respect, there was no distinction between mines and any other property; that the cases in which equity has exercised jurisdiction over mines are all capable of explanation by the ordinary **[550]** principles of equity; that a bill in equity will not lie for the recovery of land or of any interest or easement in land, upon a purely legal title: *Jones* v. *Jones*; (*a*)[2] *Stansbury* v. *Arkwright* (6 Sim. 481); *Baker* v. *Booker* (6 Price, 379); *Crow* v. *Tyrrell*; (*d*) though the Court will assume jurisdiction where the plaintiff shews that some outstanding legal estate or other impediment prevents a recovery at law: *Dormer* v. *Fortescue*; (*e*) **[551]** *Bolton* v. *Deane* (Pre. Ch. 516, 525); *Pulteney* v.

(*a*)[1] For the first branch of the argument, and also for a more full statement of the second, see Mr. Smirke's report.

(*a*)[2] 3 Mer. 161; in which case it was held that an heir-at-law cannot maintain a bill against a devisee to enforce the direction of an issue, devisavit vel non. The extent of the doctrine contained in this case seems to have been doubted by Lord Abinger. See ante, p. 382, et seq.

(*d*) 3 Madd. 179. To this class of cases add *Pemberton* v. *Pemberton*, 13 Ves. 297; *Armitage* v. *Wadsworth*, 1 Madd. 189; *Hitchins* v. *Lander*, Coop. 34; *Calverley* v. *Williams*, 1 Ves. jun. 213.

(*e*) 3 Atk. 124; see *Dobson* v. *Leadbetter*, 13 Ves. 230. In *Dormer* v. *Fortescue* Lord Hardwicke says, "Where a man brings his bill in this Court, where there is a trust and upon a mere equitable title, there he shall recover the estate; and the Court will give him an account of the rents and profits from the time the title accrued, unless upon special circumstances."

First, "he shall recover the estate."

When a person comes into a Court of Equity for the purpose of having his equitable title established, and of compelling a conveyance to himself of the legal estate, the Court, upon decreeing a conveyance, will also, either by the same decree, or by some subsequent order, put him in possession. Thus, on a bill for redemption, the Court, on decreeing a reconveyance, will also decree the defendant to deliver up possession of the mortgaged premises to the plaintiff; *Yates* v. *Hambly*, 2 Atk. 363; Seton on Decrees, 146; see *James* v. *Biou*, 3 Swanst. 247; *Pym* v. *Bowreman*, ib. in notis. So upon a bill by an equitable mortgagee, by deposit, if the decree be for a conveyance of the legal estate, and a foreclosure (which however seems not now to

Warren (*b*). That, in accordance with a similar rule at law, no account of **[552]** mesne profits will be decreed in equity till possession has been recovered: *Norton* v. *Frecker;* unless it can be shewn, **[553]** as in *Pulteney* v. *Warren*, that the recovery of possession at law was, under particular circumstances, impossible. **[554]** That, although Courts of Equity have sometimes interfered, by injunction, to prevent waste, yet in such cases there must be some privity between the parties to justify the interposition, and an account is then incident to the injunction to prevent a multiplicity of suits: *Jesus College* v. *Bloome* (3 Atk. 262); *Bishop of Winchester* v.

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be more common than a decree for sale; see C. P. Coop. 10, 2 M. & K. 417; Coote Append. 713), the decree will contain a direction for the delivery up of the possession of the property; *Hiern* v. *Mill*, Seton, 179; *Price* v. *Carver*, 3 Myl. & Cr. 157. So upon a bill for dower, where the plaintiff's title generally as dowress is admitted (in which case a Court of Equity now assumes concurrent jurisdiction with a court of law), the decree will be for delivery up of possession; Seton, 261. A like decree will also be made in favour of an equitable jointress: Eq. Dr. vol. 2, p. 373; *Grove* v. *Hooke*, 4 Bro. P. C. 593 (ed. Toml.). So where a person is entitled to the equitable interest in a term with a legal remainder in fee, the Court, in decreeing an assignment to him of the term, will also decree the termor to deliver up possession of the land, *Moor* v. *Hodgkinson*, Rep. temp. Finch, 373; *Reynolds* v. *Jones*, 2 Sim. & Stri. 207. Upon a decree for specific performance against the vendor of an estate, the delivery of possession will be enforced by order: Fonblanque, Eq. vol. 1, p. 35. For instances in which bills have been brought to recover real property, on the ground of an equitable title in the plaintiff, see *Selby* v. *Alston*, 3 Ves. 339; *Fletcher* v. *Tollett*, 5 Ves. 3; *Widdowson* v. *Earl of Harrington*, 1 J. & W. 532; *Locke* v. *Southwood*, 1 Myl. & C. 411; *Tolderry* v. *Colt*, ante, vol. 1, 240; *Yarnold* v. *Wallis*, ante, p. 160.

On the other hand, where a person, asserting a legal title to an estate, calls upon a court of equity to aid him in the recovery of that estate, the Court will do no more than remove such impediments (whether legal or equitable) as prevent the plaintiff from recovering the possession of the estate at law. Thus where an heir-at-law, plaintiff in equity, is prevented from bringing his ejectment only by reason of a legal impediment, which can at once be removed, as an outstanding term which is held adversely to him, a Court of Equity will not aid him, as to the possession, beyond decreeing the removal of the term, although it will reserve to him, in the event of his establishing his title at law, a right to an account of the mesne profits: *Dormer* v. *Fortescue*, 2 Atk. 282, 3 Atk. 124. So where a legal mortgagee comes into equity for a foreclosure, or, in other words, for a removal of that equitable impediment to his recovery at law, which is occasioned by the right of redemption, the Court will do no more than decree the foreclosure. The plaintiff must recover possession of the estate by ejectment: *Sutton* v. *Stone*, 2 Atk. 101.

The case of a dowress, whose legal title is disputed, seems to stand between the two classes of cases which have been mentioned. In such case, upon the title being established at law, the Court of Equity decrees possession, as well as every other part of the relief sought by the bill. See Roper, Husb. and Wife, vol. 1, p. 450 (ed. Jac.). If it were otherwise, the dowress, when directed by the decree to proceed at law, would have to bring two actions; first, an action upon a writ of dower to establish her title, Co. Litt. 32 b.; and, secondly, ejectment to recover the possession; ejectment not being maintainable till dower is actually assigned: *Doe d. Nutt* v. *Nutt*, 2 Car. & P. 430. The court of equity, however, being satisfied, by the evidence before it, of the legal title of the dowress, will dispense with her proceeding by ejectment. Indeed, it should seem that, except under peculiar circumstances (see *Curtis* v. *Curtis*, 2 Bro. C. C. 620), the Court will not, where it desires the establishment of the title of the dowress at law, compel her to bring a writ of dower, but will grant her an issue, or, if the facts be not disputed, direct a case for the opinion of a court of law

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(*b*) 6 Ves. 73. In *Brown* v. *Newall*, 2 M. & C. 572, Lord Cottenham says: "Where, by the interposition of the Court to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, the Court will give him a remedy equivalent to that from which the interposition of this Court has debarred him. That will be found to be the principle established in *Pulteney* v. *Warren*."

Knight (1 P. W. 406); *Crockford* v. *Alexander* (15 Ves. 138); *Thomas* v. *Oakley* (18 Ves. 184). That although, as appears from the judgment of Lord Brougham, in *Parrott* v. *Palmer* (3 Myl. & K. 632), an account has, in the case of mines, been taken without an injunction, yet, in *Sayer* v. *Pierce* (1 Ves. sen. 232), Lord Hardwicke dismissed a bill which merely prayed an account of the profits of a mine. That the dicta in the books distinguishing the case of a mine, on the ground of its being a species of trade, evidently refer to partnerships in the produce, where a co-adventurer seeks for an account: *Story* v. *Lord Windsor* (2 Atk. 630); *Jefferys*

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upon the question of title. See Roper, vol. 1, p. 450, n.; Story, Eq. Jur. chap. 12, sect. 624 (2nd ed.).

With respect to partitions since the stat. 3 & 4, Will. 4, c. 27, sect. 36, which abolishes the writ of partition, the general jurisdiction seems to be in equity. (As to copyholds, see 4 & 5 Vict. c. 35, sect. 86.) Courts of Equity, therefore, in cases where the titles of the parties are equitable, or, being legal, are not disputed, will, upon decreeing mutual conveyances of the respective shares of the parties, also decree or order possession according to the conveyance. In cases, however, where the legal title is in dispute, it must be established at law, either upon an issue or a case. See *Cartwright* v. *Pultney*, 2 Atk. 380; *Miller* v. *Warmington*, 1 J. & W. 473.

It will be perceived that the foregoing observations do not include cases of fraud or mistake. Upon the points which have been discussed, see the late case of *Strickland* v. *Strickland*, 6 Beav. 77. See also, as in some degree connected with them, *Haigh* v. *Jaggar*, 2 Coll. 231, and the cases there cited.

In order to compel the delivery of possession of lands under the decree of a court of equity, it was the practice to sue out a writ of injunction, enjoining the defendant to deliver up the estate according to the decree, and then to ground upon it the writ of assistance, to be executed in case of disobedience of the injunction: Wy. Prac. Reg. 254, 424; *Huguenin* v. *Basely*, 15 Ves. 180; 2 Dan. Ch. Pr. 723, and the cases there cited. But by the stat. 1 Will. 4, c. 36, rule 19, the writ of injunction, and also the previous writ of attachment, are abolished; and under the 13th of the orders of 26th August, 1841, the writ of execution is unnecessary, and by the last-mentioned order it is now sufficient to serve the decree or order for delivery of possession; and upon proof made of demand and refusal to obey such order, the prosecuting party is entitled to a writ of assistance. For the modern form of the writ of assistance, see Smith, Ch. Pr., vol. 1, p. 449.

Secondly, "the Court will give him an account of the rents and profits from the time the title accrued, unless upon special circumstances."

It is clear that, if there is a trust estate and the cestui que trust comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits: Story, Eq. Jur. ch. 8, sect. 512, citing *Dormer* v. *Fortescue* and *Coventry* v. *Hall*, 2 Ch. Rep. 259. And the account will generally be taken from the time when the title accrued. Thus, in *Reynolds* v. *Jones*, 2 S. & S. 206, where real estate was devised to A. for a term of years, upon trust to raise money to pay the testatrix's debts, with remainder to B. for life, with remainder to her children, as she should appoint, and, in default of appointment, to her children as tenants in common in fee; B. married and had five children, and joined with her husband in levying a fine of the estate, and conveying the fee simple to the trustee; B. died in 1801, without executing the power of appointment, leaving only two children—namely, her eldest and another son—surviving her; the eldest son was at that time resident in Jamaica, and remained there till 1815, when he died intestate and without issue; in 1817, the other son made a formal entry on the premises, and filed his bill to recover the estate; Sir John Leach held that he was entitled to the four-fifths of the estate which he inherited from his eldest brother, and to four-fifths of the rents and profits from the time of entry. So an account of the arrears of dower (subject to the restriction imposed by this Statute of Limitations, 3 & 4 Will. 4, c. 27, sect. 41) will be taken from the death of the husband. *Oliver* v. *Richardson*, 9 Ves. 222. There are cases, however, in which the account has been taken from a later period than the accruer of title. See *Pulteney* v. *Warren*, 6 Ves. 73; *Denys* v. *Shuckburgh*, ante, p. 42.

A person who has a clear remedy at law for the recovery of an estate must proceed at law not only for the possession, but for the mesne profits. He cannot file a bill

v. *Smith* (1 J. & W. 298); in which cases, as well as in some instances on the ground of confusion of boundaries: *Sayer* v. *Pierce*; *Bishop of St. Asaph* v. *Williams*; (*i*) and of fraud, *Mitchell* v. *Dors* (6 Ves. 147), equity will assume jurisdiction.

Mr. Erle and Mr. Barlow, for the respondents. If equity is to be administered in the stannaries on the same principles, and in the same cases only, as in the High Court of Chancery, there is still enough to support this petition. Mines have often been distinguished from other property. The operations are necessarily carried on in secret. The interest in them is infinitely subdivided into shares. No **[555]** form of action at common law will give an adequate remedy. In *Bishop of Winchester* v. *Knight* (1 P. Wms. 406) a bill for an account was retained, though the title was disputed, and an action of trover was directed; and one of the reasons assigned, namely, that a customary tenant is "a sort of fiduciary," can make no difference in the principle; for it was a clear wrong for which a legal remedy lay. So, in *Sayer* v. *Pierce* (1 Ves. sen. 232), the bill was retained, while the title was tried by ejectment, though the plaintiff had never been in possession. A fortiori, the Court has jurisdiction in the present case, where no ejectment would lie. *Jesus College* v. *Bloome* (3 Atk. 262) affirms the jurisdiction as to mines as distinguished from timber. In *Whitfield* v. *Bewitt* (2 P. Wms. 240) the remainder-man had a decree for an account of timber cut by the tenant for life, on the ground that trover would have been an inadequate remedy. If this be so in the superior Courts, the petitioner's remedy in the stannaries is still more defective: for, granting ejectment to be the proper form of action in Westminster Hall, it is a form unknown to the stannaries. The sheriff of Cornwall is not attendant upon the Vice-Warden; and his bailiffs can raise no posse comitatus, to give possession by force. The modern practice, grown up long within time of memory, of issuing an habere facias, never extended itself to these Courts. Blackstone (Comm. vol. 3, p. 200) says that, before the invention of the writ of possession in ejectment, in the reign of Edw. 4, "the Courts of Equity began to oblige the ejector to make a specific restitution of the land to the party injured." The Vice-Warden has adhered to the ancient practice instead of taking upon himself to invent a new writ.

But supposing ejectment to be an action which would lie in this Court, it is not suitable to the sort of interest **[556]** that a bounder possesses: his right is that of an easement, coupled with a profit. If ousted from actual possession, he might, perhaps, maintain it, as he might trespass: *Harker* v. *Birkbeck* (3 Burr. 1556); *Harper* v. *Charlesworth* (4 B. & C. 574). But a mere right to dig, and take the ore when dug, was determined to be no foundation for an action of ejectment in *Doe d. Hanley* v. *Wood* (2 B. & Ald. 724); though Abbott, C. J., there intimated that it might have been different, if the lessor of the plaintiff had been in actual possession when the supposed expulsion took place.(*d*) So the Court, in *Wheeler* v. *Toulson* (Hardr. 330), inclined to the opinion that ejectment would not lie for herbagium, because it was only part of the profit of the soil. [Parke, B. In *Doe d. Lord Falmouth* v. *Alderson* (Smirke, 39; 1 M. & W. 210) it appeared that, by the custom of Cornwall, the interest of a bounder was not a mere easement, but was sufficient to support an action of ejectment. In *Doe dem. Hanley* v. *Wood* the decision turned on the construction of a deed.] The opinion of the Court of Exchequer, in *Doe* v. *Alderson*, was an interlocutory one. The case was sent to a new trial, to ascertain the opinion of the jury on the

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merely for an account of mesne profits. See 3 Atk. 129; 6 Ves. 89. If however, he has a good title to other relief in equity, in relation to the estate, he may also have an account of mesne profits; as where an heir brings his bill against a person who has been in possession of the estate by mistake, for the re-delivery of the title-deeds; there, it seems, he may treat that person as his bailiff, and have an account against him for mesne profits: *Moneypenny* v. *Bristow*, 2 Russ. & M. 117. So, also, in the ordinary case of an heir coming into equity for the removal of outstanding terms, there seems no doubt that, after his title is established at law, the Court, on hearing the cause on the equity reserved, will give him an account of mesne profits: *Hylton* v. *Morgan*, 6 Ves. 293.

(*i*) Jac. 349. As to the principles on which the Court will act in relation to the confusion of boundaries: *Miller* v. *Warmington*, 1 J. & W. 484; *Godfrey* v. *Littel*, 2 R. & M. 630.

(*d*) Id. 737.

custom. They certainly found the right to be an interest and not an easement; but the finding was immaterial, for they negatived the existence of any bounds at all. If bounds are a mere easement or liberty, neither ejectment nor trespass will lie for an exclusion from them; nor will trover lie for taking the ore in specie, which still belongs to the landowner until appropriated by the bounder. There is, therefore, no complete remedy, unless resort is had to the equity side of the Vice-Warden's Court.

But it is objected that, to deal with bounds, is to assume a jurisdiction over the land,(*g*) and that this is excluded **[557]** by the words "placita terræ" in the charters. If this, however, be a mere customary liberty, then it is not land, nor such an interest in it as is contemplated by the charters. A plea of land is an action in which the title to the freehold is in question. But the right of bounders is a chattel, and transmissible to executors (Stan. Act, 2 Jac. 2, s. 4). It is a right collateral to the land, existing by custom, and in the very creation of which the interference of the Stannary Courts is required.

May 30th.—PRINCE ALBERT, L.-W., now delivered judgment. This case comes before me by way of appeal from an order of the Vice-Warden of the Stannaries Court of Cornwall, over-ruling a demurrer filed by the appellants to a petition of the respondent. This petition was entitled on the equity side of the Court, and was in the nature of a bill in equity. The case was argued, upon the appeal, on the twenty-first of the present month. The judges with whom I have advised have communicated to me their opinion, and the judgment which I am about to pronounce is in conformity with that opinion. [His Royal Highness then stated the material facts of the petition, and proceeded as follows:]

To this petition the appellants put in a demurrer, in which were assigned divers causes of demurrer, including the following:—that the respondent had not, by his petition, made or shewn such a case as entitled him, in the Vice-Warden's Court, to any account, discovery, payment, or relief, as in the prayer of the petition mentioned, from or against the appellants, or either of them, touching the matters alleged in the petition, or any of such matters; and that the petition contained no matters of equity whatsoever, nor any statement, complaint, matter, or thing, which could entitle the respondent, by law, to the interference or assistance of a Court of Equity against the appellants, or either of them.

The demurrer came to be argued before the Vice-**[558]**-Warden, on 24th January, 1838; and, on 21st April, 1838, judgment was delivered over-ruling the demurrer, and ordering the appellants to answer the bill; and it is from this judgment that the present appeal has been brought.

The particular ground of demurrer, which has been referred to, does not challenge the jurisdiction of the Vice-Warden to decide questions proper for the decision of a Court of Equity; but, admitting that jurisdiction for the purposes of the argument, it insists that the matter of complaint in this petition is not proper for the decision of any Court of Equity.

Assuming, for the purpose of trying this question, that the petitioner might have recovered the possession of the property in ejectment, and that the jurisdiction exercised by the Vice-Warden, on the equity side of the Stannaries Court, does not differ from that which is exercised in the High Court of Chancery, if the petition had prayed that possession might be delivered to him, and nothing more, it is clear that the demurrer must have been allowed. For the question, upon which the right to possession in this case depends, is purely a legal question, and no impediment is suggested in the petition, the necessity of removing which would entitle the petitioner to transfer his complaint from a court of law and bring it into a Court of Equity.

So, if the plaintiff, in addition to a prayer that possession might be given him, had prayed that the defendant might account for the mesne profits since he took possession of the mines, and these profits had been of the ordinary character of rents of real estate, the demurrer must have been allowed; for there is nothing in such an account which requires the extraordinary powers of a Court of Equity to take it.

The question then remains, whether or not the circumstance that the mesne profits, of which an account is sought, are the profits of a mine, alters the case? The petition does not state, even in the most general terms, that **[559]** any difficulty would exist in taking the account, nor that the account cannot be taken except in a court of

(*g*) See Bro. Briefe.

equity; nor does it suggest a single fact from which the Court can infer that a reason exists why the account of mesne profits may not be taken as conveniently in a court of law as in a Court of Equity, unless it is to be inferred that such is the case from the mere fact that the profits, of which an account is sought, are the profits of a mine.

I am of opinion that I cannot judicially draw such an inference, in the absence of circumstances leading to it, and in a case between parties wholly adverse to each other. Such an inference could not be drawn, unless it were admitted that in no conceivable case can an account of mine profits be taken without having recourse to a Court of Equity.

The next question then to be considered is whether it is right to assume that possession of the mine might have been recovered in ejectment? The Vice-Warden, in deciding this case, did not express any doubt that possession of the mine might be recovered in ejectment; his proposition was merely this, that a Court of Equity had concurrent jurisdiction with a court of law. The cases cited at the bar during the argument shew that ejectment will lie for a mine in circumstances like those of the present case; and I consider that such is the law of the case.

Then, has a Court of Equity a concurrent jurisdiction with a court of law in the absence of all special circumstances to give it such jurisdiction? The Vice-Warden was of opinion that such a concurrent jurisdiction existed. In support of this opinion, which is clearly at variance with the first principles of equity as administered in the High Court of Chancery, the Vice-Warden relied on certain precedents in the Stannary Court which were brought under his notice. And if these precedents had been so numerous as to lead irresistibly to the conclusion that the jurisdiction of that Court over such questions was clearly established; or if it **[560]** had appeared that, in those precedents, the decision of the Court had been come to after solemn argument, the question might have been entitled to a different consideration from that which I feel bound to apply to it. But this is not the case; and, in the absence of the most conclusive evidence in support of an equitable jurisdiction so anomalous as that contended for, I am compelled to hold that no such jurisdiction exists.

In the judgment which has been delivered, I have relied upon the circumstance that no difficulty is suggested in the petition in the way of taking the accounts, which the petitioner asks. Admitting, as a general proposition, that where any part of the relief which a party claims is proper for the decision of a Court of Equity, that Court will incidentally decide all questions at law which may be ancillary to the equitable relief, there is strong authority for holding that, in the particular case of a party, out of possession of an estate, claiming equitable relief, the right to which depends upon the right of possession, the Court requires that the party, so circumstanced, should recover the possession at law before he files his bill for the consequential equitable relief. The decision of the Vice-Warden must therefore be reversed.

It may be proper to add that, although it has been unnecessary, for the purposes of this appeal, to advert to the question of the equity jurisdiction of the Vice-Warden of the Stannaries, I entertain no doubt whatever of its existence.

Order reversed, without costs.

APPENDIX.

[561] SLATTER *v.* SLATTER. (Vol. i. p. 30.)

The decision in this case probably proceeded on the particular terms of the instrument, which did not, as it appears, comprehend the statutory distributive share of the wife in the husband's effects. That a deed of separation between husband and wife is not void because it contains no covenant on the part of the trustee to indemnify the husband, or other valuable consideration, appears from *Frampton* v. *Frampton*, 4 Beav. 287. In that case Lord Langdale, M. R., said, "Laying out of consideration the agreement of the wife, as wholly inoperative, and admitting that this Court can in no way interfere to enforce a separation, yet, considering what has been done to enforce agreements between husband and trustee, though accompanied by a provision for separation, it does not appear to me that a voluntary assignment and declaration of trust can be vitiated by such a provision; and, without regard to any supposed contract, it would scarcely be just to say that, although a voluntary trust may be binding in other cases, it shall not be so in the case where a husband has, by creating such a trust, prevailed upon his wife to live apart from him, and waive the enforcement of her conjugal rights. The decision, in this case, goes far beyond the doctrine laid down in *Logan* v. *Birkitt*, 1 M. & K. 220, and some other authorities. In *Fitzer* v. *Fitzer*, 2 Atk. 511, referred to in *Frampton* v. *Frampton*, Lord Hardwicke recognized the validity of a voluntary separation deed, except as against creditors; "Against creditors," he observes, "every conveyance of the husband that is voluntary, and for his own benefit, is fraudulent." In the case before him the husband must have become insolvent soon after the execution of the deed of separation; (for the deed was executed in 1738, and the suit for enforcing it was heard in 1742); and there were other circumstances of a suspicious nature referred to in the judgment. His Lordship, therefore, held the deed to be inoperative as against the creditor of the husband, though his debt was subsequent to the execution of the deed; but decreed that the [562] trusts of the deed be performed in favour of the wife as against the husband.

COATES *v.* STEVENS. (Vol. i. p. 66.)

See *Sidmouth* v. *Sidmouth*, 2 Beav. 449; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Thorpe* v. *Owen*, 5 Beav. 224.

PRICE *v.* ASSHETON. (Vol. i. p. 82.)

See *Rickards* v. *Rickards*, 2 Y. & C. C. C. 419, affirmed by Lord Lyndhurst, C., on appeal. Sir Francis Simpkinson has kindly called the reporter's attention to an important difference between Melmoth's statement of the case of *Hyde* v. *Skinner* (referred to in argument in the principal case), and that of Peere Williams. In Melmoth's MSS. the case is stated thus:—

L. C. 11th Nov. 1723. *Hyde* v. *Skinner*.

"The defendant made a lease to William Hyde, plaintiff's late husband, of a house in Enfield, for five years, at £35 a year, and therein covenants (inter alia) that he, his executors, administrators, and assigns, should, within twelve months before the end of the lease (if thereto required by the said William Hyde), execute to the said William Hyde a further lease of the premises under the like covenants and at the same rent as were therein contained, for such further term as the said William Hyde should then desire.

"Mr. Hyde died before the expiration of the lease, and plaintiff, being his executor, gave notice within the time limited by the lease for a further term of 50 years, and

now brought his bill to have a specific execution of the covenant, and a lease for 50 years pursuant thereunto.

"The defendant insisted the covenant was personal only, and that, Mr. Hyde being dead, defendant was not obliged to make a new lease to his executor.

"But Lord Chancellor was clear of opinion that the plaintiff was entitled to the benefit of the covenant, and decreed the defendant to make a new lease to plaintiff, at the same rent and under the same covenants as were contained in the old lease, except the covenant for renewal, which was to be omitted; but this lease was to be made for twenty-one years only: for though the covenant was general that a lease should be granted for such further term of years as Mr. Hyde should desire, yet that must have a reasonable construction." Melmoth's MSS. D. 113.

[563] The accuracy of this statement is borne out by the entry in the registrar's book, and seems to deprive Lord Hardwicke's observation in 3 Atk. 88 of much of its force.

SPARKE *v.* MONTRIOU. (Vol. i. p. 103, 3rd Marginal Note.)

See *Hardman* v. *Ellames*, 2 Myl. & K. 745; *Adams* v. *Fisher*, 3 M. & C. 549. But see also Wigram on Discovery (2nd ed.), p. 295 et seq.

BARNES v. STUART. (Vol. i. p. 123.)

This construction of the stat. 3 & 4 Will. 4, c. 42, s. 26, is supported by *Oliver* v. *Latham*, 1 Phill. 408; see p. 420. See also *Holden* v. *Hearn*, 1 Beav. 445.

BELLWOOD *v.* WETHERELL. (Vol. i. p. 219.)

Stated also in Wigram on Discovery, 284. The statement contained in the judgment of Lord Abinger, of the case of *Bolton* v. *The Corporation of Liverpool*, is applicable only to that case as decided by the Court below, and not as decided on appeal. See 4 Y. & C. 153, correcting this statement, and also correcting 2 Y. & C. 39.

WHITBREAD *v.* JORDAN. (Vol. i. p. 303.)

This has been considered an extreme case; and, although the correctness of the decision itself has not been impugned, the principles upon which it proceeds appear to be doubted by a learned writer. Sir Edward Sugden, in his Vend. and Purch., pp. 1053, 1054 (11th ed.), after quoting the judgment, from the words "when a party having knowledge," p. 328, to the words "sought not after it," p. 329, says, "This, however, is an extension of the rule, which we should be cautious how we act upon in practice." He then observes that "the rule of equity, not to relieve against a purchaser having the legal estate, is not confined to a prudent or wary purchaser, but to a bonâ fide one without notice;" and that "it could hardly be maintained that a deposit of deeds is of itself implied notice to a subsequent purchaser or mortgagee, who, acting bonâ fide, but not cautiously, does not inquire after the deeds." And these observations, as applicable to *Whitbread* v. *Jordan*, seem to be adopted by Sir James Wigram, in *Jones* v. *Smith*, 1 Hare, 66. Sir Edward Sugden, however, says, in a subse-**[564]**-quent passage, that his observations "do not apply to a case where no inquiry is made, in order that the fact of the deposit might not be disclosed." But was not that precisely the case of *Whitbread* v. *Jordan?*—unless, indeed, it be suggested (which has not been done) that the negligence, upon which the learned judge relied, was not gross. In *Jones* v. *Smith* (on appeal), 1 Phill. 255, Lord Lyndhurst appears to have taken a clear view of the grounds on which the principal case was decided. His Lordship says, "It appears to me that that case was decided on the ground that the learned judge was satisfied that the transaction was not bonâ fide, and that the party had purposely abstained from making inquiry, the money being advanced for securing a pre-existing debt; that, in short, there was wilful blindness. That was evidently the impression on the mind of the learned judge; but he said that, even if it were not so, the facts of the case were such as to amount to negligence of so gross a nature that it would be a cloak to fraud if it were permitted."

The other branch of the principal case, namely, that which relates to the production of the vendor's copies of court roll, is one of considerable importance. It has

been said by an intelligent writer (see Jarman's Conveyancing, by Sweet, vol. 9, p. 10), that the case of *Whitbread* v. *Jordan* seems to have been deprived of its value as an authority by the doctrine laid down by Lord Lyndhurst, C., in *Cooper* v. *Emery*, 1 Phill. 390. The accuracy, however, of this conclusion seems doubtful. Lord Lyndhurst says, "Another question is whether the purchaser is entitled, in this case, to a covenant for the production of copies of the court rolls. If the vendor has these copies, or if they are in his power, he is bound to produce them; but if not, I think the purchaser is not entitled to call for a covenant to produce them; because he may at any time resort to the rolls themselves, and make use of them in evidence." Now, it is conceived that, in the principal case, the copies of court roll which had been pledged by Jordan to Whitbread were, in the sense intended by Lord Lyndhurst, in the power of the mortgagor; and, consequently, that, if they had been called for by Boulnois, Jordan would have been legally bound to produce them; and an endeavour to enforce that obligation would have led to a discovery of the real facts of the case. Although Lord Lyndhurst's observations in *Cooper* v. *Emery* are of a general nature, yet, when put in connexion with the circumstances of that case, it can scarcely be considered that his lordship intended to lay down any universal rule on the subject. In the case before him, the copies of court roll which were demanded were not those of the vendor himself, but of a previous owner; the estate having been en-**[565]**-franchised in 1799, by means of a deed which recited that the then copyhold owner was seised in fee according to the custom. Moreover (if the statement in the argument be correct, see 8 Jurist, 181), the property comprised in the contract formed a small part only of the property comprised in the copies of court roll; so that the presumption was that they had gone into the possession of the parties who owned the larger portion of the property—a circumstance which (whether or not, according to strict practice, it relieved the vendor from his obligation to procure or to covenant for the production of those copies) was sufficient to clear his title from all suspicion arising from his non-possession of them.

Upon these grounds it is conceived that the observations of Lord Lyndhurst in *Cooper* v. *Emery* are entirely consistent with the principles contained in *Whitbread* v. *Jordan;* but, supposing it to be otherwise, those principles seem clearly to accord with other authority. In order to prove title to copyholds, it is not necessary to produce the original rolls; it is sufficient to produce a copy of a court roll under the steward's hand, or an examined copy of the court roll if sworn to be a true one. See B. N. P. 247 a. (7th ed.), and the cases there cited; and see *Doe d. Cawthorn* v. *Mee*, 4 B. & Ad. 617. The original reason of this seems to have been the inconvenience of producing the rolls themselves, and thence has arisen a general usage on the subject: *Rex* v. *Hains*, Comb. 337. Practically, therefore, it should seem that the vendor's copies of court roll are part of his title-deeds, and ought (in the ordinary course of things, and independently of any question of fraud) to be handed over to the purchaser, if the vendor has the possession of them, or, if he has not the possession of them, be made the subject of a covenant for production. And until Lord Lyndhurst's decision in *Cooper* v. *Emery* Sir Edward Sugden seemed to be of this opinion. His words were, "When the estate is copyhold, and the purchaser is not entitled to the custody of the copies of court roll, he is entitled to a covenant to produce them, and it has been usual to require attested copies of them." As a reason for this statement, he added that the court rolls, though of a public nature, were not only not strictly records, but were in a private custody, and that although the inspection of them by a copyholder might be enforced, yet it might be necessary to resort to the Court of King's Bench for that purpose. See Sugd. V. and P. (10th ed.), vol. ii. p. 120. See also the observations in Sweet's edition of Jarman's Conveyancing, vol. ix. p. 10. See, however, now, V. and P. (11th ed.), p. 476, referring to *Cooper* v. *Emery*.

[566] HIPWELL *v.* KNIGHT. (Vol. i. p. 401.)

See the observation of Sir Edward Sugden on the third marginal note of this case; V. and P. 11th ed., p. 283.

BLAKE *v.* WHITE. (Vol. i. p. 420.)

See Mr. Cooper's note upon the law of Principal and Society; C. P. Coop. Rep., pp. 569, n., 572; and see Pitman on Principal and Society, 168, n.

LORD CAWDOR *v.* LEWIS. (Vol. i. p. 417.)

See the observation of Lord Cottenham on the second marginal note of this case; Cr. & Phill. p. 180.

TREDWELL *v.* BYRCH. (Vol. i. p. 476.)

See *Lautour* v. *Holcombe*, 7 Jur. 97; *Attorney-General* v. *Compton*, 1 Y. & C. C. C. 417.

PROSSER *v.* EDMONDS. (Vol. i. p. 481.)

See *Hunter* v. *Daniel*, 4 Hare, 420.

WILMOT *v.* CORPORATION OF COVENTRY. (Vol. i. p. 518.)

In the marginal note of this case, for "expressed" read "expected." See *East London Water Works Company* v. *Bailey*, 4 Bing. 283. As to a corporation seised in fee of lands to their own use, and not for charitable purposes, binding themselves and their successors by a consent to a decree of a court of equity, see *Attorney-General* v. *Warwick*, Hill's MSS. vol. xiv. p. 48.

PILKINGTON *v.* HIMSWORTH. (Vol. i. p. 612.)

See *Wilton* v. *Clifton*, 2 Hare, 535.

GLYN *v.* SOARES. (Vol. i. p. 653.)

Reversed in the House of Lords; see 7 Cl. & Finn. 466. The ground of reversal seems to be comprehended in the following ob-[567]-servations of Lord Cottenham, namely, that "bills of discovery, in aid of the defence to an action, are permitted for the purpose of obtaining from the antagonist at law the discovery of matter, which, being admitted by him, may aid the defence; and not for the purpose of procuring evidence." A similar observation was made by his Lordship in the case of *Kerr* v. *Rew*, 9 Law Journ. 50, in which a bill of discovery in aid of a defence to an action at law was brought by underwriters against both the party effecting the insurance and the party interested, the latter not being a party to the record at law; and the demurrer of the latter was allowed. It seems, therefore, to be now settled that, except in the particular cases mentioned by Lord Eldon in *Fenton* v. *Hughes*, 7 Ves. 289, no person can be made a defendant to a bill of discovery in aid or defence of an action who is not a party to the record at law. See *Balls* v. *Margrave*, 3 Beav. 448. As to what was the practice in the Court of Exchequer in relation to bills of discovery by underwriters, see the note to *Price* v. *Chippendale*, ante, p. 470.

BROOKSBANK *v.* SMITH. (Vol. ii. p. 585.)

See *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

BRADSHAW *v.* BRADSHAW. (Vol. ii. p. 72.)

See *Doe d. Hiscocks* v. *Hiscocks*, 5 Mee. & W. 363.

Upon the subject of misdescription of the legatee, as well as upon some other points, the following case, which the reporter has extracted from Jodrell's notes, vol. 2, p. 134 (Hargr. Coll.), may be acceptable. The case is cited upon one point in 2 Ves. jun. 564; 3 Atk. 257; and 19 Ves. 125.

Tomkins v. *Tomkins*. In Chan., H. T., 1743.

The testator, William Tomkins, by will, gave 200l. to his brother Joseph, and afterwards gave him his brewhouse and utensils, and all the rent that should happen to be due upon it, in trust for the benefit of his eldest son, Benjamin, till he should attain twenty-one; but if he died before twenty-one, then he gave it to his second son, Joseph. Then he gave 50l. apiece to each of his other children, and made his

brother Joseph executor; giving legacies to all his next of kin, and particularly 20l. to his sister, by the name of his "sister Benjamin;" and to her three children, 50l. each; and died without making any [568] disposition of the surplus. The testator had no sister Benjamin, but the wife of his brother Benjamin, and she had four children.

Upon this will, very inaccurately drawn, several questions arose as to what interest Benjamin took in the brewhouse; whether Joseph, the second brother, came within the description of "other children," whether the brother's wife thus described could take; and also what would become of the surplus (there being legacies given to all the next of kin, as well as to the executor); and whether all the children could take 50l. each.

LORD CHANCELLOR. As to the first question, this is a very inaccurate will; but, as to the legacy given to his sister Benjamin and her children, I think the description sufficient, brothers' wives being often called by their husbands' Christian names for the sake of distinction; and as it has been agreed that the legacies should extend to the fourth child, it is not necessary to give any opinion upon it, though I should have thought it a favourable case for all the children. Had the testator expressed it to "all" her three children, this would certainly have taken them all in, and the word "three" must have been rejected as repugnant. In the present case, indeed, the word "all" is not used, but "her children" are indefinite words, and to be construed universally; and, were they not to extend to all, the legacy would be void for want of knowing which of the three should take and which be excluded.

As to the second question, the next and principal question is upon Benjamin's interest in the brewhouse; whether the words "till he shall attain twenty-one" are to enure as a limitation of his interest in the brewhouse, or only of the continuance of the trust in the trustees; the will not fully explaining the testator's intent, which must therefore be supplied by construction. Now, I think these words are to be considered only as a limitation of the continuance of the trust. The rent devised must mean the arrears of rent due at the testator's death, for he could never mean that the arrears, which might be but one-fourth part of a year's rent, should be subject to the contingency; and the giving the brewhouse over upon one contingency shews that, if that contingency did not happen, the testator meant that Benjamin should retain it. He was giving something to every one of his family: but if Benjamin is not to hold this lease after his age of twenty-one, he will have given nothing to the person whom he seems to have principally regarded, and this lease must fall into the residue of the personal estate, and go to persons to whom he certainly did not intend it to go. Besides, a very small transposi-[569]-tion makes the matter clear; for, if this lease had been given to the use and benefit of his eldest son Benjamin, in trust till he came to twenty-one, there would not have been the least doubt of the testator's intent. I therefore think the dying before twenty-one is the only contingency upon which this interest is to be taken out of Benjamin.

As to the third question, whether the devise to the other children of his brother Joseph shall exclude Joseph, the contingent legatee, I think it shall not, as meaning only other than the eldest son, Benjamin; for nothing is given Joseph, the son in possession, and he ought, therefore, to be considered as one of these other children.

As to the fourth question, I think the legacy devised to the executor Joseph excludes him from the surplus of the personal estate, the late cases having gone further than the former did on this head. That of *Foster* v. *Munt*, 1 Vern. 473, has been sometimes said to have been determined on the fact of fraud, but it does not appear from the proofs in that cause that any fraud was made out; and there it was first established that a legacy to an executor for his care and pains excludes him from any further benefit, it being plain, in such case, that he is intended only as a trustee. It was afterwards held that a legacy given generally to an executor would have the same effect, because the testator could not intend to give him all and some, though, were that point to be settled de novo, there might be some reason for a different determination, as a legacy to the executor might be intended only to put him upon a par with the other legatees, that, in case of deficiency of assets, he might still be sure of something in proportion with the others. But the law is now settled. Nor has the giving a legacy to the next of kin been suffered to preclude them from the residuum, where the executor has had a legacy given him likewise. In some of the cases, legacies have been given to some of the next of kin, in others to all, which have not yet

excluded them from the surplus, their right being founded upon an equity arising from the Statute of Distributions, and they taking by way of succession ab intestato, as the heir-at-law takes all such parts of the real estate as are undisposed of. I am therefore of opinion that the surplus in the present case must be divided amongst the next of kin.

LIVESAY *v.* REDFERN. (Vol. ii. p. 90.)

See *Hills* v. *Wirley*, 2 Atk. 605.

[570] WRAGG *v.* DENHAM. (Vol. ii. p. 117.)

Richards v. *Morgan*. March 17, 1753. Upon exceptions.

Lord Chancellor said that a mortgagee in possession ought to do such repairs as he can repay by the rents of the estate after his interest paid, but he need not rebuild or lay out large sums beyond the rent, for that would be to lend more principal money, upon, perhaps, a deficient security.

[De Grey's Notes, Harg. Coll., No. 471, p. 227.]

HALL *v.* GODSON. (Vol. ii. p. 153.)

Affirmed, with some variations. See 7 Cl. & Finn. 759.

HALL *v.* WHEELER.

Affirmed. See 7 Cl. & Finn. 761.

HALL *v.* CLEE.

Affirmed. See 7 Cl. & Finn. 744.

PRIOR *v.* HORNIBLOW. (Vol. ii. p. 200.)

The decision in this case, as to the effect of the stat. 3 & 4 Will. 4, c. 27, upon the bequest of a residue, was followed (with some hesitation) by Knight Bruce, V. C., in *Adams* v. *Barry*, 2 Collyer, 290.

NYSSEN *v.* GRETTON. (Vol. ii. p. 222.)

See *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695.

DAVIES *v.* THOMAS. (Vol. ii. p. 234.)

See the observations on this case in Sug. V. & P. (11th ed.), p. 879.

The following case, upon the subject of notice of a charge, seems to have a place here:—

Morlin v. *Webb*. In Chan., 4 Nov. 1738.

Edmund Webb made his will, and (inter alia) devised his real estate to Serjeant Webb and one Smith, subject to the payment of his debts and legacies.

[571] Testator died in 1706. Serjeant Webb and Smith, in 1708, made a mortgage for 1500l. to A. B. of the real estate so devised; and in the mortgage deed it was recited that it was found necessary to raise 1500l. for payment of the testator's debts and legacies.

The legatees of Edmund Webb brought their bill in this Court against the mortgagee and others to be satisfied their legacies, and, in case of a deficiency of assets, to have preference of the mortgagees, as having notice of the legacies at the time they lent their monies.

A question arose before the Court, whether the mortgages should have preference or not.

LORD CHANCELLOR. This is a case of a mixed nature, and the rule generally is, where an estate is given to be sold by trustees for payment of debts set down in a

schedule, the purchaser is obliged to see to the application of the monies towards payment of the debts; but where the debts are not particularised, it is otherwise. In the present case the legacies certainly appear. But the debts are to be paid generally; nor can the purchaser know the testator's creditors: and, as they are to be first paid, and the trustees cannot pay the monies without sale or mortgage of the premises, the mortgages ought in the first place to be satisfied before the legacies are paid, which were charged on the premises.

[Capper's Notes, A. 1, p. 181, Hargr. Coll.]

NEATE *v.* LATIMER. (Vol. ii. p. 257.)

Affirmed. See 4 Cl. & Finn. p. 570.

GREGORY *v.* GREGORY. (Vol. ii. p. 313.)

The following important case, bearing upon the subject of the principal case, has been furnished to the reporters by Mr. Bevir:—

Stiles v. *Guy.* In Excheq., 17 & 18 Nov. & 14 Dec. 1832.

A testator gave all his real and personal estate to his executors, A., B., and C., upon certain trusts; and he directed them, as soon "as conveniently might be after his decease," to get in "such parts thereof as consisted of book debts and securities for money not approved by them." The will contained a clause indemnifying the trustees against the acts, &c. of each other. A., B., and C. all proved the will; but B. and C. left the management of the trust to A., who was an attor-**[572]**-ney in great credit, and had from time to time been entrusted by the testator with large sums of money, which were allowed to remain in his hands, and for which the testator was in the habit of drawing upon him, he allowing interest on the balance. At the testator's death, the balance in A.'s hands was 10,000l., which was secured by his promissory notes and accountable receipts. B. and C. never took any steps to enforce payment of this sum from A., who, six years after the testator's death, became bankrupt: Held, that, by proving the will, B. and C. had accepted the trusts, and were liable to make good the loss occasioned by A.'s bankruptcy.

In proper interpretation, a promissory note is not a "security."

It was alleged by B. and C. that some of the cestuis que trust had acquiesced in the money being allowed to remain in A.'s hands: Held, that, if such were the fact, they had no ground of complaint.

A.'s bankruptcy did not occur until after he had put in his answer to the original bill, whereby he admitted a sum to be due from him, which sum he was ordered to pay into court. This order was subsequently enlarged, without, as B. and C. alleged, any communication with them, and the money was thereby lost: Held, that if such were the fact, they were not liable for that sum.

B. and C. joined in signing a receipt for mortgage-money, which was paid to A.: Held, that they were not liable for his misappropriation of this sum.

John Tuckey, by his will, gave, devised, and bequeathed all his property, real and personal, to the defendants, Anthony Guy, Richard Tuckey of Haydon, and Richard Tuckey the younger (whom he also appointed his executors), upon trust, as soon as conveniently might be after his decease, "to sell and convert into money all such part or parts thereof as should not consist of monies or securities for money, and to call for, receive, and get in all such part or parts thereof as consisted of book debts or securities for money not approved by them;" and to apply the proceeds upon certain trusts, under which the plaintiffs were entitled to a share therein. The will contained a proviso that neither of the trustees should be answerable or accountable for any more of the trust monies than what they should respectively actually receive by virtue of the will; neither should any one of them be charged, or chargeable with, or answerable for the receipt or receipts of the other or others of them, but each for his own acts, receipts, and wilful defaults only; nor should they, or any or either of them, be answerable or accountable for the insufficiency or deficiency of any security or securities wherein any part of the trust monies should or might be invested; nor should they,

or any or **[573]** either of them, be answerable or accountable for any involuntary loss of all or any part of the trust monies, but should be acquitted and saved harmless in respect of all such acts, matters, and things as should be done by them, or any of them, in pursuance of the will, and in the management and execution of the several trusts thereby in them reposed. The testator died in the month of September, 1829; and his will was proved by the three executors. The management of the trust affairs was left by the other trustees to the defendant A. Guy, who was an attorney, and up to the time of his bankruptcy, in the year 1829, was in very good credit in the district where he lived, and was in the habit of receiving from various persons large sums of money, acting as their banker, paying what was necessary for their occasions, and allowing interest on the balance. It appeared that he had enjoyed the entire confidence of the testator, who entrusted him with the possession and investment of monies belonging to him to a very large amount, and was in the habit of dealing with him as his banker, from time to time paying to him, and allowing him to receive, monies belonging to him, and drawing monies from him, and leaving large balances in his hands, upon which Guy allowed the testator interest. At the time of the testator's death, the balance in Guy's hands amounted to upwards of 10,000l., for which the testator held his notes of hand and accountable receipts. The defendants Tuckey never took any steps to enforce payment from Guy of this sum. They had, however, frequently called on him for accounts, which he had promised, but neglected to furnish, and they were about to institute a suit against him, to compel him, to come to an account, when the present bill was filed by the plaintiffs against them and the other cestuis que trust, for a general administration of the testator's estate. In December, 1829, shortly after he had put in his answer to the original bill, the defendant Guy became bankrupt, and the principal question was whether the defendants Tuckey were responsible for the loss which the estate had sustained in consequence of his bankruptcy. They alleged, by their answer, that some of the cestuis que trust, including the adult plaintiff, had, to some extent, acquiesced in the money being allowed to remain in Guy's hands.

Guy, by his answer to the original bill, admitted the sum of 6100l. to be due from him to the estate, and the plaintiff obtained the usual order for payment of that sum into Court. This order was subsequently enlarged, without, as the defendants Tuckey alleged, any communication with them, or consent on their part; and they insisted that the money was thereby lost, and that they ought not to be held liable for it.

[574] It appeared that the defendants Tuckey had executed a re-conveyance of an estate which had been mortgaged to the testator by one Garratt for 1500l., and that they had signed a receipt for the mortgage money, which had, in fact, been received by Guy; and they contended that they were not liable for this sum, inasmuch as they had joined in the re-conveyance, and signed the receipt, merely for the sake of conformity.

Mr. Swanston and Mr. Wilbraham, for the plaintiffs.

Mr. Simpkinson and Mr. Parry, for the defendant R. Tuckey of Haydon.

Mr. Treslove and Mr. Wigram, for the defendant R. Tuckey the younger.

Mr. Ellison, Mr. Benson, Mr. Pitman, Mr. Blunt, Mr. Jeremy, and Mr. Wood, for the other defendants.

Cases cited for the plaintiffs: *Walker* v. *Symonds*, 3 Swanst. 1; (and see p. 62, where Lord Eldon disapproved of *Harden* v. *Parsons*, 1 Eden, 145, and cases in notes, 3 Swanst. pp. 78, 80, 84); *Terry* v. *Terry* (Prec. Ch. 273; S. C., Gilb. Eq. Rep. 10); *Wilkes* v. *Stewart* (Coop. 6); *Langston* v. *Ollivant* (id. 33); *Eagleton* v. *Kingston* (8 Ves. 438, 467); *Mucklow* v. *Fuller* (Jacob, 198).

For the defendants Tuckey: *Attorney-General* v. *Randell* (21 Vin. Ab. 534) *Balchen* v. *Scott* (2 Ves. jun. 678); *Hovey* v. *Blakeman* (4 Ves. 596); *Lord Shipbrook* v. *Lord Hinchinbrook* (11 Ves. 252; 16 Ves. 477); *Brice* v. *Stokes* (11 Ves. 319); *Langford* v. *Gascoyne* (id. 333).

Dec. 14th, 1832.—LORD LYNDHURST, C. B. Courts of equity have always been extremely tender towards trustees, and anxious to protect them, as far as possible, where their conduct has been fair and bonâ fide. In this case, independent of the particular provisions of the will, there was great negligence on the part of the trustees. If the debt had not been due from a co-executor, but from a third person, no doubt can exist but that the suffering a debt of this amount to remain outstanding on the mere personal security of the debtor would be extremely reprehensible, and an act of

great negligence on the part of the trustees. In principle, there is no difference in the situation of things, [575] and in the duty of an executor, whether the debt was due from a stranger or from one of the co-executors. It is, however, unnecessary to decide this case upon the general duty of executors, because it appears to me that the language and directions of the will are extremely precise. It appears to me to be impossible, by any interpretation of the will, to consider that the terms, "so soon as convenient after the death of the testator," could be satisfied, by extending the time to so long a period as six years. The executors, by proving the will, took upon themselves, and accepted the trust, and were bound, therefore, to discharge the duties they voluntarily imposed upon themselves: and, not having called in the money "as soon as convenient after the death of the testator," but having suffered it to remain in the hands of Guy upon personal security, they have not done that which, in their situation, their duty imperatively required. This case does not rest upon general reasoning; but it has been, in principle, decided by the case of *Mucklow* v. *Fuller* (Jac. 198), a case which was not decided hastily, but after much consideration, in the first instance, by the present Master of the Rolls, when sitting as Vice-Chancellor, and afterwards, on the revision of the case by Lord Eldon, upon appeal from the decision of the Court below. That case was in principle the same as the present, and the facts were not very dissimilar. [His Lordship stated the case of *Mucklow* v. *Fuller*.] It seemed to be admitted, in the course of the argument in the present case, that *Mucklow* v. *Fuller* strongly pressed against the present defendants. It was said, by way of distinguishing that case from the present, that one particular sum only was there mentioned, and that a particular period was limited within which the duty was to be performed. These circumstances do not materially distinguish this case from the other; and one particular sum only being mentioned cannot make any essential difference. Here the sum must have constantly attracted the attention of the trustees from its magnitude; and the period of three years does not distinguish between that case and the present question, in my construction of the present will. The terms are, "as soon as convenient after the death of the testator;" the Court will not put a strict construction upon these terms, but it is impossible to put such a construction upon them as would override a period of six years. It appears to me that *Mucklow* v. *Fuller*, in principle and circumstances, corresponds with the present case. But it was thrown out in argument, that that case stood by itself, and that there was no other similar decision in the books. This did not [576] impugn the decision in *Mucklow* v. *Fuller*, unless there was some contradictory decision. There is no decision at variance with it, and it is impossible not to subscribe to the principle there laid down. But it was said that a certain degree of discretion was given to the trustees; that they were "to call in such part of the property as consisted of book debts and securities that were not approved of by them;" and that, in the present instance, the debt was secured by two promissory notes. But a security by promissory note is, in proper interpretation, no security at all—it is merely evidence of the debt; and of so little value does this Court consider such securities that, if a testator directed his trustees to lay out money in securities approved of by them, and they were to invest such money on the mere security of a promissory note, it would be such a breach of trust as to render the trustees liable for the amount of any loss that might be sustained. It appears to me that, if the case rested here, I must make a decree charging those parties with the loss sustained in consequence of the bankruptcy of Guy.

But the case does not rest here. It is suggested in the answers that, to a very considerable extent, most of the parties interested, and the plaintiff himself, to a certain point, acquiesced in what was done by the trustees. Now, if they did so acquiesce, they have no ground of complaint whatsoever. It therefore appears to me that, before any decree can be pronounced, there must be an inquiry for the purpose of ascertaining whether they really did know what the trustees had done or neglected to do; whether they acquiesced in the course that was pursued, and, if so, to what period; and, if the defendants require it, there must be such an inquiry as was suggested in the case of *Mucklow* v. *Fuller* (Jac. 202), whether or not the debt could at any time have been recovered.

The case does not rest here; for, after the bill was filed, an order was made for the payment of the money into court. It is suggested that this order was enlarged, without any communication with the defendants, and without their consent; and it was further said that, in consequence of that enlargement, the money was lost. It is

said that, if the original order had been enforced, the money would have been paid: if, therefore, the loss has been occasioned by the act of the plaintiff, without any sanction or approbation on the part of the defendants, it is not reasonable that the defendants should be held accountable. There must be an inquiry, therefore, into that fact.

The form of the order will be: Inquire whether any, and which **[577]** of the adult parties acquiesced in the debt being left outstanding in the hands of Anthony Guy, and if so, up to what time; and whether, if the defendants Tuckey had taken measures to call in the debt so due from Guy to the testator, it might or could have been recovered; whether the enlargement of the order for paying the money into court was made without the knowledge or consent of the defendants R. Tuckey of Haydon and R. Tuckey the younger; and whether, if such enlargement of the order had not taken place, the money might or could have been recovered: with liberty to state special circumstances. Independent of this part of the case, there is another point relating to a sum of 1500l., paid in respect of Garrett's mortgage. It appears that the receipt was signed by R. Tuckey of Haydon, at the time of payment, and by the other defendant after; and it appears, also, that the two Tuckeys joined in the re-conveyance. This circumstance is not sufficient to affect them with relation to this sum of 1500l.; they merely performed acts which were necessary to be done, and the money was paid to and received exclusively by A. Guy, in their absence. There must be a declaration, therefore, that the defendants are not liable for this sum.

CROPPER *v.* KNAPMAN. (Vol. ii. p. 338.)

See *Law* v. *Law*, 2 Collyer, 41. Bill by a creditor against an executor and a debtor to the estate, sustained; the executor being out of the jurisdiction, and the debtor possessing assets. *Henriques* v. *Roderiques*, Melm. MSS. D. p. 273.

MILLS *v.* CAMPBELL. (Vol. ii. p. 390.)

The word "not" appears to be omitted in the third line of the argument for the defendant.

THORPE *v.* MATTINGLEY. (Vol. ii. p. 421.)

Reversed. See 7 Cl. & Finn. 137. Upon a dictum in the judgment in this case, see *Fellowes* v. *Clay*, 4 Q. B. R. 313, 343.

DOWBIGGEN *v.* BOURNE. (Vol. ii. p. 462.)

Mr. Cooper, in the Appendix to his Reports, complains of the judgment in this case. See C. P. Coop. Rep. Appendix, 645. See *Armitage* v. *Baldwin*, 5 Beav. 278.

[578] EX PARTE ELLISON. (Vol. ii. p. 528.)

See *Box* v. *Box*, 1 Drury, 42.

GOULBOURN *v.* BROOKS. (Vol. ii. p. 539.)

Neale v. *Willis*. In Chan., 17 May, 1740.

Thomas Brignet, being seised and possessed of a considerable real and personal estate, made his will in 1730, and thereby, amongst other things, gave to his nephew, John Neale, 600l., to be laid out by and in the name of his executors in the purchase of some advowson or other spiritual preferment for him, and that the executors should place out the 600l. at interest as soon as conveniently might be after his decease, until such spiritual preferment could be had; and the testator directed, if he should lend his nephew John any monies by note or bond, that it should be deducted out of the 600l.; and that, if there should remain any surplus after paying such preferment, such surplus should go to his nephew; and he gave other legacies to two other nephews, Robert and Thomas Neale, payable at different times. And then came the following clause on which the question arose: viz., that if his nephews John, Robert, and Thomas Neale, or any of them, should happen to die before their respective or

several legacies became payable, then the legacies of him or them so dying should not be paid, but fall into the residuum of his personal estate; and he made Thomas Brignet (residuary legatee) and A. B. executors, and died May, 1732. His nephew John was then in priest's orders, and died April, 1733, having made his will; and the plaintiff, as his representative, brought her bill to have the legacy paid, with interest, from the death of Thomas Brignet, the testator.

Attorney-General, Cruys, and Murray, pro quer.; and Brown, for defendant.

It was argued on the plaintiff's behalf that under the above circumstances the legacy was not lapsed, and that no part should go beside the legatee. The interest thereof is given to him as is the residue of the purchase-money; and if the legacy was payable before the death of the legatee it is a transmissible interest, and shall go to his representative; that it was not appointed to be paid at any certain time, and if an avoidance had been purchased and the legatee had died before presentation, the executor of the legatee should have presented. Further, if the legatee had elected that the money should not **[579]** be laid out, he might have come into this Court for it in case he had two livings before. So, if the next presentation or advowson had been bought, the legatee might have sold it.

LORD CHANCELLOR is of opinion that the legacy given to John Neale is transmissible to his executors. If John Neale had come into this Court for it, the executors, perhaps, might have insisted that the money should be laid out according to the testator's will.

But if John Neale had found an advowson to be sold on the testator's death, he might have demanded the monies to make such purchase, for no certain time of payment is directed by the testator. Any other construction would make it depend upon the will of the executors whether they would make more or less haste to purchase an advowson.

Decree the legacy with interest from the testator's death, and costs.

[Capper's Notes, A. 1, p. 246; Hargr. Coll.]

THORPE *v.* JACKSON. (Vol. ii. p. 563.)

See *Barker* v. *Buttress*, 7 Beav. 134.

MARFELL *v.* RUDGE. (Vol. ii. p. 566.)

The practice acted upon in this case does not prevail in the Court of Chancery.

The following case (ex relatione Mr. Shapter) may properly be introduced at this place:—

Watt v. *Evans.* In Exchequer, 3 July, 1834.

Payment of a substantial part of the purchase-money of real estates will not take a parol contract for purchase out of the Statute of Frauds.

A contract by parol was entered into fifteen years ago for the purchase of an estate for the price of 800l., and 50l. was paid. This did not take the case out of the Statute of Frauds.

LORD LYNDHURST, C. B. The balance of authority upon the cases was in favour of the contract not being taken out of the statute, although the payment was of a substantial or material part of the purchase-money, and so was the reasoning.

The two arguments were, first, the impossibility of drawing the **[580]** line between substantial and insubstantial; and, secondly, that the statute allowed earnest-money, or part payment of purchase-money, to be available in the case of personal estate, which negatived its being allowed to have that effect in the case of real estate.

To this argument it had been replied that it had proved too much; for delivery or part delivery of goods is expressly allowed by the statute to take a contract out of it, and yet it is not considered to negative the position that delivery of possession of real estate shall have the same effect.

But to this it is answered that, were not the delivery of possession of lands to take the case out of the statute, the purchaser would be led into difficulties and would be a trespasser.

Considering that there was a conflict of opinion, the Chief Baron dismissed the bill seeking to establish the contract, without costs.

STORY *v.* JOHNSON. (Vol. ii. pp. 586, 599.)

The *Anonymous case* in Brownlow, mentioned in argument, is thus commented upon by a learned writer:—"As far as can be gathered from the imperfect statement of this case, it should seem that, as between A. and the twelve, they took the moieties as tenants in common; and that the twelve, as between themselves, took their moiety as joint-tenants. The operation, therefore, of their feoffment and the re-infeoffment would be to make partition among themselves, quoad their own estate and interest, of the twelve tenements; and each would become seised of the tenement conveyed to him respectively by the feoffee, as tenant in common with A., in equal shares. In fact, every one of the twelve would, as between themselves, and putting A.'s share out of the question, be a separate proprietor of the tenement allotted to him respectively." [Allnatt on Partition, pp. 60, 61.]

DOMVILLE *v.* BERRINGTON. (Vol. ii. p. 723.)

See *Sidney* v. *Ranger*, 12 Sim. 118.

SHEFFINGTON *v.* WHITEHURST. (Vol. iii. p. 1.)

Affirmed. See 9 Cl. & Finn. 219.

SMALL *v.* ATWOOD. (Vol. iii. p. 105.)

See *Humphries* v. *Horne*, 3 Hare, 276.

[581] ATTORNEY-GENERAL *v.* LAMBE. (Vol. iii. p. 162.)

See *Smith* v. *Duke of Beaufort*, 1 Hare, 521.

KIRBY *v.* CARR. (Vol. iii. p. 184.)

See *Besch* v. *Frolich*, 1 Phillips, 172.

HALL *v.* LAVER. (Vol. iii. p. 191.)

See *Hall* v. *Laver*, 1 Hare, 571.

WILLIAMSON *v.* NAYLOR. (Vol. iii. p. 208.)

See *Phillips* v. *Phillips*, 3 Hare, 281.

BRETT *v.* GREENWELL. (Vol. iii. p. 230.)

Sir Edward Sugden declined to follow this case in *Napier* v. *Napier*, 1 Dru. & War. 407.

JONES *v.* MAUND. (Vol. iii. p. 347.)

The rights of creditors upon the change of firms, arising from the introduction of new members, seem to be well illustrated by the following case:—

Jones v. *Sutton*. In Chan., Jan. 1753.

Plaintiff, Jones, had lent to T. Gibson and John Jacob, in September, 1736, 1600l., on a declaration of trust of so much money owing to them from the estate of Benjamin Hoskins Stiles, and, on the 22nd October following, lent them 250l. on their note, and, in September, 1736, 400l. more on their note. John Jacob died in December 1737, and made Mr. Gibson executor of the partnership estate, and Mr. Gibson took H. Jacomb into the partnership, and the former debts were carried into the new partnership account; and, on the 15th February, 1737, plaintiff and Mr. Gibson settled an account. On 22nd May, 1740, it was computed what was due for the principal and interest on the two notes, and plaintiff paid

into the shop of Gibson and Jacomb so much more money as to make up the debt 2000l., exclusive of the 1600l. lent as above; and at the **[582]** bottom of the account Mr. Gibson wrote the following memorandum:—"Then settled the account with Mr. John Jones, the amount thereof due to him being 2000l., which is to carry interest at 4l. per cent. from this day. Witness my hand, for myself and H. Jacomb, 22nd May, 1740." And the two former notes for 250l. and 400l. were delivered up. H. Jacomb died the 31st May, 1743, and made Mr. Gibson executor of the partnership estate, and his wife, the defendant Frances Jacomb, executrix of his separate estate. Upon his death, Mr. Gibson took Richard Sutton into partnership, and the old partnership debts were carried into the new partnership account. Mr. Gibson died the 20th September, 1744, and also made two wills, the one of his partnership estate, and the other of his separate estate, and made the same executors of both wills, viz. Richard Sutton, Owenbridge Harwood, and Nathaniel Cole, and interest had been paid at eight different times to plaintiff for the 2000l. by Gibson in his lifetime, or by Sutton, after his death. Sutton became afterwards a bankrupt, and he never surrendered himself under the commission, and defendant Stephen Gibson is the assignee under the commission.

The bill is brought by plaintiff against the representatives of John Jacob, H. Jacomb, T. Gibson, and the assignee of Richard Sutton, to be paid the 2000l., with interest. It was argued by the plaintiff's counsel that the representatives of John Jacob ought to contribute towards satisfying the two sums of 250l. and 400l., and interest, and which were included in the said debt of 2000l., and that those debts were originally due from T. Gibson and J. Jacob, and were not extinguished by being brought into the account of the new partnership; for, where a debt is due by simple contract, the taking a note for that debt does not extinguish it, and it is not like cancelling a bond, for that is the only evidence of the debt, and when the specialty is destroyed the debt thereby is extinguished. If there is a joint bond, and one of the obligors dies, his estate shall not be discharged in equity until the bond is paid: *Bishop* v. *Church*, before Lord Chancellor: *Lane* v. *Williams*, in Vern. As to Jacomb and Gibson's estates there can be no doubt, for the demand still remains against them, and the security is unaltered.

It was insisted on for the defendants, the representatives of John Jacob, that he was in no way liable to satisfy the two sums of 250l. and 400l. The legal remedy was against Gibson only, and he possessed the partnership effects, which were sufficient at Jacob's death to pay all the then partnership debts. That new credit was given to Gibson and Jacomb, and the former notes were delivered up, and **[583]** interest was allowed to be paid upon a sum of 2000l. due from the new partnership. The new debt is allowed in the civil law: Dig. lib. 46, s. 2, l. 1, and Voet's Comment. upon the place.

The Court denied to charge the representatives of Jacob, and dismissed the bill as against them, but declared that the case was very different as to the representatives of Jacomb, for the stated account was still subsisting against them and F. Gibson, and nothing had been done by plaintiff to change the debt. Plaintiff received interest, indeed, for the 2000l., both from Gibson and Sutton, but each of them was the representative of Jacomb, whose estate had been increased by the debt. If a partner dies, the creditor has a right to come into this Court against the surviving partner and the representative of the deceased partner for a satisfaction. It has been said that the plaintiff has been guilty of laches in respect of his demand against the estate of Jacomb; but Sutton did not become bankrupt till 1747, and the bill was filed soon after. There was a case cited of *Pilgrim and Owen*, heard by himself, wherein it was said he inclined to fix the shop with all the credits given to it; but he never was of opinion that an old credit should be discharged when it was not meant by the parties; otherwise, in respect of a new credit given by a shop to new creditors; and all this is in aid of creditors and not of the debtors.

Court decreed satisfaction to be made out of the estates of Gibson, Jacomb and Sutton, for the 2000l. and interest.

[Capper's Notes, vol. i., p. 241, Harg. Coll.]

COOPER *v.* BYRON. (Vol. iii. p. 467.)

Reversed in the House of Lords, see 11 Cl. & Finn. 556.

TOWNSEND *v.* CHAMPERNOWNE. (Vol. iii. p. 505.)

See *Sidebotham* v. *Babington*, 5 Beav. 261.

WHITE *v.* HILLACRE. (Vol. iii. p. 597.)

The second marginal note in this case is erroneous, and not warranted by the judgment. The error arose from some observations which fell from the Court in the course of the argument, but which are not reported.

[584] EX PARTE BISHOP OF DURHAM. (Vol. iii. p. 690.)

This case, and others of the same description, relating to Railway Acts, have not been followed in the Court of Chancery. See *Ex parte Molyneux*, 2 Collyer, 273.

CAMPBELL *v.* DICKENS. (Vol. iii. p. 720.)

See *Brydges* v. *Branfill*, 12 Sim. 337.

CUDDEN *v.* CARTWRIGHT. (Ante, p. 25.)

Reversed in the House of Lords; see 8 Cl. & Finn. 766.

DENYS *v.* SHUCKBURGH. (Ante, p. 42.)

See *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

COMBE *v.* CORPORATION OF LONDON. (Ante, p. 139.)

The following are notes of entries relative to the case of *The City of London* v. *Thompson*, cited in the principal case:—

Amongst the Records of the Court of Exchequer (Pleas) in the Public Record Office in the custody of the Right Honourable the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, Orders, 1723.

The Term of Saint Hilary, in the 10th year of the reign of the Lord George, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, &c., and in the year of our Lord 1723:

Between the Mayor, Commonalty, and Citizens of the City of London, Plaintiffs, and Thompson and Others, Defendants.

Wednesday, the 29th day of January.—Upon motion of Mr. Bootle, of counsel with the defendants, and hearing Mr. Serjeant Stevens, of counsel with the plaintiffs, it is ordered that the aforesaid plaintiffs permit the defendants, or their agents, to inspect the orders (that is to say, in English, "bye-laws") of the city of London, and the acts of Common Council of the city aforesaid, and also the books of the **[585]** Cocket Office, and take copies of such orders (in English "bye-laws"), acts of Common Council, and of such entries in the books of the Cocket Office aforesaid as they shall desire, but at their own proper costs and charges.

Between the Same, Plaintiffs, and *the Same, Defendants.*

Same day.—Upon the motion of Mr. Serjeant Stevens, of counsel with the plaintiffs, and hearing Mr. Bootle, of counsel with the defendants, it is ordered that this cause shall be tried at the bar of this Court on Wednesday, the 6th day of May next coming.

DECREES. Trinity, 9 Geo. 1, 1723.

Mayor, &c. of London v. *Thompson*, 12th July.

Decree states that, in Michaelmas, 8 Geo. 1, the Mayor, commonalty and citizens of the city of London exhibited their bill against John Thompson and others, thereby setting forth that plaintiffs, the Mayor, &c., in Hilary, 10 Anne, exhibited bill against Gascoigne and others, thereby setting forth that in the City of London there had been time out of mind an office called the Cocket Office, for entering and certifying all sorts of corn, grain and other seed exported by water carriage from the port of London to parts beyond the seas, which office had been always enjoyed by plaintiffs and exercised by their deputies, who had constantly attended there, and duly executed the said office, and kept books for such entries and certificates. That the fees of the said office were and had been 12s. 6d. for cocketing every 100 quarters or greater quantity of corn or grain exported in one vessel; and, for less than 100 and more than half a hundred quarters exported in one vessel, 6s. 3d.; and if less, &c., the same passeth free of duty: which fees had been due to the plaintiffs for their pains and charges in executing the said office. That Gascoigne and others exported corn, &c., without paying the duty; and they prayed that defendants might discover the quantities and come to an account for them. Defendants denied the duty. Cause heard 2nd July, 1713, and a trial directed upon issues (same as those afterwards mentioned for this cause). Issues were tried at sitting after Trinity 1713, and verdict for plaintiffs; and afterwards final judgment was given, that defendants should account with plaintiffs for the duties.

Further shewing that Thompson, being a corn-factor, had since 1705 exported from the city, suburbs, liberties, and port of London, 600,000 quarters of corn and grain yearly, which he ought to have **[586]** cocketed; and praying that he might make a discovery of the quantities exported since 1705, and account with plaintiffs for duties.

Thompson denied there was such an ancient office, called Cocket Office, but admitted there was an office called the Lord Mayor's Office, which was erected to take cognizance of corn, grain and other seed imported at the port of London by water carriage, for which several small fees are payable to the Lord Mayor and some inferior officers of the city, but insisted there was no duty payable on the exportation; and he admitted he had exported without entering and certifying, and always refused to pay the said duty.

Further reciting that in Hilary, 9 Geo. 1, Thompson and others filed a cross bill against plaintiffs, thereby setting forth that the mayor had the care of all the corn imported by water carriage to the port of London, and that the office for such transactions had been anciently called the Lord Mayor's Office, in respect of which, and as a recompense to the officers attending same for the Lord Mayor's permit to unlade, and for the use of the city bushel, divers small fees time out of mind had been paid. That, for encouragement of tillage, act of Parliament had been passed to encourage export of corn, and corn had been exported from port of London and other ports, to parts beyond seas, without paying any duties, &c. That the Mayor, &c., of London, pretended there was an ancient office called the Cocket Office, &c. Whereas these plaintiffs charged there was none, and prayed a discovery of the defendants' books, and other matters in the bill prayed; and that the plaintiffs might be at liberty to try the right with the defendants to the office, &c. To which cross bill the mayor, &c., answered; and the two causes being heard together; and upon reading the two decrees of 2nd July, 1713, and 5th November, 1714, in the aforesaid cause, and several proofs in the original cause, the Court directed a trial at the bar of this Court upon the following issues:—

1st. Whether the plaintiffs in the original cause are entitled to a duty of 12s. 6d. for cocketing every 100 quarters, or any greater quantity of corn, grain, or other seed exported at one time in one vessel, from the port of London, or the city of London, or the liberties of the city of London, or the suburbs or out-parts of the said city of London, to be transported to parts beyond the seas.

2ndly. Whether the said plaintiffs in the original cause are entitled to a duty of

6s. 3d. for cocketing every less quantity than 100 quarters, and not less than half a hundred of corn &c., to be exported &c. (as the other).

[587] Hilary, 8 Geo. 1, fol. 171.

Mayor, &c. of London v. *Benjamin Gascoigne and Samuel Fitch.*

Reciting that, by order 15th November, 1714, upon the equity reserved upon the postea, and several orders made in the cause, it was then ordered that defendants should account with plaintiffs for the duty of 12s. 6d. for cocketing every 100 quarters or any greater quantity of corn, &c. (as before), and also for the duty of 6s. 3d. for cocketing of every lesser quantity, &c. That deputy-remembrancer made his report thereon, dated 8th January, 1721, and had found, &c. so much due from the defendants to the plaintiffs for cocketing of several quantities of corn and grain, by them exported from the port of London, and the liberties, suburbs, or out-ports thereof, beyond seas.

The Court decreed and ordered the report to be confirmed, and defendants to pay the amount found due, and costs.

Mayor of York v. *Pilkington.* In Chan. Dec. 1743. S. C. 1 Atk. 282.

This was a bill brought to quiet the plaintiffs in a right of fishery, in the river Ouse, of which they claimed the sole fishery, from one place to another, against the defendants, who, the bill supposed, claimed several rights, either as lords of manors, or as occupiers of adjacent lands, for a discovery, and account of the fish they had taken. To the relief of this bill there was a demurrer as being a matter cognizable at law.

Brown and Fazakerley, for defendants, insisted that this does not come within the rule and intention of bills of peace, because distinct rights in defendants; and therefore no issue can be formed that will conclude them; and therefore will not in its nature hinder a multiplicity of suits, which is the only reason why this Court entertains bills of peace and legal rights. That it differs widely from the cases of lords of manors and their tenants, and parsons and parishioners, where the right of one tenant is the right of all. That the bill likewise was improper, because the right has never been established at law against any one.

Attorney-General. This bill will as much establish a right as any bill of peace whatsoever. For one issue will not absolutely determine the right of all in any bill of peace, since verdict against one is not pleadable against another.

[588] The question and issue is whether the plaintiffs have a sole and separate right of the fishery for such a part of the river; not what rights the defendants have. General right, in the case of lords and tenants, is only established for the lords, but does not absolutely determine the right of all the commoners, because some may have a right by composition. So, in the case of tithes, separate persons may have separate exemptions from the general right of the parson, which is the only thing the bill of peace establishes. *City of London* v. *Perkins*, House of Lords. Decreed against the defendant without directing an issue, because the general right had been before tried against other persons, and found in right of the city for the duty claimed, and those defendants claimed no particular exemption. *Weeks* v. *Carter*, 1734. Bill brought by the lord of a manor, on a custom, for 6d. a load for all hay brought to his market, which was to be distributed—2d. to the scavenger, 2d. to the housekeeper against whose door the cart stood, and 2d. to the lord; to establish his right to which, this bill was brought against all the housekeepers in the market and the scavenger; and Lord Talbot directed an issue, which was found for the lord. Decreed accordingly.

Idle, same side, cited 1 Vernon, 266, 22.

Lord Chancellor. This case was argued before, and I was inclined to allow this demurrer; but I have since changed my opinion.

Two causes of demurrer.

1st. The distinct rights.

And it does certainly differ from the cases of lords and tenants, parsons and parishioners, where there is a general right, and a privity between the parties.

But there have been cases that have gone further, where there has been a general

right only claimed by the plaintiff, and no privity between plaintiff and defendants, nor any general right on the part of the defendants.

Of this nature are all the bills for duties, where several persons have been brought before the Court to establish the plaintiff's right; but though such bills, to avoid multiplicity of actions, have been brought, yet the defendants might make distinct defences.

I think, therefore, this bill is proper, and the rather, because it appears these are all the persons who have obstructed the plaintiffs, or claimed any right to do so.

If the plaintiffs have a general right to the sole fishery, it is a right against them all: and they may take advantage of these several **[589]** exemptions, if they have such, though the general right is tried and established.

Second cause of demurrer—

That this right has never been tried at law. But this rule has not always been held, and there have been a variety of cases both ways.

The cases are reported together in Precedents in Chancery, 530. *Duke of Dorset* v. *Girdler*, which was not a bill to establish the right, but to perpetuate the testimony; and there this objection was allowed.

But in the other case of *Bush* v. *Western*, which was to establish this right, this objection was overruled.

Demurrer must be overruled. [Ballow's MSS., 142, Harg. Coll.]

HALL *v.* LAVER. (Ante, p. 216.)

See *Hall* v. *Laver*, 1 Hare, 571.

COOKE *v.* BOWEN. (Ante, p. 244.)

See *Dowding* v. *Smith*, 3 Beav. 541.

WARBURTON *v.* VAUGHAN. (Ante, p. 247.)

See *Robinson* v. *Wood*, 5 Beav. 246.

CROPPER *v.* KNAPMAN. (Ante, p. 249.)

The case of *Talbot* v. *Rutledge*, which was cited by Sir F. Simpkinson, in the principal case, is thus stated in Capper's Notes:—

Talbot v. *Rutledge*. 17 Oct. 1747.

Plaintiff and defendant dealt in the lace trade as co-partners, and the bill was brought for a general account, and a decree pronounced for the purpose, with the usual directions. Defendant was sworn before the Master touching his receipts and payments, and on his examination in writing, wherein he acknowledged the receipt of some sums of money, but swore, in the examination, that he disbursed those sums at other times on account of the partnership dealings; and the Master, by virtue of that examination, charged the defendant with his receipts, and put him upon proving the discharge, **[590]** and there was no other proof than as above to charge the defendant. The defendant took the general exception to the Master's report; and, on arguing the exception in the presence of counsel on both sides.

LORD CHANCELLOR declared that the rule of the Court and courts of law, in reading an answer or examination against a party, is different. That the Court is too confined in its rule, and the courts of law are too large. That one part of an answer in this Court may be read against the party without reading the answer throughout, but at law it is otherwise; and if the judge at law considers that, though the whole of the answer is read, yet every part of the answer or examination is not of equal credit, the rule of law is to be preferred. In this Court, if a man is charged by a book or other writing, he shall also be discharged if the entries are made for that purpose therein; and so have been many cases relating to goldsmiths' and merchants' accounts; and this was allowed in a case relating to Sir Stephen Evance. But what is sworn by a man's answer or examination admits of a different consideration: as, if a man, by his answer, admits he received several sums at particular times, and, in the same answer

or examination, swears he paid away those sums at other times in discharge, he must prove his discharge; otherwise it would be to allow a man to swear for himself, and to be his own witness.

Court overruled the general exception, and confirmed the report.

[Capper's Notes, vol. 1, p. 219, Harg. Coll.]

KNIGHT *v* MARQUIS OF WATERFORD. (Ante, p. 283.)

Reversed in the House of Lords (see 11 Cl. & Finn. 653), but the bill retained for a year, with liberty to the plaintiff to bring an action.

ANDERSON *v.* WALLIS. (Ante, p. 336).

Affirmed on a rehearing before the Lord Chancellor, (see Phillips, 202). His Lordship (Lord Lyndhurst) said: "This was a question of misjoinder as to certain property held by lease under the Dean and Chapter of Durham, that had been bequeathed to the testator's daughter and her husband Wallis, upon trust to renew the leases from time to time, and to pay the rents reserved to the dean and chapter out of the rents and profits of the premises, and to pay the fines on renewals; and, **[591]** subject thereto, upon trust to permit the testator's daughter to receive the rents and profits for her life; and, after her decease, upon trust for the benefit of her children. The testator gave the residue of his personal estate to his daughter, subject to an annuity of 25l. to his sister, Hannah Anderson. The daughter, Mrs. Wallis, was appointed executrix; and Mr. and Mrs. Wallis, under the above bequest, took possession of the leasehold premises as far back as 1827. The bill was filed by Hannah Anderson, and the infant children of Wallis, by Hannah Anderson, their next friend, stating the annuity was then in arrear, and that Wallis and his wife had omitted, fraudulently, to renew the leases. The bill then prayed an account of the arrears of the annuity, and that a proper sum might be invested, to secure the due payment in future; and that the defendants might be decreed to procure renewals of the leases at their own expense. The questions were, in the first place, whether those two claims could properly be joined in one suit; and, secondly, whether the objection, if it were a valid one, could be taken at the hearing of the cause. I think it clear that the two matters ought not to be made the subject of one suit. They constitute two distinct causes. The children had no interest in the annuity and the arrears of it. Mrs. Anderson, on the other hand, had no interest in the renewals. The plaintiffs and the causes of complaint are alike distinct; they have no connexion with each other. This is, therefore, a case of misjoinder, and might be objected to on demurrer. The remaining question is whether the objection ought to be allowed at the hearing of the cause. If it had been taken by demurrer, it is said, and justly, that the plaintiffs might have amended their bill, and much expense have been spared.

"It is certainly inconvenient, when an objection appears on the face of the pleadings, which might be taken by demurrer, that it should be passed over and pressed on the Court at the hearing. But it rests, I conceive, in the discretion of the Court to deal with that objection, when taken at the hearing, as it may, upon the whole, deem just and proper. If the Court sees that justice can be done, notwithstanding the defect in the record, and that it will lead to no inconvenience, the objection ought not to be allowed to prevail, which was the case in *Wilkinson* v. *Parry* (4 Russ. 274). The objection of the misjoinder was overruled by the Master of the Rolls, Sir John Leach, who stated that the same justice could be done to the defendant, in respect of the wife and the only child, who had signed the deed of indemnity, and who had been joined as plaintiffs, as if they had been made defendants. The objection, in this stage of the cause, could not be allowed to have the effect of rendering the expense of the suit wholly useless. And, **[592]** in the case of *Lambert* v. *Hutchinson* (1 Beav. 277), the present Master of the Rolls states, 'There are cases in which, notwithstanding a misjoinder of plaintiffs, the Court has permitted a decree to be made at the hearing. It has been done, when it has appeared that justice has been done to all parties, notwithstanding the misjoinder.' The conclusion to be drawn from these and other similar decisions is that, if justice cannot be done and great inconvenience may be sustained, in such a case the objection ought to prevail. See the cases of *Bill* v. *Cureton*, *Mortimer* v. *West*, *Nigel* v. *Phelps*, *Story* v. *Johnson*, and other authorities.

These are cases, undoubtedly, where the objection must be allowed, owing to the impossibility, from the frame of the record, of making a proper decree, as in the case *of Cholmondeley* v. *Clinton* (2 J. & W. 1).

"Where justice cannot be properly done, it is obviously a sufficient answer, that the objection might have been taken on demurrer. The inconvenience of pressing to have a decree in the present case may be great, and much injustice may be occasioned by it. This, too, was pointed out by the learned Baron in giving his judgment in the Court of Exchequer. If, for instance, the plaintiff, Mrs. Anderson, should die, the suit would abate, though, as to that portion of it in which the children were solely interested, it would not have abated through the misjoinder; and again, if she were to get a decree in her favour as to the part in which she is interested, the infants might have a decision against them, which might be obviously erroneous, and then it would be her interest not to appeal.

"So, if the converse were to take place, she might appeal, at great inconvenience and injury to the other plaintiffs. It was argued that the plaintiffs had brought this inconvenience upon themselves; but the learned judge very properly observed that the objection could not be made in the present case, because the parties interested in that portion of the suit were infants. Upon the whole, then, as this appears to be a question for the discretion of the Court, and as I have no reason to think that discretion has been improperly exercised in this instance, I am of opinion that the judgment should be affirmed. It appears that before the judgment was given in the Court of Exchequer a bill had been filed in this Court by another next friend to compel the renewal of the leases."

Judgment below affirmed, without prejudice to the institution of another suit by annuitant.

PLUMBE *v.* PLUMBE. (Ante, p. 345.)

See *Dalton* v. *Hayter*, 7 Beav. 313, 321.

[593] MIDDLETON *v.* SHERBURNE. (Ante, p. 358.)

In *Allen* v. *Macpherson*, Phillips, 133, Lord Abinger's suggestion in the principal case, that the case of *Kerrich* v. *Bransby*, was reversed on the merits, was mentioned in the course of the argument. Lord Lyndhurst, however, said, that that had not been the understanding of the profession: and the case certainly (notwithstanding its aspect as reported) always appears to have been treated as involving the question of jurisdiction. In addition to the authorities mentioned by Lord Lyndhurst, which support this view, see the argument of the Solicitor-General in *Attorney-General* v. *Wynne*, Moseley, 127.

CATOR *v.* CROYDON CANAL COMPANY. (Ante, p. 405.)

Affirmed on a re-hearing before the Lord Chancellor, 19th December, 1843. The argument, on appeal, will be found reported in the Jurist, vol. 8, p. 277.

His Lordship said: "This was an appeal from the equity side of the Court of Exchequer. The facts of the case are so fully, and I think, so accurately stated in the report of the proceedings in the court below, that it is unnecessary for me to enter into them in detail. The question related to a sum of money, amounting to about 600l., which was awarded under the Croydon Canal Act in respect of a piece of land forming part of a common, called Penge Common, which was taken for the purposes of the act. The other sum was a sum of about 180l., which was awarded by the same commissioners in respect of compensation for damage done to another piece of land forming part of the same common. At the time when this award was made, Mr. Scott claimed to be the owner of the soil of that common; but the commissioners, not being satisfied as to his title, did not make the award to him specifically, but did that which they were entitled to do, viz., they awarded the compensation and the value of the land generally for the persons who should turn out ultimately to be entitled. The first objection made was an objection of this nature—that Mr. Scott ought to have been made a party to the suit. Mr. Scott, soon after the award was made, assigned to the present plaintiffs his interest in those sums for 500l. It was said that, as these proceedings were instituted by the assignee, the assignor ought to have been made a

party to the suit. It is quite clear that, where the assignor has a legal title and he assigns his interest, and any pro-[594]-ceedings are taken by the assignee with respect to the property so assigned, the assignor must be a party to the suit, because, by his assignment, he does not part with the legal estate, and the person having the legal estate must be before the Court. But that principle clearly does not apply to the facts of this case. There was no sum awarded specifically to this gentleman, Mr. Scott. All that he had was an equitable interest—an equitable title to be paid the sum of money if he made out his title to the land. That equitable interest and right he assigned before the suit; he parted, therefore, with all interest, and, having parted with all interest of every description, of course it was not necessary that he should have been a party to these proceedings. This point was pressed in the court below; but I do not think that in this court it was much relied on. The main question that was argued was this: that the plaintiffs were barred by time; and it was necessary, therefore, to consider that objection with reference to the facts of the case. And, first, by the acts of Parliament, when the land was taken and the damages awarded, under the circumstances which occurred in this case, it was necessary, before the company took possession of the land, that they should either pay the money into the Court of Chancery for those persons who should ultimately turn out to be entitled to it, or that they should invest it in one of the modes pointed out by their act of Parliament. If they had paid the money into the Court of Chancery, or if the money had been invested in the manner required by the act of Parliament, the Court of Chancery, or the persons for whom the money had been so invested, would have been trustees for those persons absolutely who should make out their title: they would have been trustees; they would have held adversely to the plaintiffs; and, therefore, the plaintiffs, at any time, might have made good their claim. It would appear, therefore, very extraordinary, that if the company had performed what they were required to do by the act of Parliament, the plaintiffs would have been entitled to have succeeded in obtaining possession of this money; but that, by violating the act of Parliament, and infringing its provisions, they should place the plaintiffs in a worse situation, and themselves in a better situation, than they would have stood in if they had complied with its requisitions. It is said, in the answer, that these provisions were made for the benefit of the company in a certain manner; that is to say, if they could not find out the persons who were entitled to the property, by investing it, or by paying it into the Court of Chancery, they became entitled to enter into possession, which they otherwise could not have done. Therefore, so far, it was for their benefit. [595] They did enter into possession, and, having entered into possession, it was their duty to have done that which the act of Parliament required under such circumstances—either to place the money in the Court of Chancery, or to invest it in one of the modes pointed out by the act. But, independently of this consideration, looking at the case in another point of view, are these parties, taking into consideration the whole of their conduct, barred by time? Have they been guilty of laches, any negligence, anything amounting to any acquiescence? Because it is on this foundation that time is a bar in a court of equity. Now, look at the circumstances of the transaction. At the time when these sums were awarded it was not ascertained who were the persons entitled to receive them. Application was made by the present plaintiffs; the canal company refused to pay the money; and, no long period afterwards, they fell into difficulties, and became insolvent, which state of circumstances continued up to the year 1836, and was put an end to by a transaction to which I shall presently refer. In this state of things, the company's affairs became changed; and, looking at the nature of the title of the plaintiffs and their claim, every person acquainted with the subject of this title must come to this conclusion—that, practically, in the ordinary course of proceeding in a court of justice, there would have been extreme difficulty and much expense incurred, in endeavouring to establish their title. Could it have been required, under such circumstances, that they should do so? In the year 1827 the Inclosure Act passed; an act for the purpose of inclosing Penge Common, of which this piece of land formed a part.

"Then it was that, for the first time, they were in a situation in which they could conveniently assert their right, and ascertain their title to the property in question. What did they do on that occasion? Their solicitor instantly applied to the company and required the company to pay to the commissioner, under that Inclosure Act, the money in question, in order that he might apportion it among the persons entitled by

his award. They refused to do so. What was the next step taken by these parties? The plaintiffs then immediately sent in their claim of title to the commissioner; that title was investigated; and the commissioner under the award decided that they were entitled to a certain allotment on the common, and that four or five other persons were also entitled to allotments. It was therefore by the award of the commissioners, which was pronounced in the year 1837, that the title of these parties was first ascertained. Immediately that the title was ascertained, they applied for the payment of the money; the company refused to pay the money, and this bill [596] was filed. All this appears on the face of the proceedings. Is there anything in this view of the transactions that can justify the Court in saying that there was any laches, any negligence, any conduct importing acquiescence on the part of the plaintiffs? On the contrary, whenever they could, with any chance of success, press their claim against the defendants, they constantly did so. But there is another consideration, which is also of material importance with reference to this question as to the bar of time, and it is this: The parties had no right whatever to call for payment of this money until their title was ascertained. That title was not ascertained until the award of the commissioner; and the moment the award of the commissioner was pronounced, when they had a right to claim the money, they instantly made a demand. I think it cannot be considered, therefore, under these circumstances, that there was any negligence or any want of due activity. There is another consideration, also applicable to this part of the case, which is material, namely, the act of Parliament which was made in the year 1836. I have mentioned that the company were in a state of insolvency during a long period of time; that is admitted. They are extricated from this situation in consequence of an agreement which they entered into with the Croydon Railway Company. The Croydon Railway agreed to purchase the site of the canal for the purposes of the railway. All this was done under an act of Parliament, and the purchase-money was about 40,000l. By the provision of the act that money was to be paid to the company, not that they might dispose of it as they should think proper, but that it might be applied for particular purposes; and those purposes were the payment of debts, claims, damages, liabilities, and demands to which they were subject. If they received this money, therefore, under the authority of this act of Parliament, they were bound to apply it as the act required; and nobody can say that this was not a claim, demand, and debt, which was due from the company. It is said it is barred by time. A debt is never barred by time, even in a court of law. The Statute of Limitations does not bar the debt or claim, but only the demand. It was a subsisting debt, and, having received the money for the purpose of discharging this obligation, and the stipulations in the act of Parliament appearing to have been framed in consequence of the insolvent state of the company, it appears to me that they were bound to apply that money according to the requisitions of the act of Parliament. For all these reasons, I am of opinion, therefore, that the defence set up, that time was a bar to this demand, cannot be sustained; and in that I entirely concur with the judgment of the court below.

[597] "The next question is, has the case of the plaintiffs been made out? Are they entitled to this money, or any portion of it? The award of the commissioner establishes that they were entitled in the year 1837, when that award was made, to a portion of the land at Penge Common, and that other persons specifically named were entitled to portions.

"The right of the plaintiffs is traced from Mr. Scott; the greater part of the property possessed by Mr. Carter, which he had in the hamlet of Penge and the common, was derived from Mr. Scott. If, therefore, the commissioner has found that, in the year 1837, the plaintiffs were entitled to the common, and they have derived their title from Mr. Scott as to a portion of it, Mr. Scott must have been entitled in the year 1812, at the time when the award of compensation was made. If he was entitled, then, to this property at the time when the award of compensation was made, he was entitled to receive the money, and, being entitled to receive the money, he assigned his interest to the present plaintiffs: therefore, a title is made out to a part of this money in the plaintiffs, and they are entitled to maintain this suit. In what proportion they are entitled does not appear; that is properly referred to the consideration of the Master. If they make out a title to the money, or any portion of it, the rest follows as a matter of course; and the learned judge has directed a reference for that purpose. Another objection was made, that there were other parties interested

in this fund, and that they ought to be parties to the suit. I think that the plaintiffs have done all that they could by possibility do; they have made parties to the suit those persons in whose favour the award of the commissioner, under the Inclosure Act, was made; they had no means of ascertaining with certainty their title, nor is there anything before the Court to shew who the persons are, who, at the time when this compensation was awarded, were entitled to share it with the plaintiffs.

"There is nothing certain even with respect to the title of the Archbishop of York whether he is or is not entitled to have the money. All this rests, and I think properly rests, as matter of inquiry before the Master. There was only one other point raised to which it was necessary to advert: it was raised by Mr. Chandless, I think, in the course of his argument. It is said that the commissioner had no power to award damages; that the decree deals with the damages, not merely with the sums which were awarded for the purchase of the land, but with the compensation for damages, the sum of 180l.; and Mr. Chandless said that, in the second act of Parliament, there was no authority to award damages. I think, however, he misapprehends [598] the object of that act of Parliament. There was a defect in the first act, and the second act was passed for the purpose of remedying it. The object of that act is only this: to regulate the manner in which notices shall be given, and in which the commissioners shall be assembled.

"When they are assembled by virtue of the provisions of that act of Parliament, they act not under its authority only, but under the authority of both acts; and under the first they are authorised and empowered to award not only the price of the land which is sold, but also to award compensation for damages under the act. I am therefore of opinion that the decree in that particular is right. Under these circumstances, these being the only points made to which it appeared to me, in the course of the investigation, that it was necessary to advert, I think that the decree is right, and that it should be affirmed, with costs."

Appeal dismissed, with costs.

PRICE *v.* NORTH. (Ante, p. 509.)

Reversed on a rehearing before the Lord Chancellor, Phillips, 85.

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